



Real Estate

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Real Estate Guidebook

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Introduction

This booklet is aimed to offer the busy executives a brief overview over real estate investments in Romania.

However, decision making process in respect of each real estate transaction is complex and requires in—depth knowledge of a country's commercial climate, bearing in mind that legal environment is sometimes volatile.

Companies investing in real estate in Romania, or planning to do so, are advised to obtain updated and detailed information from experienced professionals.

The real estate guidebook speaks as of its date and does not reflect any changes in Romanian law or practice after such date.

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Within the current economic turmoil that also affected the Romanian real estate market, many investors were forced to analyze and deal with the complex and interconnected issues rapidly evolving from the turbulence in the financial markets, as well as anticipate and identify future developments and opportunities.

This booklet examines the main issues that an investor should consider before entering into a real estate transaction or deciding to implement a development strategy in Romania.

Țuca Zbârcea & Asociații's real estate practice group is one of the highly regarded on the local market and currently numbers three partners and more than 15 lawyers. In our practice, we came across all aspects of real estate and construction, and we always take into account the factors that are likely to affect our clients' businesses. As such, our real estate lawyers can identify complex and innovative approaches to workouts and troubled real estate transactions, and advise on the judicious sale and acquisition strategies and liquidation of distressed assets.

The group acts on a regular basis for investment funds, developers, end—users, banks and investors on a variety of real estate transactions.

Our integrated approach towards real estate work has resulted in a multi—disciplinary team of lawyers being assigned for each project, with expertise in regulatory matters, building and planning, financial and environmental aspects. We have learned throughout these years each and every real estate project has its particular features. We therefore recommend that investors seek specific legal advice in relation to their current or prospective real estate investments.

Public Property

Public Domain. Private Domain. General Rules Applicable to Each Category

Both State and territorial—administrative units (communes, cities, municipalities and counties) own properties consisting of real estate that, according to certain legal principles, belongs either to the public or the private domain.

Public property includes all immovable assets that under the law or by their nature are of public use or interest. As an example, the public property of the Romanian State includes estates such as roads, beaches and parks.

According to the Romanian Constitution and the Civil Code, real estate in the public domain, under the sanction of absolute nullity:

- May not be subject to transfers of ownership right;
- May not be acquired by acquisitive prescription (*usucapionem*);
- May not be subject to enforcement procedures;
- May not be encumbered by security interests.

Assets in the public domain may be exploited by third parties by means of administration, concession or free use. The administration right is solely granted to regies autonomes or public administrative authorities and the right to freely use the assets in the public property is granted to public utility institutions. The concession right and, respectively, the right deriving from a lease agreement, are awarded following public tender procedures, within certain prescribed conditions. For example, the initial duration of a concession agreement may be of maximum 49 years, but it may be extended for maximum half of its initial duration.

The concession agreements and the lease agreements regarding assets in the public domain must be approved by a governmental decision, a County Council's decision, a decision of the General Council of Bucharest Municipality, or, respectively, Local Council's decision, as the case may be, depending on the owner (i.e. the state, the county, the Municipality of Bucharest or a commune / city).

Real estates assets owned by the State or by the administrative and territorial units but not of public use represent the private property thereof, i.e. the State and the cities act as private owner of such property. Unlike publicly owned assets, State's privately owned assets can be alienated by sale, encumbered, seized, subject to enforcement procedures etc. like any regular private property.

Private Property

Save for public property, any real estate can be privately owned. Also, as a general rule, any legal or natural entity may be the holder of private property rights.

Rules for Foreigners Acquiring Real Estate

Foreign individuals and legal persons from the EU or stateless individuals domiciled in an EU Member State may own land in Romania provided that they reside in Romania.

Citizens of an EU Member State or stateless individuals domiciled in an EU Member State, who are not Romanian residents, as well as legal persons established under the laws of an EU Member State are allowed to acquire ownership over lands in Romania for the purpose of establishing a secondary residence or a business unit starting 2012.

Agricultural land and forests can be purchased by EU residents who are registered as farmers or agribusiness professionals and reside in Romania. Other EU nationals will be able to purchase agricultural land and forests not earlier than seven years since Romania's accession to the EU (that is 1st of January 2014).

Foreign individuals and companies outside the EU and stateless individuals not domiciled in an EU Member State may only acquire ownership over lands in Romania in accordance with international treaties and to the reciprocity principle, under conditions not more favourable than those set for EU citizens, EU legal persons and, respectively, Romanian citizens.

Foreign natural persons can also acquire ownership title on land by legal inheritance. Furthermore, any foreign individual or legal person may own buildings and/or acquire the right to use the land (based on lease agreements, concession agreements and so on). Such ownership—related right must be registered with the relevant Land Book against payment of the applicable taxes.

The most practical way for foreign investors to acquire land in Romania is to set—up a special purpose vehicle headquartered in Romania. This will be a Romanian legal entity and, therefore, will be entitled to acquire land without the legal limitations imposed to foreign citizens.

Special Features of Land Acquisition

Generally, ownership right over private real estate is freely transferable. However, there are special rules for certain categories of assets (e.g. transfer of immovable assets qualified as historical monuments etc).

Under Romanian law, deeds having as object the transfer of ownership over real estate must be concluded in authenticated form (i.e. signed in front of a Romanian notary public), under the sanction of absolute nullity.

Limitations to the Free Legal Circulation of Real Estate

As already stated, privately owned assets may be freely transferred. Exceptions to the free legal circulation rule are included in special laws.

An exception to the free circulation principle concerns the forestry land, the transfer of which is subject to a pre—emption right in favour of the State, of the co—owners and of the neighbours.

Under Law No. 422/2001 on the protection of historical monuments, the Romanian State (via the Ministry of Culture), or the territorial—administrative units respectively, also benefit of a pre—emption right in cases of transfer of the right of ownership over real estate classified as “historical monuments”.

Certain limitations to the free legal circulation of real estate are regulated

by specific restitution laws (i.e. Law No. 10/2001 regarding the legal regime of certain abusively taken over real estates and Law No. 247/2005 regarding the reform in the fields of ownership and justice, as well as certain adjacent measures): if the ownership title over a real estate which falls within the regulatory scope of the restitution laws is subject to an administrative procedure and/or litigation, the said real estate may not, among others, be validly transferred before such procedures and/or litigation are settled.

Claims Regarding Abusively Taken Real Estate by the Romanian State during the Communist Regime

Real estate investors should also consider the critical issue of claims filed by former owners of real estate abusively taken by the Romanian State during the Communist regime. Starting with 1991, the Romanian Parliament issued a series of enactments regulating the restitution of such properties, such as:

- Land Law No. 18/1991, which initially regulated only agricultural land and subsequently forest lands;
- Law No. 1/2000 on the reinstatement of the ownership right over agricultural and forest lands;
- Law No. 10/2001 regarding the legal regime of certain abusively taken over real estates between 6th of March 1945 and 22nd of December 1989; and
- Law No. 247/2005 regarding the reform in the fields of ownership and justice, as well as certain adjacent measures, which completes and unifies the general legal framework on restitution of real estate.

The rule set forth by these laws is that restitution of the abusively taken real estate should be made in kind. Specifically, the rights of ownership must be reconstituted for the original real estate, in their original locations/sites. Only should restitution in kind not be possible, the former owners shall be granted compensation.

Considering the large number of properties abusively taken by the Romanian State from 1946 to 1989, and the multitude of legal issues raised in connection with such over the years, also due to changing legislation, a detailed legal due diligence investigation on the background of the ownership title over the relevant real estate (land and/or building) should be conducted before entering into a real estate transaction.

Real Estate Publicity

As a major legislative novelty in Romanian real estate regulations, the New Civil Code (which is in force as of 1st of October 2011) sets forth the rule according to which the final registration ("*intabulararea*") of a certain right with the Land Book will have a constitutive effect (leading to the creation of the respective right), rather than a mere opposability effect, as under the previous rule.

Conversely, private ownership over an immovable asset shall cease upon the registration with the Land Book of the (previous) owner's waiver thereof, under certain regulated forms, and its de—registration from the Land Book.

However, this set of new rules shall only become applicable after the complete implementation of the unitary and mandatory cadastral system providing a technical, economical and legal record of real estate (a system already initiated in Romania starting 1996). Until the national general cadastre system is fully in place, and final registrations will become constitutive of rights as envisaged by the New Civil Code, the public record system will only have the purpose of making such rights opposable against third parties ("*opozabilitate față de terți*").

The general cadastre record system is designed to provide a public record of all transactions and relevant legal issues related to real estate located in the same territorial units.

These details are listed in the Land Book, which provides:

- A description of the property, including the cadastral number, dimensions, its categories of use, and the location of the estate;
- The history of the ownership title, including the name of the owner, the legal deed or fact which gives rise to the owner's right, property transfers, rights—of—way, and so on.

An investor acquiring real estate rights over a project (such as concession or lease) must register those rights with the Land Book to ensure their effectiveness against third parties.

Furthermore, reviewing records in the Land Book before acquiring rights over a certain plot of land may reveal issues that significantly influence the project's development (e.g. the fact that the estate is subject to an interdiction to alienate and to set mortgages, the fact that the estate is

conceded to a third party, etc).

The right to demand fulfilment of registration formalities is protected under the New Civil Code, while contractual clauses seeking to limit the right to perform certain registration formalities are deemed null and void. Where registration procedures related to a deed or right have been performed, third parties may not prove that they were not aware of such deed or right. The provisions of the New Civil Code establish two legal relative presumptions, i.e. the presumption related to the existence of the registered deed or right if it was not amended or de—registered and the presumption of the inexistence of a de—registered deed or act.

As of the entry into force of the New Civil Code, real rights (“*drepturi reale*”) acquired under condition precedent or condition subsequent may be registered with the Land Book only as provisional Land Book registrations. Lacking evidence that the condition precedent affecting a right provisionally recorded with the Land Book was met, the right shall be de—registered ex officio within five years as of the registration date. Conditions subsequent shall also be de—registered ex officio if de—registration for having met the condition was not requested within 10 years as of the registration of the affected right.

As for leased assets, the New Civil Code sets forth that, if ownership over the leased asset is transferred, the lease contract shall be enforceable against the acquirer pursuant to the following rules:

- In the case of immovable assets registered with the Land Book, only if the lease agreement was noted therein;
- In the case of immovable assets not registered with the Land Book, only if the certified date (“*data certă*”) of the lease agreement is previous to the date of the ownership transfer;
- In the case of immovable assets subject to publicity formalities, if the lessee fulfilled such formalities;
- In the case of other movable assets, if upon the ownership transfer date, the asset was used by the lessee.

Construction

Construction works can only be performed on the basis of a building permit that is issued by the local public authorities with a view to ensuring compliance of future construction with the legal provisions regarding location, design, and scope thereof.

Depending on the type of the land — *intra—muros* (i.e. within the city limits) or *extra—muros* (i.e. outside the city limits), as well as the use to which the parcels of land (i.e. agricultural or industrial) may be put, certain steps might be required before applying for the issuance of building permits and related authorizations. Should the relevant plot be classified as farming (agricultural land), one of the prerequisites for the issuance of the building permit is the change of the land designation. The process requires the filing of certain documents (including cadastral documentation and endorsements issued by various Governmental agencies) and the payment of certain fees.

As a general rule, buildings can be constructed only within the *intra—muros* areas. However, some constructions which, by their nature, may be harmful for the environment can be located *extra—muros*. In this case, the locations will be established on the basis of a prior environmental impact assessment.

Urbanism Certificate

The urbanism certificate is an administrative deed, issued by the local public authorities on the basis of existing and approved land planning documentation, mainly in order to:

- Provide information with respect to the legal, economical and technical regime of lands and existing buildings as of the application date;
- Establish the urban planning requirements to be fulfilled;
- Provide a list of the legal issues and permits necessary for the issuance of the building permit; and
- Establish the obligation to contact the competent environmental authority in order to obtain its written opinion or, respectively, its administrative endorsement, as the case may be.

The issuance of the urbanism certificate is a mandatory pre—requisite for performing construction works and for the issuance of building permits.

The urbanism certificate is issued by the same relevant authorities entitled to issue the building permit, respectively the mayor of the relevant locality where the land is located or the president of the County Council if the land (i) exceeds the boundaries of one administrative and territorial unit; or (ii) is located in the *extra—muros* area of a rural locality.

The deadline for the issuance of the urbanism certificate is of 30 days from the date the application has been filed, while the validity period of the urbanism certificate is established by the issuing authority. Generally, the validity term of such document is of one year. The urbanism certificate must specifically provide the purpose for which it is issued.

The urbanism certificate provides information concerning the technical regime of the building to be erected on the land, as well as information regarding the minimum or the maximum area of the land that can be used for construction and other relevant information regarding the status of the land (i.e. traffic requirements, supply of utilities, alignments towards the related buildings and lands, encumbrances that should be created for the land).

The urbanism certificate does not confer to its holder the right to perform construction works; the sole document allowing the performance of construction works is the building permit.

General Urbanism Plan (PUG)

The PUG has a general applicability to a certain locality, and establishes, *inter alia*, the limits of the *intra—muros* territory, the destination of the *intra—muros* land plots, the protected areas, the development of the technical infrastructure, requirements pertaining to the location and characteristics of the constructions. The PUG represents the guideline for the development of a certain locality and may be updated every 10 years.

Local Urbanism Plan (PUZ)

The PUZ mainly ensures coordination between urban development plans and the PUG of a specific locality, related to a specific area characterized by a high complexity rate or by high urban dynamics. The PUZ is prepared for a specific area and refers to:

- The street network organization;
- The urban—architectural organization depending on the urban structure;
- The land usage;
- The development of the infrastructure;
- The technical regime applicable to the respective area; and
- The protection of the historical monuments located in the relevant area.

There are several cases when the issuance of a PUZ is mandatory, such as: for central areas of the localities, industrial parks, technological parks, production areas, for commercial or cultural parks, for the development of the new residential areas and for the transport infrastructure.

The PUZ establishes regulations with respect to the construction regime, function of the area, maximum permitted height, land use coefficient, land occupancy ratio, buildings alignment, mandatory protection distances to lateral and backside limits of the plot, architectural features of the buildings, permitted materials, etc.

The PUZ is approved by the Local Council of the City Hall where the land is located. Once approved, it becomes compulsory for the respective area in relation to the technical parameters contained, and it may not be amended in order to accommodate requirements of individual development projects.

Detailed Urbanism Plan (PUD)

The PUD is a specific regulation that sets forth detailed requirements in respect of location, size of a construction on a specific plot of land, as well as its harmonization to the surrounding areas. The PUD is prepared to further detail the provisions of the PUG/PUZ or for the purpose to regulate specific construction conditions.

Building Permit

Construction works (irrespective of whether civil or industrial) may be carried out only based upon a building permit which should be issued in accordance with the urban and territorial planning documentation and based upon a project designed in accordance with the requirements of the urbanism certificate. As so, the building permit may only be issued after the fulfilment of the following steps: (i) obtaining the urbanism certificate, which describes, *inter alia*, the town planning requirements for the relevant area, (ii) obtaining the relevant endorsements and approvals indicated in the urbanism certificate and (iii) submitting the technical documentation of the future construction.

Building permits may be issued to the holder of a real right over the immovable asset (land and/or construction), such as: ownership, usufruct right, or superficies. A building permit may be issued on the basis of a lease agreement only in the case of temporary buildings and provided that the owner of the real estate expressly consents to such constructions being erected on the land. If the beneficiary is changed before completion of the works, the building permit remains valid and is automatically transferred to the new beneficiary, which is bound to observe its provisions.

Generally, the building permit is issued by the mayor of the relevant locality where the land is located or the president of the County Council if the land (i) exceeds the boundaries of one administrative unit; or (ii) is located in the *extra—muros* area of a rural locality, within 30 days since the filing of the application and conditional upon the submission of all the required documentation. Generally, the building permit is valid for a period of 12 months and the beneficiary is liable to begin the construction works within this term. Should construction works be initiated within the validity period, such validity period will be automatically extended for the

whole duration of the construction works. If the construction works are not initiated or are not completed within the validity period provided by the building permit, the extension thereof can be requested 15 days prior to the expiry of its initial term, but such extension will be granted only once and for a maximum period of 12 months.

Reception Minutes

The completion of construction works and the compliance thereof with the provisions of the building permit are ascertained by the reception minutes—a deed prepared by the representatives of local authorities, of the constructor and of the beneficiary of the respective construction works.

Further to inspecting and assessing the result of the construction works the reception commission may: (i) accept the construction works; (ii) delay the reception, if there are defects that may be remedied within a limited period of time, or (iii) reject the construction works, if there are major discrepancies between the construction works performed and the details of the construction design and/or building permit.

Based on the legal provisions in force, the registration of constructions with the Land Book is grounded cumulatively on the building permit, the reception minutes upon the completion of works, as well as on a cadastral documentation.

Due Diligence Investigation

Prior to taking an investment decision in respect of a real estate asset located in Romania, it is advisable that a thorough review of the legal issues pertaining to such asset is undertaken.

The legal due diligence exercise should focus mainly on the ownership title over the relevant real estate and on the current legal status of such real estate (including permitting issues).

Depending on the structure of the envisaged transaction (share deal or asset deal), corporate and financial matters are also analyzed. The outline below is not exhaustive and should be adjusted in accordance with the features of each project.

Generally, the main sections of a legal due diligence report in an asset acquisition could be summarized as follows:

- Status of real estate;
- Successive transfers of the ownership title over the real estate;
- Changes in the legal status of the real estate;
- Encumbrances and rights of third parties on the real estate;
- Seller's capacity to enter into the real estate sale—purchase agreement;
- Town—plan regulations and construction—related authorizations;
- Litigations;
- Environmental aspects;
- Conclusions: concerns and recommendations.

The following includes a brief description of each of the abovementioned items.

Current Status of the Real Estate

This section of a legal due diligence report provides:

- A brief description of the real estate (i.e. location and neighboring properties, size, land destination, buildings erected thereon and so on);
- A description of the current ownership title over the property and the registration thereof with the Land Book.

Successive Transfers of the Ownership Title

This section regards mainly the history of the ownership title transfers, i.e. inheritance issues, information regarding expropriation (nationalization) procedures and so on.

Such analysis is of a particular importance as according to Romanian relevant legal statutes and the jurisprudence in case of ownership transfer by means of convention, the legality of the current owner's title is influenced by the legality of previous transfers. Therefore, in order to prove beyond any doubt the ownership right on a certain asset, the person claiming such right would have to prove the validity of successive transfers and the ownership right of all previous transferors.

Changes in the Legal Status

Such section mainly regards the changes undertaken in relation to the legal status of a property (e.g. allotments and mergers, etc.) and the legality thereof.

Particular importance is given to the underlying documentation on various legal or cadastral operations in order to ensure that there are no omissions or facts that could affect their validity.

Encumbrances and Rights of Third Parties

This section provides details on any existing encumbrances (mortgages, rights of way, leases, etc.), as well as any other rights held by third parties on the real estate, including registration thereof with the Land Book.

Seller's Capacity to Enter Into a Real Estate Sale—Purchase Agreement

This is carefully scrutinized especially in such cases where the seller is a legal entity. Should this be the case, this section analyzes and identifies any relevant corporate requirements for the valid execution of the sale—purchase agreement (i.e. the need to have specific corporate approvals prior to entering into a transaction, special majorities provided by the Articles of Incorporation and so on).

Town—Plan Regulations and Construction—Related Authorizations

This section of the report regards the following:

- Town—planning requirements in respect of the target property in order to identify any possible constraints for developing a certain project;
- In case of constructions, the validity of all the permits and authorizations issued in relation to the target property.

Litigation

This section deals with pending and/or threatening litigation regarding the real estate and/or the ownership title and focuses mainly on the stage of litigation and the potential outcome of claims. Special attention is given to restitution claims that could have been filed by former owners of nationalized real estate, either in front of the courts of law or in accordance with a special restitution procedure regulated under Romanian relevant legal statutes.

Environmental Matters

This section aims to identify, from a legal perspective, if there are any environmental concerns with respect to the real estate and related liabilities of the owners. Recommendations for conducting a specialized environmental audit are being made, should there be any issues that require more in—depth technical knowledge.

Conclusions: Concerns and Recommendations

This is a critical section of any due diligence report as most clients are relying on the outcome of the review when taking an investment decision. In this section red flags areas discussed in a broader manner throughout the report are emphasized and potential concerns with regard to the ownership title and the legal status of the real estate are summarized.

Needless to say, it also includes recommendations on how such concerns could be mitigated and provides valuable input on the representation and warranties as well as on any conditions precedent that should be included in the transaction documents in order to protect the purchaser.



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