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Jurisdiction update: Moldova — Securities & Banking

Jan 14 2011 Roger Gladei and Aelita Orhei

Moldovan financial services and securities legislation has undergone significant modernisation in recent years. Such modernisation was focused on: (i) fuelling the capital market by streamlining the securities issuance and secondary market transfer rules; (ii) unifying the supervision of all non-banking financial institutions under the roof of a single supervisor; and (iii) harmonisation of national laws on credit institutions, capital market, insurance and microfinance organisations with European Union legislation. This new waive 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 in line with Directive 2006/48/EC of the European Parliament and of the Council of June 14, 2006 on taking up and pursuit of the business of credit institutions. The regulator, National Bank of Moldova, has the authority to issue and withdraw banking licences, as well as to regulate and supervise the banking sector, and tries to keep pace with and impose on the banks the best international rules and practices.

To incorporate a bank in Moldova, the following steps should be taken:

- Founders file with the NBM the licensing application, accompanied by corporate documents; disclosures on the identity, qualification and experience of the directors/key officers, the significant (i.e., five per cent or more) shareholders and their affiliates; financial disclosures; and the bank's business plan. The requirement to prove that the shares will be purchased from own (not borrowed) funds has been recently abolished.

- The NBM issues the preliminary approval of the application within three months.

- Founders pay in the capital (minimum tier one capital is set at 100m Moldovan lei (approx €6m), which is going to increase up to 150m lei starting from 2012 and 200m lei starting from 2013). The bank leases or purchases office premises and equipment, employs key personnel and retains an external auditor. If these requirements are not met within one year, the preliminary approval ceases.

- The NBM issues the banking licence within one month after all the above requirements are fulfilled.

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 functions.

The acquisition of significant (five per cent or more) equity interest in Moldovan bank, either through initial or secondary offering, is subject to the NBM prior clearance. Banks are likewise deemed as public interest entities; therefore, bank shareholders can only transfer shares via the Moldovan Stock Exchange, with some minor exceptions. 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, aim to ensure the soundness and transparency of the banking system, whose purpose has been partly achieved.

Legislation

- In the last decade banking bankruptcy has required robust supervisor's reaction. The immediate regulatory response aimed to exempt the bank bankruptcies from control of the courts of law and, therefore, expedite the claims settlement procedure. Under the amendments to the Law on Financial Institutions, which were enacted in June 2009, the external administrator, appointed and supervised by the NBM, shall be in charge of bank liquidation. 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 only 2009 bank bankruptcy was a combination of the last two legal scenarios, which ensured smooth settlement of individual claims but set aside the major liquidation burden.

- In late 2010 new amendments were made to the LFI (pending President's promulgation), which pertain to the following:
  1. 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.
  2. The NBM shall be armed with additional intervention tools, such as "special supervision" and "special administration". Special supervision is imposed on a financially distressed bank and can last up to three months. A special supervising committee appointed by the NBM does not substitute the bank's management and, based on its conclusions, the central bank may institute the external administration or go directly to withdrawal of licence and bank liquidation. The NBM can institute the special administration when a bank is in breach of certain prudential ratios, remedial measures or legal provisions. A special administrator is appointed by and reports solely to the NBM and he/she substitutes all the governing bodies of the bank. The NBM can declare payment memorandum, for a maximum of two months, when the risk of mass withdrawal of deposits exists.
  3. 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.
  4. Additional know your customer, anti-money laundering and corporate governance requirements are to be imposed on banks, with drastic sanctions for non-compliance.
  5. Liquidation remains out-of-court and bank liquidators are vested with additional powers. Employee claims, for three months before opening the liquidation proceeding, shall take priority over all other claims.
- The meaning of the term "banking secret" has been clearly defined by the amendments to the LFI enacted in September 2010. 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.
- In response to vast criticism of the loan security enforcement proceeding (which remains lengthy and poorly effective), the NBM has drafted and submitted for consultation amendments to the LFI and other laws, which aim to simplify the enforcement process. Under these amendments, a lender (bank or credit union/company) can enforce the mortgage in extra-court proceedings, i.e., by having the mortgage agreement authorised for enforcement by a public notary. In turn, banks would be bound by more extensive legal requirements toward pre-lending information disclosure.

Non-banking financial institutions

Consolidated supervision of the non-banking financial sector has been strengthened under the National Commission for Financial Markets. 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 securities 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 financial market legislation has been revised as follows:

- Enactment of the new 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. Insurers are provided with a five-year term to transform into joint stock companies and their minimum capital shall increase by 2012 to MDL15m (approx €1m) for non-life and to MDL22.5m (approx. €1.5m) for life insurance, whereas the life and non-life insurance businesses are to be split. Before expiration of this five-year transition period, Moldovan insurers remain free to assign into reinsurance up to 100 per cent of underwritten policies.

- A new draft Law on the National Commission of Financial Markets has been drafted under the World Bank support. The draft law primarily aims to bring the operation of the commission in line with best international standards, set by international standard setters, the International Organisation of Securities Commissions, the International Association of Insurance Supervisors, the International Organisation of Pensions Supervisors and the World Council of Credit Unions. In particular, the draft law aims 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. Licensed entities (current "professional participants") will be subject to fully-fledged prudential supervision, whereas other regulated/supervised entities (microfinance organisations, leasing companies, mortgage lending companies) will enjoy only limited (business conduct) supervision, labelled as "monitoring".

- Regulation of microfinance organisations will be revised to ensure that the sector is properly supervised and systemic risks are mitigated. Such revision will start with the drafting and putting into operation of the new Law on Micro-finance Organisations, which will impose on these entities requirements similar to banks.

Capital market

Replacing the current Law on Securities Market with the new Law on Capital Market is to bring substantial changes in the regulation of the capital market. The new draft Law 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 offered to public, on insider dealing and market manipulation etc.,). The draft 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 the investor's protection and mitigate systemic risks.

The draft law introduces:

- Abolition of supervision of the private share offerings and move the focus to public offerings only.

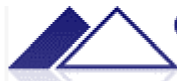
- Abolition of the concentration rule and creation of the new capital market infrastructure, to include regulated markets and multilateral trading facilities established by investment firms.

- 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 draft 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.

Market capitalisation still remains insignificant. The most notable transactions relate to strategic investors consolidating their shareholdings through mandatory or voluntary buy-outs. The gradual liberalisation of the financial market, combined with the appealing corporate tax regime (zero rate of corporate income tax shall be maintained until 2012 and the dividend tax of 15 per cent 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.



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