

Romanian Legal Update: Significant changes in the field of corporate governance for public undertakings

06 June 2016

Law No. 111/2016 for the approval of the Government Emergency Ordinance No. 109/2011 regarding the corporate governance of public undertakings (the Ordinance) has been published in the Official Gazette No. 415 of 1 June 2016 and will enter into force on 4 June 2016 (the Law).

The Law brings significant amendments to the Ordinance, intended to enhance the requirements on transparency, competency and efficiency of the management and operation of public undertakings.

New entities to which the Ordinance applies

The Law extends the application of the Ordinance to all public undertakings, including credit institutions (such as CEC Bank S.A. and Exim Bank S.A.), financial institutions, investment services and investment management companies, insurance and reinsurance companies, which qualify as public undertakings.

The Ordinance shall not apply to Autonomous Regia “Rasirom” and State Company “Romtehnica” S.A. operating in national defence and security areas.

Public Finance Ministry - monitoring authority

The Law contemplates the role of the Public Finance Ministry as monitoring authority for the application of the Ordinance.

The Public Finance Ministry, in collaboration with the relevant ministries which are “public supervisory authorities” (autoritati publice tutelare in Romanian), have to issue the methodological norms for the implementation of the Ordinance by 4 October 2016.

Highlights:

- Credit and financial institutions – public undertakings – bound to observe the Ordinance
- No prior submission of powers of attorney for the general meeting of shareholders (GMS)
- Position of temporary directors/managers newly regulated by the Ordinance
- Significant role of public supervisory authorities and Public Finance Ministry as monitoring authorities

New rules regarding the protection of shareholders

Under the general regime provided under the Company Law No. 31/1990 the shareholders' proxy representatives must submit their powers of attorneys within 48 hours before the

general meeting of shareholders (GMS). The Law provides that this requirement is no longer applicable to the public undertakings. This streamlines the formalities for participating and voting in the GMS by the shareholders.

In case of voting by correspondence, the voting forms/ballots must be deposited by the shareholders within 48 hours prior to the meeting.

The “related parties” transactions exceeding 10% of the company’s net assets or turnover must be approved by the GMS. “Relates parties” transactions means transactions entered into between the company and its directors/managers, employees, controlling shareholders (state) or companies controlled by them (including state controlled companies).

Temporary directors and managers of public undertakings

As a novelty, the Law sets forth the regime of temporary directors and managers appointed without a selection procedure, in case of the vacancy of one or more positions.

Hence, if any position of member of board of directors (BoD) becomes vacant, the public supervisory authority or the shareholders (upon the case) may or must immediately (if the number of the remaining directors is below the legal number) appoint/convene the GMS for the appointment of temporary directors to fill the vacant positions. In case of vacancy of one or more manager positions, the BoD may also designate the temporary managers.

Temporary directors/managers will be appointed until the completion of the selection procedure in accordance with the Ordinance, but for maximum 4 months (or 6 months for grounded reasons).

Extended powers of public supervisory authorities

Public supervisory authorities (through their corporate governance departments) have new powers, including:

- the preparation of the “expectation letter” (i.e. a document meant to present the performances expected from the management bodies and the policy in respect of public undertakings with specific duties related to the provision of public services);
- the approval of the performance ratios for the management bodies; and
- monitoring role in respect of the management of public undertakings and the application of the Ordinance.

Significant amendments to the management of public undertakings

The Law brings several changes in respect of the management of public undertakings, including in relation to the number of BoD members, the maximum number of BoDs/supervisory bodies of public undertakings of which a person may be member, remuneration scheme, powers and revocation.

As regards the selection procedure, in case of public undertakings which exceed certain thresholds of employees and annual turn-over, the selection of the BoD members/managers by an independent human resources expert becomes mandatory.

The Law expressly provides that the managers (whether or not they are members of the BoD) must be selected following a specific selection procedure for the respective manager position.

Sanctions for non-compliance with the provisions of the Ordinance

The Law provides for detailed sanctions regime if the provisions of the Ordinance are breached, as follows:

- the non-compliance with the provisions of the Ordinance triggers, pursuant to the law, the disciplinary, civil, administrative or criminal liability, as the case may be, of the persons/entities empowered to apply the Ordinance;
- substantial administrative are applicable by the representatives of the Public Finance Ministry to public supervisory authorities, or the president of the BoD/supervisory body in case of specific breaches of the Ordinance; and
- as a novelty, such administrative fines are doubled if relate to failure to implement the mitigation measures ordered by the representatives of the Public Finance Ministry.