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# Romania

# LENDING & SECURED FINANCE


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This country-specific Q&A provides an overview of lending & secured finance laws and regulations applicable in Romania.

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# ROMANIA
# LENDING & SECURED FINANCE

## 1. Do foreign lenders or non-bank lenders require a licence/regulatory approval to lend into your jurisdiction or take the benefit of security over assets located in your jurisdiction?

As a rule, in Romania, crediting activities can be performed on a professional basis by financial and crediting institutions authorised by the National Bank of Romania ("**NBR**").

Non-banking financial institutions may also carry out lending activities or conclude financial leasing and offer secured loans. Such institutions carry out their activities under the supervision of NBR.

Only credit institutions can accept deposits from the public on a professional basis. This is mainly because banks operate in accordance with strict prudential regulations and under the supervision of the NBR.

EU licensed credit institutions may also provide lending activities in Romania on a professional basis, by establishing a branch or directly through passporting.

Non-EU licensed credit institutions may provide lending in Romania on a professional basis, by establishing a branch, that should be authorized by NBR, and the competent authority from the country of origin does not oppose the establishment of such branch in Romania.

Intra-group lending such as cash pooling or shareholder financing within non-professional lending groups of companies are not unusual.

Generally, foreign lenders or non-bank lenders do not require a license or NBR approval to take the benefit of security over assets located in Romania. Certain limitations may apply, for example: from a tax perspective, in relation to the acquisition of secured receivables or to enforcement by means of appropriation of the assets subject to the security interest, especially in relation to immovable assets.

Certain operations involving loans (e.g. loan granted by a foreign entity exceeding a loan term of 1 (*one*) year) must be notified to the NBR for statistical purposes only, for monitoring of external private debt at national level, but do not require NBR's authorization.

## 2. Are there any laws or regulations limiting the amount of interest that can be charged by lenders?

Parties are free to establish the applicable interest rate (including default interest). However, this is usually agreed based on the arms' length principle, comparable to similar operations performed on the market.

Market standard in Romania, for both banks and group loans, is to generally calculate the interest rate by reference to a market standard variable reference rate, such as ROBOR (for RON-denominated facilities) or EURIBOR (for EUR-denominated facilities) plus an agreed margin, if the case.

In case the parties fail to include or agree on a conventional interest rate, based on the applicable legislation, the interest rate shall be equal to the reference interest rate set by NBR (*e.,* the monetary policy interest rate published in the Official Gazette of Romania).

In loans providing a cross-border element, where Romanian law is applicable and payment is to be made in foreign currency, the statutory interest shall be 6% per year, unless otherwise agreed by the parties.

## 3. Are there any laws or regulations relating to the disbursement of foreign currency loan proceeds into, or the repayment of principal, interest or fees in foreign currency from, your jurisdiction?

Current and capital transactions between residents and non-residents may be carried out in both foreign and domestic currencies.

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Between residents, the general rule is that payments, proceeds, transfers and any other such operations related to the trade of goods and services, as well as labour related payments, must be performed in RON.

Other specific operations, such as cash flows generated by loans, deposits, security transactions, distribution of dividends, may be performed between residents without restrictions, in both RON and foreign currency.

## 4. Can security be taken over the following types of asset: i. real property (land), plant and machinery; ii. equipment; iii. inventory; iv. receivables; and v. shares in companies incorporated in your jurisdiction. If so, what is the procedure – and can such security be created under a foreign law governed document?

Romanian law provides that security can be created over various types of assets.

Irrespective of the law applicable to the credit facility, security agreements must be governed by Romanian law if the secured assets are located in Romania when the security is concluded (*e.,* immovable and movable assets), or belong to a company incorporated under Romanian laws (*i.e.,* shares).

The most frequent security structures used in financing transactions include:

4.1 Immovable mortgages

The immovable mortgage is a security right created by law or based on an agreement in favour of a creditor, who thus obtains the right to enforce its claims in relation to the real estate asset. The mortgage agreements over real estate assets must be concluded before a Romanian public notary.

The creditor's right over the mortgaged asset is maintained even if the respective asset is sold or transferred in any way and the secured creditor may recover its claim before unsecured or inferior rank creditors.

Immovable mortgages may be established over the following:

- immovable assets (*e.,* land and/ or buildings) and their accessories;
- right of usufruct (use and collect rent) over such assets and their accessories;
- ownership quotas over the immovable assets; or
- superficies right.

As a matter of practice, the immovable mortgage agreements commonly provide several prohibitions related to the mortgaged real estate, which may vary according to the mortgagor's business activity, including prohibition to transfer the mortgaged asset, to lease or free lease it, to build on it, to merge and de-merge the land plot etc.

The rank of the immovable mortgage is given by the registration order in the Land Book (as detailed below). When duly registered, a creditor will have a preferential right over another creditor who registers its security subsequently or is unsecured altogether.

4.2 Movable mortgages

As a rule, movable mortgages may be created through written agreements executed as a private deed, with no further notarization requirements.

Any tangible or intangible asset may be subject to a movable mortgage (*e.,* accounts, inventory, good will, receivables, automobiles, equipment, stocks, ships, airplanes, art, intellectual property etc.), if it has a certain value to its owner or its creditor. A mortgage may also be created over the universality of the assets of the debtor.

The movable mortgage must be registered with the National Register for Movable Publicity (the "**National Register**"). But there might be cases where certain supplementary actions will have to be undertaken to ensure that the mortgages are valid and opposable to third parties.

The ranking of a movable mortgage is generally determined by reference to the time that the publicity formalities are performed with the National Register, irrespective of the time that the secured obligations are born.

## 5. Can a company that is incorporated in your jurisdiction grant security over its future assets or for future obligations?

The Romanian law allows the creation of security interests over future assets, but under the condition that they are determinable. Security over movable future assets will enter into force when the relevant assets have come into existence and the debtor acquires ownership over such assets.

In addition, security granted in consideration of future

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obligations (including payment ones) are considered valid and will obtain their ranking once they have been properly registered. However, in case the security was granted in consideration of a borrowed amount and the creditor refused to disburse said amount, the guarantor can obtain the deregistration / reduction of the security at the expense of the creditor, as well as damages.

## 6. Can a single security agreement be used to take security over all of a company's assets or are separate agreements required in relation to each type of asset?

In theory, one security agreement can encompass all type of mortgaged assets, as there are no legal requirements imposing separate agreements.

However, in practice, separate agreements are preferred because of the particularities applicable to each type of asset, or due to validity / perfection requirements (*e.*, authentic agreement for immovable assets).

Therefore, the common security structure is as follows:

- an immovable mortgage agreement, under which all or certain real estate of the debtor is mortgaged;
- a general movable mortgage agreement, under which the borrower mortgages the universality of movable property, as well as other tangible and intangible assets, such as accounts, receivables, individual movable assets exceeding a certain threshold etc; separate agreements may be concluded for each category of the mortgaged assets, if preferred;
- a share mortgage agreement, under which the shareholders of the debtor mortgage their shares.

## 7. Are there any notarisation or legalisation requirements in your jurisdiction? If so, what is the process for execution?

The only security agreement that must be signed before a Romanian public notary are the immovable mortgage agreements, namely those in relation to the real estate assets. All other security agreements may be created through written agreements executed as a private deed, with no further notarization requirements.

## 8. Are there any security registration requirements in your jurisdiction?

In relation to the immovable mortgage agreements, formalities should be performed with the following registries:

- Land Book – such registration is performed by the public notaries authenticating the immovable mortgage agreements; and
- National Register – for the movable assets ancillary to the real estate (*e.*, movable assets incorporated in the immovable ones etc.).

In relation to the movable mortgage agreements, formalities should be performed with the National Register, but there might be cases where certain supplementary actions will have to be undertaken to ensure that the mortgages are valid and opposable to third parties. For example, registrations in respect of mortgages over shares must be carried out in the relevant shareholders' registry, depositary and / or Trade Registry. For mortgages over receivables, the borrower must send notifications informing the third-party debtor with respect to the existence of the mortgage and the collection requirements.

Depending on the type of asset, Romanian or European legislation might set forth special regulations, such as in the case of mortgages over ships, airplanes, trademarks, which must comply with additional publicity formalities.

## 9. Are there any material costs that lenders should be aware of when structuring deals (for example, stamp duty on security, notarial fees, registration costs or any other charges or duties), either at the outset or upon enforcement? If so, what are the costs and what are the approaches lenders typically take in respect of such costs (e.g. upstamping)?

Loan agreements and guarantees do not trigger any payable taxes or stamp duties. However, in relation to registering / perfecting the security documents, some relevant charges and duties may become applicable, as detailed below:

- fees payable to the relevant land books for obtaining excerpts for the authentication purposes: RON 40 (approx. EUR 9);
- public notary fees for the authentication of an immovable mortgage agreement: RON 1,285 (approx. EUR 260) + 0.07% of the value of the

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secured amount for the difference exceeding RON 500,000;
- translator fees for the certified translations of the finance documents, as the case may be;
- fees payable to the relevant land books for registration of an immovable mortgage agreement: RON 100 (approx. EUR 20) / asset + 0.1% of the secured amount;
- fees payable to the National Register and any other public register for registration of the security documents: the initial registration – RON 40 (approx. EUR 9) + the fee of the National Register;
- court and enforcement fees for proceedings in relation to the finance documents.

## 10. Can a company guarantee or secure the obligations of another group company; are there limitations in this regard, including for example corporate benefit concerns?

- Companies may only enter into agreements which benefit their business objectives. The concept of "*group benefit*" is not recognised within the company law and therefore any particular transaction should be scrutinised from the perspective of each individual group company. For example, a guarantor may show a benefit if it receives a part of the loan proceeds, either directly or indirectly, or if otherwise receives a remuneration.

A separate but related assessment regards the "cause" of a transaction. Agreements lacking a valid cause, meaning a commercial reason of the underlying transaction are null and void.

## 11. Are there any restrictions against providing guarantees and/or security to support borrowings incurred for the purposes of acquiring directly or indirectly: (i) shares of the company; (ii) shares of any company which directly or indirectly owns shares in the company; or (iii) shares in a related company?

Company Law no. 31/1990 prohibits a joint stock company to lend or set up guarantees for the purpose of a third party acquiring said company's shares (also known as financial assistance).

For a limited liability company, the applicability of the prohibition is debatable, but the risk of financial assistance may not be fully dismissed. Acquisition loans need to be structured in such a way as to avoid the financial assistance risk in each case.

## 12. Can lenders in a syndicate appoint a trustee or agent to (i) hold security on the syndicate's behalf, (ii) enforce the syndicate's rights under the loan documentation and (iii) apply any enforcement proceeds to the claims of all lenders in the syndicate?

The standard structure of a syndicated loan includes the appointment of a security agent to handle the security.

The security agent cannot be appointed as a trustee, because the concept of trust is not regulated under the Romanian law. Thus, the following structures have been used by lenders:

- the agency structure: traditionally used by a syndicate to appoint the facility agent to act as its attorney-in-fact in relation to the guarantees. Thus, Romanian law allows creditors to appoint a third party as agent and enable him to act on their behalf in what concerns the management and enforcement of security.
- the parallel debt structure: used for foreign law-governed facility agreements, under which the borrower and the other obligors undertake towards the security agent to make all payments due to all creditors, but without affecting the rights of the creditors.
- the joint creditorship: enables the creditor that is designated as security agent to enforce all claims of the syndicate against the borrower and the other obligors.

## 13. If your jurisdiction does not recognise the role of an agent or trustee, are there any other ways to achieve the same effect and avoid individual lenders having to enforce their security separately?

Romanian law recognises the concept of agent, but it does not recognise the common law concept of trustee.

The closest concept to trust, under the Romanian law, is *fiducia*. However, there are considerable differences between the two legal instruments and the concept of trustee is not commonly used in Romanian finance structures. Alternative structures have been described above.

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## 14. Do the courts in your jurisdiction generally give effect to the choice of other laws (in particular, English law) to govern the terms of any agreement entered into by a company incorporated in your jurisdiction?

An agreement shall be governed by the law chosen by the parties (including English law, if elected). Such law elected by the parties will be recognised and enforced by the Romanian courts of law. An agreement concluded under foreign law but producing effects in Romania must however comply with mandatory public policy requirements of Romanian law.

Romanian or European legislation imposes however the applicable law to the security agreements – such agreements must be governed by the jurisdiction in which the secured assets are located.

## 15. Do the courts in your jurisdiction generally enforce the judgments of courts in other jurisdictions (in particular, English and US courts) and is your country a member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (i.e. the New York Arbitration Convention)?

Foreign judgments may be generally recognised and enforced in Romania, based on national legislation, as well as on bilateral and multilateral treaties, such as:

- EU Regulation no. 1215/2012 on jurisdiction and enforcement of judgments in civil and commercial matters;
- the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed by the European Union, Denmark, Iceland, Norway and Switzerland;
- the Hague Convention on Choice of Court Agreements; and
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*e.*, the New York Arbitration Convention).

Judgments of non-European Union member states (such as United Kingdom and USA) may be enforced by Romanian courts, based on a bilateral or a multilateral treaty, subject to undergoing though a special recognition process regulated under national procedural laws.

With respect to the United Kingdom, the recognition and enforcement of judgments are no longer based on the European rules, since Brexit occurred. A certain risk resides, as to whether the Romanian courts will automatically recognise English judgments based on the Hague Convention on Choice of Court Agreements or other bilateral / multilateral treaty, or if such judgements may need to first pass a recognition process regulated under national procedural laws.

As to the USA, the applicable rules are those provided by the Hague Convention on Choice of Court Agreements. However, the Hague Convention is limited in scope, being applicable only to disputes between parties to agreements in civil or commercial matters where the court of jurisdiction is explicitly agreed upon.

## 16. What (briefly) is the insolvency process in your jurisdiction?

A debtor unable to cover its certain, liquid and due debts would be considered insolvent. The insolvency state of the debtor is (i) presumed when the debtor fails to observe its payment obligations for a period that exceeds 60 days, respectively (ii) imminent when it may be proved that the debtor will fail to pay its debts whenever these become due.

The persons entitled to submit requests regarding the opening of the insolvency proceedings are: (i) the debtor, (ii) one or more creditors with receivables exceeding RON 50,000 (approx. EUR 10,000) or (iii) any other person or institution whose right of submitting such request is granted by law. These requests are made before the competent courts.

In practice in many cases requests for opening of insolvency are made by creditors instead of commercial disputes. Those requests can be denied / rejected by the court if the debtor pays the due amount or if it can prove that the dispute is commercial and that it continues to repay its other undisputed debts.

Law no. 85/2024 on insolvency and pre-insolvency procedures (the "**Insolvency Law**") regulates three main stages of the proceedings applicable to the companies experiencing financial difficulties, as follows:

*Observation Period*

The period between the opening of the insolvency proceedings and the confirmation of a reorganisation plan is called the observation period. The observation period cannot last for more than 12 months under the Insolvency Law.

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The opening of the insolvency procedure is approved by the syndic judge who also appoints a judicial administrator that shall supervise the company through the entire insolvency procedure and, in most cases, shall take over the management of such company.

During the observation period, the chances for the debtor to continue its activity are analysed.

*Reorganisation*

If the debtor has the means to continue its activity and repay its debts, the reorganisation of its business is materialized within the content of the reorganisation plan.

The reorganisation plan shall contain, amongst others, the payment schedule, the specific measures to be taken but, most importantly, the category of creditors whose debts are totally/ partially cut-off.

Should the debtor not observe the terms of the reorganisation plan, the bankruptcy procedure may be initiated.

*Bankruptcy*

Bankruptcy can occur, *inter alia*, if the debtor:

- fails to express its intention to reorganise its business;
- does not observe the deadline to submit the reorganisation plan;
- fails to repay the amounts owed as per the payment terms included in the reorganisation plan;
- does not have sufficient assets to support a reorganisation;
- expressly requests it.

## 17. What impact does the insolvency process have on the ability of a lender to enforce its rights as a secured party over the security?

The opening of insolvency proceedings against a company automatically suspends any individual enforcement against said company and its assets, including the one initiated by secured creditors. All enforcement measures will continue under the protection of the insolvency regulations.

Within the insolvency proceedings, the mortgage rights of the secured creditors generally subsist and are observed. Moreover, secured creditors have preferential treatment under the Insolvency Law, in consideration of their mortgages established on the assets of the insolvent debtor.

During the observation period, the secured creditors may request the registration of the entire amount owed by the debtor under the loan agreement with the preliminary table of claims. Following the initial registration of the receivables, a valuation report is prepared with respect to the mortgaged assets, based on which the secured creditors shall be registered with the table of claims (i) in the secured creditors' category with the value of the guarantee and (ii) in the unsecured creditors' category with the difference between its entire claim and the value of the guarantee, if the case.

During the reorganisation period, partial or total reductions of receivables could occur, as part of the reorganisation plan. However, such reductions are rarely applied in relation to secured creditors. The reorganisation plan can also provide the sale of the debtor's assets, including the mortgaged ones. Should this be the case, other guarantees, of the same value, shall be established or the proceeds resulted from the sale will be distributed to the secured creditor.

During bankruptcy, all debtor's assets will be sold, usually at public auctions. Save for procedural expenses, all proceeds resulted from the sale of mortgaged assets will be distributed to the secured creditor. However, reductions in price might become applicable if the assets cannot be sold at the evaluation value.

It also should be noted that, under the Insolvency Law, if the secured creditors are not fully satisfied following the sale of their collateral, the outstanding amounts will be deemed to be unsecured claims.

## 18. Please comment on transactions voidable upon insolvency.

Under the Insolvency Law, the judicial administrator or liquidator may file actions before the insolvency court for the annulment of certain fraudulent acts and transactions performed by the debtor to the detriment of the creditors' rights within 2 (*two*) years prior to the opening the insolvency proceedings.

Such annulment claims are intended to return to the estate of the insolvency debtor the transferred assets or the value of other benefits provided.

An action for the annulment of fraudulent acts performed by the debtor to the detriment of creditors may be filed by the judicial administrator or liquidator within 1 (*one*) year from the expiry of the time-limit set for the preparation of the first report by the judicial

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administrator or liquidator, but no later than 16 (*sixteen*) months from the opening of the proceedings. If the action is admitted, the parties thereto will regain their former position and the obligations existing on the date of transfer will be reregistered.

In addition, after the insolvency proceedings have been initiated, all acts, transactions and payments performed by the debtor after the opening of proceedings are automatically null and void, apart from the ones required for the conduct of current business, authorised by the syndic judge, and / or endorsed by the judicial administrator / the creditors' committee.

## 19. Is set off recognised on insolvency?

The opening of insolvency proceedings does not affect any creditor's right to invoke a set-off if the legal requirements for legal set-offs are met prior to initiating the insolvency proceedings.

The set-off also applies to reciprocal claims incurred after the opening of insolvency proceedings.

## 20. Are there any statutory or third party interests (such as retention of title) that may take priority over a secured lender's security in the event of an insolvency?

Generally, in case of the debtor's insolvency, secured creditors rank higher than all other type of creditors in relation to the proceeds resulting from sale of the mortgaged assets.

The Insolvency Law regulates only one category of creditors that may rank higher, respectively the ones that grant facilities after the insolvency procedure is open, to help the insolvency company continue its business activity (also known as the super-privileged creditors). However, such cases have been rarely seen in practice.

Such loans can be secured either with assets free of any encumbrance, or with assets that are already mortgaged in favour of other preexisting creditors. In the latter case, the approval of the preexisting creditor will be first requested, but may also be circumvented if such approval is withheld.

In cases where super-privileged creditors exist, the proceeds resulted from the sale of the secured asset will be distributed in the following order:

a. fees, stamp duties and any other expenditure arising out of the sale of the secured assets, including expenses required for the conservation and administration of those assets, etc.;
b. claims of the super-privileged creditors, covering capital, interest and other ancillaries, where applicable;
c. claims of preexisting creditors covering capital, interest, increases and penalties of any kind.

## 21. Are there any impending reforms in your jurisdiction which will make lending into your jurisdiction easier or harder for foreign lenders?

No such legal reform plans are currently known.

## 22. What proportion of the lending provided to companies consists of traditional bank debt versus alternative credit providers (including credit funds) and/or capital markets, and do you see any trends emerging in your jurisdiction?

Alternative financing options had gained for a while popularity over the past few years. For example, bonds issued on the relevant exchange or to specific local or foreign companies, at higher costs than regular financing were starting a trend; following the recent post-pandemic inflation, these instruments became less affordable.

Issuance and listing of stock (shares) over capital markets is permitted in Romania, but the listing requirements may discourage some firms from seeking such financing.

As to bank loans, while international banks generally look for larger tickets, local banks aim to cover all segments of the market.

## 23. Please comment on external factors causing changes to the drafting of secured lending documentation and the structuring of such deals such as new law, regulation or other political factors

No external factors have impacted the legislative framework applicable to secured lending.

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