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Legal Newsflash

Romania transposes the Mobility Directive, aligning the national legislation with EU directions on cross-border conversions, mergers and divisions

On 28 June 2023, the Romanian Parliament finally adopted Law no. 222/2023 ("Law no. 222/2023") amending and supplementing the Companies Law no. 31/1990 ("Companies Law"), as well as Law no. 265/2022 ("Trade Registry Law") on the Trade Registry and amending and supplementing other normative acts regarding the registration with the Trade Registry, which transposes into the national legislation the Directive (EU) 2019/2121 ("Mobility Directive") of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, thus putting an end to the uncertain framework triggered by the breach of the transposition deadline. The Law no. 222/2023 has been published in the Official Gazette of Romania on 20 July 2023 and entered into force on 24 July 2023.

A. Context

The Mobility Directive has been adopted at the end of 2019, with the aim of removing certain barriers in the exercise of freedom of establishment by:

a) **covering the lack of a legal framework as regards cross-border conversions and divisions involving the incorporation of new companies**, while providing adequate protection for shareholders, employees, and creditors; and
b) **amending and supplementing the pre-existing directions as regards the cross-border mergers**, seen as a significant milestone in improving the functioning of the internal market for companies and their exercise of freedom of establishment.

As a joint effort to harmonize the national legislation of the Member States, the Mobility Directive should have been transposed by 31 January 2023. Although steps have been taken towards the implementation of the Mobility Directive, most of the Member States, including Romania, transposed it with delay, while others did not manage to implement it so far.

However, even if the Mobility Directive has not been timely implemented by all Member States, as per the EU case law, the provisions of the Mobility Directive which are unconditional, sufficiently clear, precise and do not call for additional measures from the Member States have direct effect in the jurisdictions where the Mobility Directive has not been transposed into the national legislation, such as the case of Romania until the entry into force of Law no. 222/2023.

Hence, even if the Member States transpose the Mobility Directive at their own pace, at least the lack of adequate legal framework as regards the cross-border conversions, mergers and divisions has been covered by the direct effect of the Mobility Directive, therefore allowing for such operations to be implemented in all Member States.

B. Pre-existing Romanian Framework

Prior to the implementation of the Mobility Directive, the Companies Law regulated only cross-border mergers, in line with the Directive (EU) 2017/1132 relating to certain aspects of company law, with no legal provisions being set forth in relation to cross-border conversions and divisions.

While the Companies Law and the Trade Registry Law have constantly been amended in the last years so as to streamline the corporate governance of the Romanian companies and the registration process with the Trade Registry, there was a need for the section related to cross-border mergers to be improved, furthermore given that the appetite for such operations was very low on the Romanian market due to the skepticism as regards the existing legal framework on the subject.

C. Scope of Law no. 222/2023

In line with the Mobility Directive, Law no. 222/2023 regulates the following corporate operations (generically referred to hereinafter as "**Cross-border Reorganizations**"):

1. **Cross-border mergers**:

    a) **with an existing recipient company**, whereby one or more companies **transfer all their assets and liabilities** to another existing company, in exchange for the issue to their shareholders of securities or shares and, if applicable, a cash payment;

    b) **with a new recipient company**, whereby two or more companies **transfer all their assets and liabilities** to a company they form, in exchange for the issue to their shareholders of securities or shares and, if applicable, a cash payment;

c) **with the parent company**, whereby a company **transfers all its assets and liabilities** to the company holding all the securities or shares representing its capital; or

d) **between companies with the same shareholding structure**, whereby one or more companies **transfer all their assets and liabilities to another existing company**, without the issue of any new shares, provided that one person holds directly or indirectly all the shares in the merging companies or the shareholders of the merging companies hold securities and shares in the same proportion in all merging companies.

2. **Cross-border divisions involving the incorporation of new companies**:

a) **full divisions**, whereby the divided company **transfers all its assets and liabilities** to two or more recipient companies, in exchange for the issue to the shareholders of the divided company of securities or shares in the recipient companies and, if applicable, a cash payment;

b) **partial divisions**, whereby the divided company **transfers part of its assets and liabilities** to one or more recipient companies, in exchange for the issue to the shareholders of the divided company of securities or shares in the recipient companies, in the divided company or in both the recipient companies and the divided company, and, if applicable, a cash payment;

c) **divisions by separation**, whereby the divided company **transfers part of its assets and liabilities** to one or more recipient companies, in exchange for the issue to the divided company of securities or shares in the recipient companies.

3. **Cross-border conversions**, namely operations whereby a company converts the legal form under which it is registered in a Member State into a legal form of the destination Member State, and transfers at least its registered office to the destination Member State, while maintaining its legal personality.

In order to fall within the scope of Law no. 222/2023, the reorganizations shall involve at least a company of another Member State that falls within the scope of the Mobility Directive and a Romanian company functioning under one of the following corporate forms:

a) joint-stock company (in Romanian: *societate pe actiuni*, "**SA**");
b) limited partnership by shares (in Romanian: *societate in comandita pe actiuni*, "**SCA**");
c) limited liability company (in Romanian: *societate cu raspundere limitata*, "**SRL**");
d) European company with its registered office in Romania (in Romanian: *societate europeana cu sediul in Romania*).

D. Procedural Steps for Cross-border Reorganizations

The procedural steps of Cross-border Reorganizations are similarly regulated by Law no. 222/2023 and the Mobility Directive, with small differences mainly triggered by the specifics of each operation. Given the cross-border nature of the operations falling within the scope of Law no. 222/2023, there are two main phases to be followed in relation to such a process, as follows:

1. **Preliminary phase**, which mainly entails the following steps:

a) **Drafting and signing the Cross-border Reorganization plan**, which shall mention, among others, the exchange ratio, proposed compensation payment, terms for the allotment of shares, proposed indicative timetable, safeguards offered to creditors, likely repercussions of the reorganization on the employment, precise description of the transferred assets and liabilities etc. and shall be accompanied by the (new) articles of association of the companies involved in the reorganization and the financial statements (audited, if the case) of such companies, which should not be older than 6 month from the date of the Cross-border Reorganization plan;

b) **Drafting and signing the report of the management body for the shareholders and employees**, explaining and justifying the legal and economic aspects of the Cross-border Reorganization, as well as the implications of such operation for employees. The report shall be made available to the shareholders and the employees of the companies involved in the reorganization at least six weeks prior to the date of the general meeting of the shareholders having on the agenda the approval of the reorganization, but the preparation of such report and the corresponding formalities in relation to it are not necessary under specific circumstances, in particular in case of intra-group reorganizations or if the shareholders unanimously waive the shareholders-related part of the report;

c) **Preparation of the expert report by an independent expert**, who priorly examined the Cross-border Reorganization plan. The expert report shall mainly include the expert's opinion as to whether the cash compensation and the share exchange ratio are adequate and shall be made available to the shareholder of the companies involved in the reorganization at least one month prior to the date of the general meeting of the shareholders having on the agenda the approval of the reorganization. Similar to the report of the management body, the preparation of the expert report and the corresponding formalities in relation to it are not necessary under specific circumstances, in particular in case of intra-group reorganizations or if the shareholders unanimously waive the preparation of the report;

d) **Publication of the Cross-border Reorganization plan (in Romania, in the Official Gazette)**, accompanied by a notice to the shareholders, creditors and employees, informing them that they are entitled to file observations to the Cross-border Reorganization plan. The publication shall be made at least one month prior to the date of the general meeting of the shareholders having on the agenda the approval of the reorganization;

e) **Approval of the Cross-border Reorganization** by the general meetings of the shareholders of the companies involved in the Cross-border Reorganization, which can be held with at least 30 days after the date of the publication of the Cross-border Reorganization plan (however, please note that, due to the 45-day opposition period of the creditors from the publication date, it is recommended that such approval should be taken after the passing of such 45-day period). Such a resolution can be validly passed only with the favorable vote of two-thirds of the present or represented shareholders;

2. **Registration phase**

a) **Obtaining the pre-reorganization certificate**, issued by the competent authority as per the national legislation of the relevant Member State. In line with Law no. 222/2023, the Romanian Trade Registry Office is competent to issue pre-reorganization certificates in relation to the Romanian companies involved in Cross-border Reorganizations. As regards the timeline, the Romanian Trade Registry Office shall issue the pre-reorganization certificate within 10 days of the submission of the file, term which can be extended by 15 days in case there are missing documents from the file or up to six months, if there are reasonable grounds of fraudulent or abusive action;

b) **Communication of the pre-reorganization certificate** by the issuing authority to the competent authorities of the other Member States having jurisdiction on the reorganization in subject;

c) **Assessment of the fulfillment of the requirements in the destination state by the competent authority of the destination Member State.** If Romania is the destination country, the Romanian Trade Registry Office is competent to perform this limited check, mainly focusing on the compliance with the national laws on the incorporation and registration of companies and, where appropriate, with the requirements regarding the employees' participation to the procedure;

d) **Registration of the reorganization by the competent authority in the destination country**, followed by the notification of the competent authority in the departure country that this step has been completed;

e) **Final registration of the reorganization by the competent authority in the departure country.**

Closely connected with the registration of the reorganization by the competent authorities is the **Effective Date** of the process. In case the Romanian law is applicable, the reorganization is effective, as the case may be:

a) **in case of cross-border mergers**: on the date when the beneficiary company is registered with the Trade Registry if the merger implies the incorporation of a new company, or, in case no company is incorporated in the process, when the amended articles of association of the beneficiary company is duly registered with the Trade Registry, except if **the parties chose another Effective Date, which may not, however, be later than the end of current financial year of the beneficiary company, nor before the end of the last completed financial year of the company transferring its assets and liabilities**;

b) **in case of cross-border divisions**: on the date the divided company is de-registered from the Trade Registry or, as the case may be, when the amended articles of association of the divided company is duly registered with the Romanian Trade Registry;

c) **in case of cross-border conversions**: on the date when the Romanian company is registered with the Trade Registry.

Once approved by the competent authorities in the Member States of the companies involved in a Cross-border Reorganization, such an operation cannot be annulled after it becomes effective. Only by way of exception, it is possible to request the annulment of the resolution of the general meeting of the shareholders approving the Cross-border Reorganization within 30 days as of its publication, but the grounds for such request are very limited and no action will be taken if the companies involved in the reorganization manage to rectify the irregularity.

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E. Protective Measures

Even if a Cross-border Reorganization cannot be, in principle, annulled once it becomes effective, certain protective measures are set out, so as to counterbalance the interest of the shareholders, creditors and employees in the context of such a process, including:

a) **protective measures for the shareholders**: right of the shareholders who voted against the approval of the reorganization to withdraw from the company and to dispose of their shares in exchange for adequate cash compensation, right to challenge the exchange ratio, etc.;

b) **protective measures for the creditors**: right to request and obtain adequate guarantees for the receivables which are not due prior to the publication of the Cross-border Reorganization plan**,** which can be exercised within 45 days as of the publication of the Cross-border Reorganization plan, joint liability of the companies involved in the reorganization for the debts not covered by the Cross-border Reorganization plan, etc.; and

c) **protective measures for the employees**: right of information and consultation, participation right (i.e., right of the employees to be involved in the decision-making process at the level of the employer including, for example, by carrying out negations, by having an employee representative in the management or supervision body) etc.

F. Conclusion

The implementation of the Mobility Directive into the national legislation not only broadens the specter of options for reorganization processes, but also raises the security of such operations, while implementing adequate protective measures for the shareholders, creditors and employees of the companies involved.

We strongly believe that the entry into force of Law no. 222/2023 will increase the confidence of the clients in the legal framework on the subject and such processes will often be taken into consideration for structuring corporate reorganizations.

We look forward to seeing how the competent authorities from the Member States will develop their practice in this respect and which will be the practical difficulties in implementation, especially given that we already have such projects in pipeline, which will be among the first on the Romanian market after the entry into force of Law no. 222/2023.

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