COUNTRY UPDATE-Moldova: Securities & Banking

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Moldovan financial services and capital market legislation has undergone significant modernisation in recent years. Such modernisation has had as objectives: (i) implementing international best standards in the banking area and improving ownership transparency, (ii) reviving the capital market and increasing access to finance through capital market; (iii) shift from rule-based ("tick-the-box" approach) to risk-based supervision in financial sector; and (iv) harmonisation of national laws on credit institutions, capital market, insurance and leasing with European Union legislation.

Further, signing of the Association Agreement with the EU and its ratification (on July 2, 2014) has brought to the agenda of Moldovan lawmakers the objectives of transposing the relevant EU Directives into domestic laws. This new wave of legislative reform ultimately aims to create an investor-friendly legal environment which is seen as a precondition for sustainable growth of market-based Moldovan economy.

Banking system

The Moldovan banking legislation is perceived as quite progressive and generally in line with (i) Directive 2013/36/EU of the European Parliament and of the Council of June 26, 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, and (ii) Regulation (EU) No. 575/2013 of the European Parliament and of the Council of June 26, 2013 on prudential requirements for credit institutions and investment firms.

The new Law No. 202/2017 on Banks Activity, enacted on January 1, 2018, has imposed more stringent requirements on the local banks insofar as corporate governance, risk management and compliance is concerned, in line with Basel III requirements. In particular, banks shall revise their internal management framework and ensure the material risks are properly addressed and prevented.

The regulator, National Bank of Moldova (NBM), has the authority to issue and withdraw banking licences, as well as to regulate and supervise the banking sector. It tries to keep pace with and impose on the banks the best international standards.

To incorporate a bank in the Republic of Moldova (Moldova), the following steps shall be taken:

- Founders shall file with the NBM the licensing application, accompanied by corporate documents; disclosures on the identity, qualification and experience of the directors/key officers, the shareholders with significant equity interests (i.e., 1 percent or more) and their affiliates; financial disclosures; the bank's business plan etc. Shares shall be fully paid in cash, regardless if from own or borrowed funds. In case of bridge institutions the share capital can be paid in state issued securities.
- The NBM issues the preliminary approval of the application within five months.
- Founders shall pay in the capital (minimum capital is set at 100 million Moldovan lei, approx 5 million euros). The bank shall lease or purchase office premises and equipment, employ key personnel and retain an external auditor. If these requirements are not met within five months, the preliminary approval ceases.
- The NBM issues the banking licence within two months after all the above requirements are fulfilled. The license is issued for an unlimited term, for a fee of 50,000 Moldovan lei (approx 2,400 euros).

The branch of a foreign bank in Moldova is subject to similar licensing requirements, whereas a representative office can be opened only subject to NBM notification. The representative office is only allowed to carry out information and representation functions and also to defend the interests of the bank.

The acquisition of significant (one percent or more) equity interest in a Moldovan bank, either through initial or secondary offering, as well as increase of such equity interest higher than 5 percent, 10 percent, 20 percent, 33 percent and 50 percent are subject to the NBM prior clearance. Notably, after the August 2011 attempts of hostile takeover of shares in one Moldovan bank, this rule has significantly toughened. Now, the NBM clearance is required for: (i) acquisition of significant shareholding or increase thereof higher than the above thresholds through transactions or any other legal act, and/or (ii) share transfers based on court judgments or any transactions resulted therefrom.

The legal amendments (labelled as 'anti-raider law'), which provided the above novelties have been declared unconstitutional in December 2011 for procedural reasons, but were shortly (March 2012) replaced by a new law to the same effect.

To meaningfully build upon these developments, in March 2013, the Law on Financial Institutions (LFI)[1] saw new amendments, purported to enhance the transparency equity investment in local banks and thus strengthen the capacity of the NBM to supervise the integrity of bank shareholders. As a result, the NBM shall be entitled to request from any direct or indirect shareholder (whether holding a significant share or not) any information necessary to carry out a prudential evaluation.

The 2013 amendments, which have been thereafter reflected in greater specificity in the new Law on Banks Activity, have also established clear criteria for the assessment of potential acquirers, with regard to their reputation, experience, integrity and financial soundness. These provisions are backed up by extensive disclosure requirements toward potential acquirers, including ultimate/beneficiary ownership disclosure, accompanied by the legal prohibition for offshore entities to acquire significant equity interests in Moldovan banks.

Also, currently the NBM shall have capacity, for the purposes of assessing the potential acquirer, to inquire relevant authorities of other states. This is without a need of a formal agreement between the mentioned authorities.

After the 2014 banking crisis, when $1 billion faded away from three Moldovan banks, Moldovan banking and capital market regulators have made significant effort in ensuring proper transparency of shareholder structure and banks' risk management. In particular the special supervision regime was imposed by the NBM on other top three Moldovan banks (Moldova-Agroindbank, Moldindconbank and Victoriabank).

Noticeably, since then regulatory efforts in recent years have been directed to ensure the soundness and transparency of the Moldovan banking system — a purpose which has been partly achieved.

Legislation

Starting in June 2009, when the relevant amendments to the LFI were enacted, bank bankruptcies were exempt from the control of the courts of law, thus expediting the claims settlement procedure. Current bank liquidation procedure is conducted by an external administrator, appointed and supervised by the NBM. The administrator has to opt for one of the following alternative liquidation scenarios: (i) sale of bank to another licensed bank as going concern; (ii) partial transfer of assets and liabilities to another bank; or (ii) liquidations of assets. Notably, the scenario that was opted for in the case of the 2009 and 2012 bank bankruptcies was a combination of the last two legal scenarios, which ensured smooth settlement of individual claims but set aside the major liquidation burden.

In 2016 the Law No. 232/2016 on the recovery and resolution of banks was enacted, which is partially in line with Directive 2014/59/EU. This law sets forth the prevention, early intervention and restructuring mechanisms.

Prevention is applicable to banks in difficulties and means that both the bank and the national resolution authority, i.e. NBM, shall prepare a recovery plan. Both plans set out the actions to be taken in the event that the bank is to run into difficulties leading to its failure. Early intervention is applicable to banks in a difficult financial situation. In these cases, NBM has the power to intervene, such as by appointing a temporary administrator of the bank. As of June 2020, only one Moldovan bank, namely Energbank, is under external administration appointed by the NBM.

Resolution is applicable to failing banks. In these cases, NBM might apply the following resolution tools: the sale of business; the bridge institution; the asset separation and the bail-in.

One of the main principles underpinning the above mentioned law refers to the NBM powers to minimise the cost to taxpayers in case of continuance of the failing bank's downward spiral. In other words, the law indicates that the private sector is to bear the costs with precedence. When a bank collapses, shareholders are first in line to cover the restructuring costs. Also, the powers in the hands of the NBM include the possibility to sell the bank undergoing restructuring or merge it with another one. This 'bail-in' mechanism, which marks a change of tack compared to the public 'bail-out' tool – which was implemented by the Moldovan Government in relation to the 2014 banking crisis – has been applicable in Moldova since mid-fall 2016.

The mentioned law sets forth that NBM will create a national resolution fund to provide financial support for banks' restructuring plans. This resolution fund shall be financed in advance, including by the banks established in the territory of Moldova.

Also, in this context, as of March 2018 a new piece of legislation has entered into force. Passed through the Law No. 250/2017 on the Supplementary Supervision of Credit Institutions, Insurance Undertakings and Investment Firms in a Financial Conglomerate, the mechanisms introduced thereby provide a comprehensive set of rules on the prudential supervision of credit institutions, insurance undertakings and investment firms on a stand-alone basis and credit institutions, insurance undertakings and investment firms which are part of respectively a banking/investment firm group or an insurance group, i.e., groups with homogeneous financial activities.

This law refers to partially transposing the Directive 2002/87/EC. Note that as opposed to the mentioned Directive – EUR 6 billion – under the Moldovan law the threshold for the balance sheet total of the smallest financial sector in the group shall be MLD 500 million, approx. EUR 24 million. Earlier in 2020 there have been put in place technical standards on calculation of the financial conglomerate's capital and on financial conglomerate's significant transactions and risks reporting.

In the beginning of 2017 the Law No. 184/2016 on Financial Collateral Arrangements has entered into force, which is partially in line with the Directive 2002/47/EC. The Law was aimed to bring the legal certainty with regard to the financial collateral arrangements, including it has set that certain provisions of the insolvency law shall not apply to the financial collateral arrangements.

Since the late 2010, a series of amendments were made to the LFI, and which were consequently as of January 2018 transposed in the Law on Banks Activity. The mentioned amendments pertain to the following:

- Legal regime of branches and representative offices has been clearly differentiated. Branches, as local business units, could incorporate smaller business units (agencies, exchange bureaus) located outside the branch office. Representative offices, in turn, shall be concerned with promotion and advertisement only.
- Learning from past lessons, the NBM has proposed to distinguish between remedial measures and sanctions and, in line with the World Bank/International Monetary Fund FSAP recommendations, has established a causal nexus between the gravities of breaches and sanctions.
- Additional know your customer, anti-money laundering and corporate governance requirements have been imposed on banks, with drastic sanctions for non-compliance.
- Liquidation remains out-of-court and bank liquidators were vested with additional powers. Employee claims, for three months before opening the liquidation proceeding, took priority over all other claims.
- The meaning of the term "banking secret" has been clearly defined, hence any information relating to the client, its assets, activity, transactions, personal or business relations are deemed to fall under banking secrecy rules. Banks have a duty to keep the banking secret and disclose confidential information only when expressly requested by law (e.g., at the request of fiscal authority, law enforcement bodies, courts of law) and following the prescribed clear-cut procedure.

Civil procedure law has also been amended to the effect that courts are now entitled to rule forceful transfer of bank shares only if the right over such shares is the direct subject-matter of litigation.

Moreover, enforcement of a foreign court judgment, in this respect, shall only be authorised upon submission of either NBM permission to hold a significant share of bank equity or NBM permission to hold such share without preliminary approval. These amendments aim to prevent hostile takeovers through court (labelled in Moldova as 'raider attack'), when bank shareholders are deprived of shares as sanction for (often fake) debt non-payment.

Apart from the already mentioned innovation brought by the new 2018 Law on Banks Activity, the novelties introduced by the new law aim, among others, at:

- Changing the rule-based supervision to the risk-based supervision and enhancing the NBM collaboration with the supervision authorities from different states.
- Introducing a wide pallet of rights and competences for the NBM especially in the supervisory review and evaluation process (SREP). The key purpose of introduced SREP being to provide that banks have adequate strategies, processes and mechanisms as well as capital and liquidity to ensure a sound management and coverage of the risks they are exposed to.
- Abolition of the audit (censor) commission, so that now, the mandatory bodies of a bank shall be the deliberative, supervision and executive one. Also, the new law limits the powers of the general shareholders meetings allegedly limiting the corporate democracy of the banks.
- Introducing the concept of independent members of the board (at least 1/3 of board members), which concept has been further elaborated in the secondary legislation passed by NBM.

New recent changes to the Law on Banks Activity deal with the cases where the bank shareholders, determined as non-complying by the NBM, have to sell their shares. If failing to do so within the prescribed 3 months period, the bank itself shall cancel the shares, issue new shares instead, offer them for sale via stock exchange and pay the proceeds to the ex-shareholder. If unsuccessful to sell, the bank shall redeem the shares while if more than 50% shareholding is concerned the NBM may withdraw the bank's licence.

Back in January 2019, the NBM had determined groups of shareholders in two Moldovan banks Fincombank and Energbank as having acted in concert and triggered the above share cancellation process. During 1.5 years none of such external intervention has been resolved.

Non-banking financial institutions

The 2018 – 2022 National Strategy for Development of the Non-Banking Financial Market and the actions plan for its implementation, approved by Law No. 129/2018, has stated the following objectives:

- development and implementation of a regulatory framework that would include the transposition of the provisions of the EU legislation, which would allow the market participants and the investors to benefit from the advantages of the European single market;
- increase the supervision efficiency by implementing the risk prevention and management;
- increase the level of financial literacy of the population on the services and instruments of the non-banking financial market and increasing consumer confidence, ensuring its protection;
- development and strengthen of the institutional and operational capacities of the NCFM to ensure performance-based governance.

In line with the above Strategy, the Moldovan Government has issued for public consultation a new draft Law on Voluntary Pension Funds. The draft law aims to align national legislation with the Directive (EU) 2016/2341 and contains provisions on the establishment and functioning of the pension funds, as part of the optional pension insurance system, based on the individual capitalized savings, provides the requirements for the organization, licensing and activities of the administrators, rules for the fund depositories, as well as NCFM's supervisory competences of these entities. A fund shall have at least 15 participants and a fund manager shall have a minimum capital of 25,000 euros that gradually would increase during 10 years up to equivalent of 125,000 euros.

Consolidated supervision of the non-banking financial sector (except for exchanges, e-money issuers and payment services providers) has been strengthened under the National Commission for Financial Market (NCFM). The regulator has benefited from the extensive knowledge transfer supported by international donors, which enhanced the technical and institutional capacity of the NCFM.

The NCFM retains the authority to license, regulate and supervise the activity of "professional participants of the non-banking financial market", which includes capital market intermediaries, insurance market participants (insurers, reinsurers, insurance/reinsurance brokers and agents, and actuaries), private pension funds, investment funds, saving and lending associations, microfinance and mortgage lending organisations, and credit bureaus.

Legislation

The main evolutions in the financial market legislation can be summarised as follows:

- Enactment of the Law on Insurance, back in April 2007, has been followed by the revision of secondary insurance legislation pertaining to insurance intermediaries (brokers and agents), diversification of investments, creation of technical and other reserves, etc. As of April 2012, all insurers had to transform into joint stock companies and their minimum capital had to increase to MDL15 million (approx 790,000 euros) for non-life and to MDL 22.5 million (approx 1.18 million euros) for life insurance, whereas the life and non-life insurance businesses are to be split.
- The amendments to the Law on Insurance enacted in July 2012 and modified subsequently in 2016 have introduced the concept of "bancassurance", under which banks, savings and loan associations, microfinance institutions and leasing companies may be appointed corporate agents of an insurance company, provided they comply with the requirements set forth by the law (i.e., solvability, professional indemnity, personnel qualification). The 2012 amendments also (i) revised the corporate governance rules, (ii) clarified the relations between insurance companies and their external auditors, and (iii) introduced more extensive disclosure requirements to insurance companies.
- In March and July 2014, the Law on Consumer Credits and respectively the Law on the Distance Marketing of Consumer Financial Services, aimed at harmonising national legislation with Consumer Credit Directive (Directive 2008/48/EC) and Directive 2002/95/EC has entered into force. The envisaged harmonisation aims at regulating: the distance marketing of financial services; manner of calculation of the total cost of credit to consumer; standard information to be included in advertising; pre-contractual information to be also provided on a durable medium; information to be included in credit agreements; right of withdrawal within 14 days; linked credit agreements; database access; early repayment rules on calculation of the compensation due, etc. Although the harmonisation with the EU Directives is only partial, market participants still have a significant burden of reforming their practices.
- Another new draft Law on the National Commission for Financial Markets which has been drafted with the World Bank technical assistance has also proven futile. The mentioned draft new law primarily aimed to: (i) set clearly the supervisory objectives and powers; (ii) strengthen and guarantee operational and financial independence or supervisor; and (iii) ensure effective international cooperation, including within cross-border investigations and information sharing. These aims have been, in part, addressed in the new Law on Non-banking Credit Institutions (please below for details).
- It is to be noted though that the 1998 Law on the National Commission for Financial Markets has been amended in 2015 to the effect that now eligible plaintiffs can not only challenge the Commission's decisions in court, but also request suspension of such decisions until a court judgment is issued. In this respect, in March 2020 a new draft law was registered for legislative approval establishing that NCFM's decisions cannot be suspended.
- Enactment of the Law on Non-banking Credit Organisations (NCO), in spring 2018, has brought significant change to the non-banking financial market. Since under the old legal frame NCFM did not have much supervision attributions, it has come with the initiative of building up to its – by then - monitoring powers only. Generally, the main objective of this new law is to uniform the regulation of all non-banking lenders, including microfinance organisations, leasing companies, mortgage and consumer loans providers. All market participants are wanted to comply with market entry conditions (minimum capital requirements, requirements towards administrators), including to obtain the NCFM approval prior to the market entry; corporate and financial data disclosure, including by instituting the NCO Registry; internal control and risk management systems and procedures, including by providing for the mandatory audit of the non-banking credit institutions which assets exceeds MDL 50 million, i.e. ca 2.5 million euros; non-banking secret and personal data confidentiality rules.

Recent 2020 amendments to the Law No. 1/2018 and other normative acts have brought deep regulatory interventions, as the following:

- Noncompliance with the NBCs legislation can result in an administrative fine up to MDL 25,000, (ca. 1,250 euros). Failure to comply with the NCFM prescriptions can result in a fine up to 10% of the operational revenues of the NCO, but not less than MDL 10,000 (ca. 500 euros) and noncompliance with the ownership structure transparency can result in a fine up to 50% from the NCO capital. Minimum capital of NCO shall be MDL 1 million (ca. 50,000 euros) instead of MDL 300,000.

- NCOs obligation to report new credit activities to credit bureaus.
- Limitation on total cost of consumer credits (including financial leasing). NCOs' credit contracts with natural persons with a term less than 2 years and/or with a principal in the value up to MDL 50,000, (ca. 2,500 euros) shall provide a charge no more than the equivalent of the principal.
- Regulatory fee of 0.1 percent – not greater than MDL 5000 (ca. 250 euros)- on non-banking credit institutions.

The "twin-peaks model" of financial prudential regulation and supervision introduced by the recent legislative evolutions is expected to usher thorough market reform. Although not yet proven in practice, the regulator displays confidence in the positive impact of the new-fangled legislation.

Capital market

Lately, the Moldovan government has been leading a dialogue with the private sector to identify and remove barriers to investment. Legislative and market-development efforts to facilitate and encourage financing in accordance with international best practices have been lately in "pole position" in Moldova. Awareness of these developments and understanding of the relevant legislation should help facilitate a complex range of transactions.

Legislation

Replacement of the old Law on Securities Market with the new Law on Capital Market brought substantial changes in the regulation of the capital market. The new Law, which has entered into effect on September 14, 2013, transposes the relevant nine EU Directives (on markets in financial instruments (MiFID), on takeover bids, on organisational requirements and operating conditions for investment firms, on the prospectus to be published when securities are publicly offered, on insider dealing and market manipulation etc).

The new Law regulates the business of investment firms, public offerings, takeover bids, capital market infrastructure (including regulated markets and information disclosure), and is designed to set and maintain high standards of capital market activities, raise the level of investors protection and offset systemic risks. The novel elements introduce:

- Abolition of supervision of the private share offerings, moving the focus to public offerings only. Public offerings are to be made only through investment companies and individuals authorized by the NCFM.
- Regulation of business of undertakings for collective investments in transferable securities, which are expected to emerge after mandatory liquidation of the investment funds set up in the early 1990s as privatisation vehicles. As per the new law, UCITS can be set up either as an "investment company" — legal entity which issues shares, or as an investment fund (without legal personality) which issues fund units.
- Extensive information disclosure, in line with Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.
- Permission to trade a broader variety of financial instruments (as opposed to the trading of securities only).
- Only JSCs meeting certain requirements are permitted to be listed on a stock exchange.
- Simplified registration for security issuance of privately-traded JSC.
- Abolition of the requirement of mandatory listing. The listing on a regulated market is to be authorised by the NCFM, provided that the issuer complies with the following requirements: (i) the publishing of a public offer prospectus; (ii) a capitalisation of 1 million euros; (iii) an equivalent of 200,000 euros of issued securities, all securities being transferable; (iv) a free float of at least 10 percent of securities belonging to the same class; etc. Listing requirements for MTFs are of a more basic nature.
- Best Execution Rule, allowing intermediaries to trade client securities at organized markets or OTC markets, substituting the Concentration Rule, requiring that investors trade securities only at a stock exchange.

After progressing at a slow pace, the enactment of the Law on the Central Securities Depository in 2016 has brought improvement to the corporate securities registration system. The new law has considered the provisions of the Regulation (EU) No. 909/2014 on improving securities settlement in the European Union and on central securities depositories. The mentioned law provides that:

- The Central Securities Depository shall have sound corporate governance and clear organisational structure. The NBM shall hold at least 76 percent of the shares in the capital of such Central Securities Depository.
- The independent registrars that keep the registers of securities for the currently registered 4,500 joint stock companies shall gradually – by the spring of 2020 – pass on to the Central Securities Depository the databases in their possession.

The Law on Alternative UCITS has been enacted in 2020 (Law No. 2/2020) considering the provisions of Directive 2011/61/EU, Regulation (EU) No. 2015/760 and Regulation (UE) nr. 345/2013. The Alternative UCITS can be set up either as an "investment company" — legal entity which issues shares or a limited partnership, or as an investment fund (without legal personality) which issues fund units. The minimum capital of an Alternative UCITS set up as a legal entity which issues shares shall be the equivalent of EUR 50 000 that gradually increases during 10 years up to equivalent of EUR 300 000 after the law is enacted.

For Law on Capital Market are expected some changes in relation to entities regulated by NCFM and on issues related to securities' transactions. One draft law introducing credit rating agencies (CRA) is pending approval in Parliament and would implement some provisions of Regulation (EU) No.1060/2009, and put CRA under the supervision of NCFM which would authorise the CRAs and regulate their activity; the draft law provides registration and regulatory fee that annually would be established by NCFM. The other draft law issued for public consultation would introduce the investing consultant that would have access on the capital market on NCFM's authorisation, would exclude the customary circulation of Moldovan depository receipt by accepting directly foreign securities for transactions and would regulate in a more detailed manner the listing process, application of sanctions by NCFM, licence issuance by NCFM to its supervised entities etc.

Despite the above legislative evolutions, market capitalisation still remains insignificant. Most notable transactions relate to strategic investors consolidating their shareholdings through mandatory or voluntary buy-outs. Risky investments into financial assets represent a minor part of the transactions on the Moldovan market; therefore, share prices are relatively immune to boom and bust cycles.

The gradual liberalisation of the financial market, combined with the appealing corporate tax regime (zero rate of corporate income tax has been replaced in 2012 with a low 12 percent tax and the dividend tax of 15 percent is subject to optimisation via the double-taxation avoidance treaties that were concluded between Moldova and more than 40 countries), stable currency and the strong commitment of the political elite toward EU accession have been creating sound prerequisites for transforming Moldova into a non-negligible investment destination in close proximity to the EU.

[1] In February 2020 the scope of this law has narrowed and it is now called Law on Liquidation of Banks.

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