

Romania: How does the Mobility Directive change the M&A framework



schönherr

EU Directive 2019/2121 (also known as the "Mobility Directive") aims to create a reinforced framework for cross-border operations while ensuring the protection of employees, creditors and minority shareholders in the internal market.

In Romania, this approach was transposed in the recent amendments to the Companies Law No. 31/1990 ("Companies Law") and to other normative acts regarding registrations in the Trade Registry, through the implementation act Law No. 222/2023 ("Law 222/2023").

Law 222/2023 implemented the provisions of the Mobility Directive on cross-border conversions and cross-border divisions via incorporation as full division (*divizare completa*) and partial division (*divizare partiala/ desprindere in interesul asociatilor*) and as division by separation (*divizare prin separare/desprindere in interesul societatii*).

The main changes with respect to cross-border operations are the following:

§ simplification of the cross-border operations process (information available from public authorities will be directly obtained by the Trade Registry, interconnected system of EU trade registers, ability to publish the merger project on the companies' websites);

§ the report section for shareholders of the directors or management body and the independent expert audit and report are no longer required in case of (i) limited liability companies with a sole shareholder, (ii) if the shareholders of the respective participating company waive their right to receive the report section, or (iii) if all shareholders of all participating companies waive their right to receive the independent expert's audit and report;

§ special provisions for employee protection:

- the directors or management body must ensure the notification and involvement of employees during the cross-border operation;
- the report section for employees of the directors or management body must include at least (i) the implications of the cross-border operations for employment relations and, where appropriate, the measures necessary to maintain those employment relations, and (ii) any material changes in the terms and conditions of employment / employment applicable to or relating to the locations of the participating companies;
- the right of the employee representatives or, if no representatives have been appointed, the employees to express their opinion on the employees' report section;
- if a system of employee involvement will operate within the Romanian legal entity resulting from the cross-border operation, the directors or the management body are obliged to ensure the protection of employee rights resulting from this mechanism for four years from

the cross-border operation taking effect;

§ a simplified procedure is available in case of intra-group operations with regard to the requirements for shareholder approval, the report of the directors or management body, the independent expert's audit and report and/or other procedural steps;

§ special provisions for shareholder protection, such as:

- the right of objecting shareholders to dispose of their shares for cash compensation;
- the right to dispute the adequacy of the cash compensation before a Romanian court;
- the right to claim that the exchange rate of the share for which they exercise the right of withdrawal is inappropriate.

§ special provisions for creditor protection:

- creditors can ask for appropriate guarantees in case of outstanding claims;
- for two years from the cross-border operation taking effect, any prior and outstanding claim can be deferred to the competent Romanian court.

§ the prerogative of the Trade Registry to review cross-border operation documentation given serious indications that the operation is being carried out for abusive or fraudulent purposes, leading to or intended for the perpetration of a criminal offence, and to defer the matter to the competent Romanian court. If the court finds that the Trade Registry's claims are well-founded, it will reject the application for a certificate prior to the cross-border operation.

All these amendments are welcome to ensure a safe and integrated cross-border operations framework at the EU level. Nevertheless, it remains to be seen how long the approval procedure for cross-border operations will be delayed by internal protection mechanisms for informing and consulting employees and creditors, and the rights of shareholders to withdraw from the company.

Authors: Mihaela Popescu (senior attorney at law), Alexandra Şmahon (attorney at law), specialised in corporate/M&A at Schoenherr și Asociații SCA