SIMPLE AGREEMENT FOR FUTURE EQUITY
Key Legal Considerations for Romania

This information document provides an overview of the three most important legal considerations of the template Simple Agreement for Future Equity (SAFE) for cross-border angel investments in Romania. It is not and it does not purport to be an exhaustive legal review of the template. It does not constitute, and cannot be interpreted as binding legal advice and it does not create a lawyer-client relationship. It is not intended to be, and should not be used as, a substitute for taking legal advice in any specific situation. Please always consult a legal expert for specific advice. DLA Piper Dinu SCA will accept no responsibility for any actions taken or not taken on the basis of this information document.

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Please see the contact details below of DLA Piper Dinu SCA.

1. Potential ambiguous nature of the SAFE under the current Romanian legal framework

While other venture capital investment instruments (such as equity investments and convertible loan agreements) are widely spread in Romania, the use of SAFEs is not often encountered because of their ambiguous nature.

Typically, a SAFE is purported to be neither traditional debt nor current equity at the time of its execution. It is a hybrid instrument that acts as an undertaking to issue equity at a later date when a specific triggering event occurs. This hybrid nature can create difficulties under the existing Romanian legal framework.

Clause 2.1 (*Object*) deems the SAFE Amount as an advance payment for the subscription price of a future Company's capital increase. The Romanian company law does not expressly envisage such an operation. Even if we are to admit that from a legal perspective advance payments are in principle possible for a wide range of obligations, the accounting treatment thereof in the case at hand may raise difficulties and should be confirmed with an accounting expert in advance of pursuing the SAFE instrument route. The main difficulty that we see is that pursuant to the Romanian accounting legislation the advance payment may not yet be recorded in the books of the Company as equity; therefore, while the parties' intention is for the SAFE not to be treated as a loan in the balance sheet of the Company, it is likely that this is the accounting treatment it will eventually get – i.e., that of a liability of the company towards a third party (as the Investor is not yet a shareholder).

The fact that pursuant to the SAFE template there are a Notional Interest and a Final Term attached to the SAFE (similar to the interest and the maturity date attached to convertible loans) which are not typical for SAFEs, as well as the references therein to the "conversion" of the SAFE Amount into shares increase the probability of its accounting treatment as a loan convertible into equity. This approach would be based on the fact that a conversion operation involves a change of the nature of the amounts converted and triggers a reclassification of the accounting treatment thereof.

While it is useful that the SAFE template envisages a Residual Conversion (thus excluding the repayment of the SAFE Amount if the Final Term is reached and a Conversion has not occurred by that time), this might not suffice as grounds to register the SAFE Amount in the books of the Company as anything but a loan pending its conversion into shares, given the current accounting legal framework. This is similar to convertible loans where, pursuant to the market practice in Romania, the loan amount would typically be "automatically" converted into shares of the company if the loan reaches the maturity date, assuming no other events triggering the conversion occurred by that time, at a pre-agreed valuation. This is to reinforce the rationale of giving the loan, which is to invest in the company (not to lend money to it), the loan route being chosen (instead of the direct equity investment route) for reasons related to the postponing of the determination of the valuation. Repayment of the loan is truly exceptional to circumstances like breach by the company of its obligation to issue the shares to the investor.

Considering the above, as things currently stand, while one may argue in favour of the possibility to use a SAFE-type instrument strictly from a Romanian company law perspective, the implementation thereof based on the accounting legislative framework might prove unfeasible (if such does not leave room for such instrument to be classified as equity at the level of the Romanian entity receiving the corresponding funds) – to be crosschecked against appropriate accounting and tax advice when considering actual use of the structure.

2. Potential difficulties in the implementation of the SAFE

A SAFE, by its nature, promises the investor future equity upon a triggering event, but the actual delivery of that equity depends entirely on the shareholders' willingness to vote in favour of the capital increase at the relevant time. This creates a structural vulnerability (which may be encountered in the case of convertible loans as well): the investor holds a contractual right to receive equity, but cannot compel the company's shareholders to approve the requisite capital increase. Obtaining in court the specific performance of the obligation to issue the shares (instead of monetary damages) appears rather improbable given that this would imply for the courts to substitute for the shareholders' decision-making authority. Clause 7.2 of the SAFE template follows this reasoning providing for the obligation of the Company to indemnify the Investor if a shareholder fails to perform the promised act.

If the company is a joint-stock company, the board of directors may be entrusted by the general meeting of shareholders, subject to certain conditions, with the authority to approve future share capital increases in advance of executing the SAFE - which gives more flexibility to the company in its implementation. Moreover, to further strengthen the implementation of the SAFE:

- the execution of the SAFE and waiver of the preemption rights of the existing shareholders in view of the corresponding share capital increase should be approved in advance by the general meeting of shareholders or, as the case may be, the board of directors even if technically a separate approval for the actual capital increase (at the level of the competent corporate body) will still be required.

- the founders should be made a party to the SAFE and undertake their own obligations as concerns the performance of the share capital increase.

3. Other examples of matters to be considered

- While not a matter of Romanian law, we highlight that:

(a) post-money SAFE (as opposed to pre-money SAFE) has become industry standard because of the level of certainty it offers as concerns the equity percentage of the investor.

(b) the pre-money concept in the SAFE template does not fully capture the economics of multiple pre-money SAFE investors converting together. In a pre-money SAFE structure, each SAFE investor's final ownership is not fixed when the SAFE is issued. At the priced round, all SAFE investors typically convert in the same financing, and their conversions dilute each other, besides the founders and existing shareholders.

(c) the SAFE-style mechanics usually refer to the number of shares/quotas, not their nominal value. Where shares have the same nominal value (as it is the case under the Romanian company law), reference to nominal value will not distort the calculations; otherwise, the formula will need to be adjusted.

- In respect of clause 3.1.2, the reference to unanimity should be replaced by the majority provided by the constitutive documents of the Company to increase the capital (in compliance with the Romanian company law).

- In respect of the definition of "Investor [Quota / Shares]", the appropriate term for the Romanian companies is "Shares".

- In respect of clause 7.9, reference to PEC (Posta Elettronica Certificata) is typical for Italy and should be removed. We assume certified email in the template refers to the (qualified) electronic registered delivery service under Regulation (EU) no 910/2014 on electronic identification and trust services for electronic transactions in the internal market (eIDAS Regulation). Parties may consider instead delivering via email the notices signed using a qualified electronic signature pursuant to the eIDAS Regulation.

Contact Information

For more legal information about Romania, please contact our partner:
Law Firm Name: DLA Piper Dinu SCA
Contact Person: Cristina Bucur, Sandra Cahu
Email Address: cristina.bucur@dlapiper.com; sandra.cahu@dlapiper.com
Phone Number: +40 727 373 322; +40 721 328 382

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