Is your company prepared, from a corporate legal perspective, for the Covid-19 crisis and post-crisis business environment?

As the global economy enters an unprecedented crisis caused by the COVID-19 pandemic, the magnitude of which is yet to be revealed, stakeholders should also pay attention to the legal corporate levers that can help companies successfully navigate this period through flexibilization and optimisation of decision-making processes and corporate- and business-functions in general.

Various companies have encountered difficulties during this period in the decision-making process at the level of directors/board of directors (BoD) and general meeting of shareholders (GMS), or have faced different hurdles entailed by a non-flexible legal framework, all of which impede their proper operation.

Given that during and immediately following a crisis, rapid reaction is of the essence, companies should use this period to take a closer look at the steps that can be implemented to mitigate future legal risks and update their internal corporate housekeeping to be able to hit the ground running once the crisis ends.

As legal advisors assisting our clients at this difficult time, we know that change is never easy. It is best to first plan it. And as this recession is unlikely to be over quickly, it is not wise to delay decisions. In this context, in addition to keeping clients updated with the newest legal and tax developments, we have put together an outline of certain corporate matters and legal tips companies could consider to embed healthy corporate practices and sustain improvements that can help business functions to be both effective and efficient.

1. Prepare your company for the future - review the articles of association

The current financial downturn we are facing requires fast and smart decisions. To be able to react accordingly, a company must have the right provisions in its articles of association. We recommend considering the following measures:

• amending and reviewing the articles of association to allow decisions to be taken electronically by both the BoD and GMS;
Although Romanian courts have already acknowledged the possibility to convene, hold and pass GMS resolutions electronically (Zoom or Skype meetings and voting by correspondence or email) even if the articles of association do not provide for this possibility and the Romanian Government approved on 7 May an Emergency Ordinance on adopting certain measures for companies in view of calling and holding the meetings of corporate bodies with the aim to facilitate these meetings during the state of emergency and for a limited period of time after the state of emergency ends, it would be safer if the relevant provisions were in place.

• ensure your company has more than one director, or that the director has delegation powers specifically included in the articles of association and a valid mandate; furthermore, ensure their powers of representation grant enough flexibility to deal with unforeseen circumstances;
• implement electronic signatures; qualified electronic signatures have the same legally binding power as private signatures under Romanian law.

2. Adjust capitalisation responsibly

A responsible company strives to balance the amount of equity and debt in its capital structure according to its needs. Adjusting the capital structure during a financial downturn must keep the interests of the shareholders foremost but should also minimise the financial risk to the enterprise. A set of measures of this type includes:

• check and remedy (if required) undercapitalisation, when a company's net assets decrease to a value that is less than half of the company's registered and subscribed share capital; this is usually resolved by a share capital increase or decrease, depending on which of these options is more useful for the company;
Even if pursuant to the Emergency Ordinance approved by the Government on 7 May the obligation of the BoD to convene the GMS in case of undercapitalization is postponed until 31 July 2020 (related to the postponement of the term for calling the GMS to approve the annual financial statements), companies could already start gathering information on this matter and proceed with the ways to solve a potential undercapitalization.
• more generally, increase, e.g. by a cash or in-kind contribution, or debt to equity swap, or decrease the share capital to better adapt the company to the current conditions and create a more efficient equity structure.

3. Implement corporate restructuring and seek M&A opportunities in a distressed market

If the business is experiencing rapid distress, a corporate restructuring can renew or enhance the route to profit, reduce costs and restore stakeholder confidence. Depending on the circumstances, there are a range of actions that may be appropriate to restructure or reorganise a company. These include:

• mergers that allow, among other things, the centralised management of all business lines, synergies, economies of scale and the management of financial risk;
In general, the consolidation of two or more businesses by way of a merger results in revenue and cost synergies that increase the value of the absorbing company or of the newly created entity. The revenue synergies include those that improve the company’s ability to regenerate and increase its revenues, such as potential market expansion, diversification of products and production facilities, access to more resources such as know-how, trademarks, patents, etc.
Regarding cost synergies, these could lead to cost reductions due to a more efficient operational cost structure. In addition, shareholders should bear in mind that a successful merger may result in economies of scale and even the elimination of certain costs, e.g. rents and management remuneration.
• spin-offs; in certain cases, a spin-off based on business lines may trigger better management of the company by helping it focus its resources and better manage the division that has more long-term potential;
Spin-offs may also be advisable for non-performing business lines which could lead to additional cost savings. Spin-offs may be also triggered by the desire to make specific business units more attractive to potential investors, especially where the concerned units have better results than the companies as a whole and the shareholders have noticed a reluctancy by potential buyers to acquire the entire entity but an active interest in a specific business units.
• intra-group transfers of assets or businesses to, or transformation into, new vehicles better suited to the business model in the current environment;
• voluntary dissolutions and liquidations of entities which may result, e.g. from spin-offs, in which case it could be proceeded with the voluntary dissolution and liquidation of the remaining non-profitable entities.

In addition, in a rapidly changing market, companies should assess whether they could monetise losses by planning for a divestiture or acquisition of underperforming assets.

Distressed M&A is more complicated than traditional M&A; however, history tells us that market shocks do give rise to opportunities and it is a question of knowing where they are and being prepared for them.

4. Improve internal corporate housekeeping

Talk of belt-tightening naturally focuses attention on economy and efficiency in organisations. This is a time to take a step forward and look at effectiveness, and how the organisation can become more fit for purpose as a result of the changes being implemented.

Companies should take advantage of this time to also put in order or update their corporate books and records for: (i) ease of doing business in the future; (ii) potential future acquisitions; and (iii) external financings by banks or new investors in legal areas including:

• registered office/secondary offices records should be valid and up-to-date to reflect the current status;
• directors/auditors terms should be updated or extended to meet future needs;
• UBOs: while the term for submitting statements on own responsibility regarding the ultimate beneficial owners of companies is suspended for the duration of the state of emergency and extended for three months after that, steps could be proactively taken and formalities could be commenced to timely file the relevant information.

In general, unless they involve opposition terms or formalities in front of Romanian courts (such as share transfers in limited liability companies, share capital decreases, mergers, etc.), registrations with the relevant Trade Registry of the above operations could have been submitted during the state of emergency as well, as Trade Registries have fully switched their work online through the platform portal.onrc.ro.

5. Be legally equipped, all together

More generally, companies should take advantage of this time to ensure they are legally equipped for seamless performance.

Among many other measures, this entails updating their governance policies around content sharing across collaboration platforms, amending individual labour agreements to reflect the nature of employment relationships post-crisis, e.g. working from home, confidentiality and data protection clauses, and amending certain agreements to better fit the individual needs of the company and its contractual partners.

Of course, based on different starting points and internal strategies, organisations will naturally differ in the attention they give to each lever. All that is necessary is to have the discipline to ignore the crowd and plan and implement measures which would have otherwise perhaps been neglected during times of optimism.
In this climate of unprecedented uncertainty with a duration that is currently impossible to predict, it is also vital to have advisers on your side who are used to dealing with challenging situations. The value of trusted advisers who can calmly and professionally assess which considerations are important, where to prioritise and to help gather and interpret the data to make optimal decisions, cannot be overstated. Our core CMS skill set also revolves around helping businesses in difficulties, helping them work through the current crisis, and being well placed to bounce back after this period of economic and market disruption.

*For more information on the above and support in the legal optimisation of your company, please contact one of our experts: **Rodica Manea** (Partner) and **Elena Andrei** (Senior Associate).*