

CMS | Romania increases duties for directors when insolvency is likely



On 17 July 2022, Law 216/2022 came into force amending and supplementing Law No. 85/2014 on insolvency prevention and insolvency proceedings and other normative acts.

Law 216/2022 also amended Romanian Companies Law No. 31/1990 (Romanian Companies Law) on the duties of directors if a company is likely to become insolvent. Also, the law brings derogations from the provisions of the Romanian Companies Law on calling deadlines for shareholders' meetings in those specific cases when a restructuring agreement or approval of the restructuring plan has been confirmed.

The above amendments transpose Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, discharge of debt and disqualifications, and measures to increase the efficiency of procedures for restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).

Increased duties for the directors

Pursuant to the changes brought by Law 216/2022 to the Romanian Companies Law, the directors/managers of a company in difficulty are under a specific obligation to consider the following:

- the interests of creditors, equity holders and other interested parties;
- the need to take reasonable and appropriate measures to avoid insolvency and to minimise losses to creditors, employees, equity holders and other interested parties; and
- the need to avoid conduct, whether intentional or grossly negligent, that threatens the viability of the business.

The above duties of directors and managers are applicable to all types of companies regulated by the Romanian Companies Law, including the most frequently encountered companies: limited liability companies and joint stock companies.

The rationale for increasing the duties of directors and managers– in the event a company is near insolvency – is to protect the legitimate interests of creditors, employees, equity holders and other interested parties from management decisions that may have an impact on the constitution of the debtor's estate.

More specifically, debtors will be protected from those decisions of directors and managers, which could have the effect of further diminishing the value of the estate available for restructuring or for distribution to creditors. In

such circumstances, directors and managers must avoid any deliberate or grossly negligent actions that could result in their personal gain at the expense of any interested party, and not to agree to transactions at below market value, or to take actions that would give unfair preference to one or more interested parties.

When assessing whether a director or manager is to be held liable for breaches of duty of care for the management of the company, the new rules on duties of directors mentioned above also need to be considered.

Derogation with respect to convening formalities

To increase the celerity of the adoption and implementation of the restructuring plan, Law 216/2022 reduces certain deadlines and terms provided by the Romanian Companies Law for calling the general meeting of shareholders, after confirmation of the restructuring agreement or approval of the restructuring plan.

More specifically,

- The deadline for calling the general meeting of shareholders for approving:

- the increase or the reduction of the share capital,
 - the lifting of the shareholders' preferential right, and
 - the acquisition of own shares for the purpose of reducing the share capital,
- was reduced from 30 days to 20 days from the publication of the calling notice in the Official Gazette of Romania, Part IV and the Electronic Bulletin of the Trade Registry, when such actions are aimed at fulfilling the measures provided for in the restructuring agreement or restructuring plan.

- The deadline for introducing new items on the agenda of the shareholders' meeting was reduced from 15 days to ten days at the latest after publication of the calling notice.

In addition, the deadline for the publication of the agenda supplemented with new items proposed by the shareholders, was reduced from at least ten days to no less than five days before the general meeting.

For more information on this law, contact your regular CMS advisor or local CMS experts: **Rodica Manea** and **Elena Andrei**.