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Setting up and operation of a company in Romania.

General guidelines for foreign investors

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1. Introduction to the legal framework governing the area.

The legal framework regulating the corporate activities area comprises a set of basic laws that cover all the aspects of a business set up and operation in Romania[1] .The core laws in the field are the Company Law no. 31/1990 ("Company Law") and the Trade Registry Law no. 26/1990 ("Trade Registry Law")[2] .

Of these, the Company Law is the most important enactment, which expressly regulates the establishment and functioning in Romania of all commercial companies (i.e. registration procedures, companies' administration, rights and obligations of the shareholders, mergers and spin-offs, dissolutions and liquidations, specific sanctions for the administrators, censors, directors and founders).

Company Law (as substantially amended by Law no. 441/2006) represents an important legislative step in Romania's commitment to align its internal legislation to the European Union one, given Romania's status as member of the Union starting January 1st, 2007[3] .

As such, the Romanian corporate governance environment became more similar to that in the EU, offering a friendly and safe legal background for the EU investors seeking to develop businesses in Romania.

2. Types of commercial companies that may be established and operated in Romania:

The Company Law regulates five types of commercial companies:

[1] In addition to this general legal framework, there are certain specific legislative enactments regulating the foreign investments activities, investors' guarantees and incentives, depending on the type of business, amounts invested, geographical area where the business is located etc. For reference purposes we mention Law no. 346/2004 on the small and medium sized enterprises, Law no. 332/2001 on promoting the direct investments having a significant impact on the economy, Government Ordinance no. 65/2001 on industrial and technological parks, Government Emergency Ordinance no. 24/1998 on the disadvantaged and free trade zones.

[2] This article does not focus on other specific investment options, such as portfolio investments and does not treat the setting up of companies in specific fields of activity, where additional requirements are provided (e.g. banking and finance sector, insurance activities, leasing operations, nuclear activities etc).

[3] The latest amendments to the Company Law have taken into account some six Council Directives (i.e. the First Directive no. 68/151/EEC/1968, the Second Directive no. 77/91/EEC/1976, the Third Directive no. 78/855/EEC/1978, the Sixth Directive no. 82/891/EEC/1982, the Eleventh Directive no. 89/666/EEC/1989 and the Twelve Directive no. 89/667/EEC/1989), as well as the OECD Principles in the area of corporate governance related to commercial companies, field development perspectives at community level and the best practices in the European Union member states.

- Limited liability company (RO: "societate cu raspundere limitata - SRL"),

- Joint stock company (RO: "societate pe actiuni - SA"),

- General partnership (RO: "societate in nume colectiv - SNC"),

- Limited partnership (RO: "societate in comandita simpla - SCS"),

- Limited partnership on shares (RO: "societate in comandita pe actiuni - SCA").

In addition to these common types of commercial companies, there are some other specific forms of businesses/associations that may be as well established and operated, at various investment levels:

- representative offices of foreign companies - (RO: "reprezentante ale societatilor straine") their scope is to promote parent company's products or services, identify new business opportunities and/or intermediate international transactions for their parent company,

- branches of foreign companies (RO: "sucursale ale societatilor straine") - with a slightly similar scope,

- silent partnerships (RO: "asociere in participatiune") - a contractual form of association used by two/more companies to perform a specific commercial activity.

Save for the silent partnerships, the representative offices and the branches, which are not legal entities, all the other types of commercial companies are considered as Romanian legal entities, have legal personality and may acquire land in Romania. Also, save for the silent partnership, all the other types of businesses are considered as residents and are subject to the Romanian fiscal and customs legislation.

The most frequently used types of companies are the limited liability companies ("SRL") and the joint stock companies ("SA"), which will be further on referred to.

3. SRL and SA registration procedure.

Setting up an SRL and an SA is subject to a similar procedure (with few particularities for each type of company). An SRL or an SA is incorporated following its registration with the Trade Registry Office ("Trade Registry") of the Tribunal under the jurisdiction of which the headquarters of the future company are located.

The written application for incorporation shall be filed with the competent Trade Registry in a period of 15 days following the conclusion of the company's Articles of Incorporation and shall be signed by the appointed administrator/other representative of the company.

The application shall have attached the following documentation:

- the Articles of Incorporation signed by the founders,

- the proof of payment of the subscribed shares,

- the proof of headquarters and of company's name availability,

- for in kind contributions to the share capital - the ownership title and, for the real estate, the certificate of charges,

- the documents ascertaining the deeds performed in the company's name and approved by the shareholders,

- declarations of the founders, first administrators/directors and of the censors (if the case), that they meet he legal requirements to act in their capacity.

As of the date of its registration with the Trade Registry (performed by a minute of the judge delegated by the Tribunal to control registration activities) the company acquires full legal capacity and is allocated a unique registration code (RO: "Cod unic de inregistrare - CUI"). Starting with this date the company may enter into any commercial transaction, as per its declared object of activity.

Up to the final point of the registration procedure, the company has only limited legal capacity, provided by law solely for the incorporation activities.

An aspect to be carefully considered prior to incorporation of a company is the legal regime of company's name. The name of any SRL must be personalized and may contain the name of one or more shareholders. In any event, it shall also have the indication that the company is an SRL. The name of an SA shall be composed of a personalized syntagm, different from other company names and shall be followed by the indication that the company is an SA.

If the new company's name is not sufficiently differentiated from other existing company names, the Trade Registry may reject the request for that particular name. To avoid such an end the applicants usually request the Trade registry to issue a name availability certificate prior to start the registration procedure.

In any case, insertion of the words *stiintific* (ENG: "scientific"), *academie* (ENG: "academy"), *academic* (ENG: "academic"), *universitate* (ENG: "university"), *universitar* (ENG: "university"), *scoala* (ENG: "school"), *scolar* (ENG: "educational") or their derivates are forbidden, while insertion of the words *national* (ENG: "national"), *roman* (ENG: "Romanian"), *institut* (ENG: "institute"), their derivates or syntagms characteristic to central authorities or institutions is allowed only upon the agreement of the General Secretary of the Government.

For names containing words or syntagms characteristic to the local authorities or institutions, the agreement of the prefect where the company has its residence is required.

4. Publicity aspects.

During the functioning of a company some mentions must be registered with the Trade Registry, for third parties information:

- donation, sale, tenancy or trading fund mortgage, as well as any other deeds certifying changes concerning incorporations or providing company or goodwill cessation,

- personal data of the authorized person; if the representation right is limited to a certain branch, the mention will be made only with the register where the branch is registered,

- patents, trade and service marks, brand names, origin names, information regarding the origin, name of the company, emblem or other distinctive signs upon which a company has any right,

- opening the proceedings of judicial reorganization or bankruptcy as well as the registering of the respective mentions,

- conviction sentence of the administrator/censor for penal deeds which make him unworthy to perform this profession,

- any alteration regarding the registered documents, deeds and mentions.

5. Social capital and shares. Shareholders.

For SA:

The minimum share capital cannot be below RON 90,000 (the equivalent of at least 25,000 Euro) and is divided into shares having a minimum value of 0.1 RON. The amount of the minimum share capital may be modified by the Government so as to represent the equivalent of Euro 25,000.

The founders must subscribe to the entire social capital of the company and must pay at least 30% of its value, the rest of to 70% having to be paid within 12 months following the incorporation of the company (in case the shares have been subscribed in cash) and within 2 years following the incorporation of the company, in case the shares have been subscribed by contributing with a plot of land. The minimum number of shareholders is two.

For SRL:

The minimum share capital is of RON 200 (approximately 60 Euro) and is divided into social parts that cannot have a value lesser than 10 RON. The founders are obliged to integrally pay the subscribed share capital prior to the incorporation.

The number of shareholders cannot be higher than 50. It is possible to set up an SRL with a sole shareholder (either a natural or a legal person, Romanian or foreign). In this case, the Company Law forbids a person to be a sole shareholder in more than one SRL. The same interdiction is for the SRL with a sole shareholder to establish another SRL having it as sole shareholder.

Usually, the SRL with a sole shareholder is used as an investment tool when the investors need to launch an SPV (special purposes vehicle) for various preliminary investments purposes (e.g. for buying estate, which cannot be directly acquired by foreign legal entities).

NOTES:
1. Labour force or services cannot serve as contributions to the share capital of a company.
2. Financial institutions, leasing and insurance companies may be organized exclusively as SA's and not as SRL's.
3. SA may issue bonds, an attribution which is not provided for the SRL.

6. Administrators.

For SA:

Being the most complex form of business organization regulated by the Company Law, all the aspects related to its organization and functioning are provided in depth. Moreover, many legal provisions specific to SA's are applying also to SRL's.

The company is administered by a sole Administrator or by a Board of Administrators. The administrators cannot act at the same time as company's employees, not even for superior executive positions.

Company Law (in its recently modified version) introduced two administration systems: the Unitarian system (a sole Board of Administrators - the classic administration system) and the Dualistic system (a Supervisory Board and a Directorate), leaving it to the founders' will to choose between the two.

According to the Unitarian system of administration the Board of Administrators has the power to perform all the activities necessary for the accomplishment of company's object of activity, save for the decisions which fall under the general meeting of shareholders' competencies.

The administrators are responsible towards the company for their undertaking of all powers granted by the founders and are subject to a number of restrictions referring to, for example, being credited by the company or to engaging the company in sale purchase deeds involving assets exceeding half of the total account value of the company's assets. However, the limitation of their powers is usually provided in the Articles of Incorporation

The Extraordinary General Meeting of Shareholders may delegate some of its powers to the Board of Administrators (i.e. changing the location of the registered office of the company, changing the object of activity of the company, establishment or dissolution of branches, agencies, representations, increase of the registered share capital). Nevertheless, the administrators cannot change the principal object of company's activity.

As per the dualist system the carrying out of company's activity is exclusively performed by a Directorate (who's members are appointed and revoked by the Supervisory Board), save for some deeds which may be concluded only by the Supervisory Board and the general meeting of shareholders. Therefore, the Directorate is exercising its powers under the control of the Supervisory Board.

For SRL:

The company has one/more administrators appointed through the Articles of Incorporation or by the general meeting and cannot cumulate their quality with the quality of company's employee. They are conducting the management activities of the company and bear the responsibility for all of their deeds.

7. General meetings of shareholders

For SA:

There are two types of shareholders' meetings - the ordinary meeting of shareholders (which is convened at least once a year, within 5 months as from the end of the financial year) and the extraordinary meeting of shareholders, which may take place at any time to decide upon a limited list of issues falling in its competencies.

The ordinary general meeting is convened to:

- discuss upon, approve or amend the annual balance sheets, after listening to the administrators and censors' report and to determine the dividend,

- to appoint and to revoke the administrators and the censors,

- to appoint and to revoke the financial auditors and to establish the minimum duration of the audit contract (for the companies obliged to have external auditors),

- to establish the proper remuneration for the administrators and censors for the current financial year, unless it was settled by the Articles of Incorporation,

- to give their opinion on the administrators' management of the budget,

- to determine the income and expenditure budget and the activity program for the next financial year, as the case may be,

- to decide upon the pledging, renting or dissolving of one or several of the company's units.

The extraordinary general meeting gathers whenever a decision is necessary to be made for:

- changing the legal form of the company,

- changing the location of the registered office of the company,

- changing the object of activity of the company,

- establishment or dissolution of branches, agencies, representations,

- extending the company's life,

- increase of the registered share capital,

- writing down of the registered capital or its completion by means of the issue of new shares,

- merging with other companies or its spin-off,

- early dissolution of the company,

- conversion of the nominative shares into bearer's shares or of bearer's shares into nominative shares,

- conversion of shares from one category into another;

- conversion of one category of bonds into another or into shares;

- issuance of bonds,

- any other modification of the Articles of Incorporation or any other decision for which the approval of an extraordinary general meeting is requested.

The two types of general meetings have different quorum requirements and the competencies of the extraordinary general meeting cannot be exercised by the ordinary general meeting, while the vice versa is accepted.

For SRL:

Save for the case the Articles of Incorporation provide otherwise, the general meeting of shareholders takes decisions with the vote of the absolute majority of all the shareholders and shares. When the agenda comprises a decision for the amendment of the Articles of Incorporation the consent of the entire share capital is necessary, unless the Articles of Incorporation provide otherwise.

The general meeting of shareholders has the following main obligations:

- to approve the annual financial statements and to distribute the net profit,

- to appoint, revoke and discharge the administrators/censors/internal auditors (if the case),

- to decide the initiation of any legal action against the administrators/censors/internal auditors for the prejudices suffered by the company,

- to modify the Articles of Incorporation.

Additional competencies may be stipulated in the Articles of Incorporation.