Corporate

1. What are the main legal enactments governing business activities in Romania?

Business activities in Romania are mainly subject to the Companies Law No. 31/1990 (Companies Law) and the Government Emergency Ordinance No. 44/2008 on the performance of business activities by authorised individuals, individual undertakings and family undertakings (GEO No. 44/2008). Also relevant is the new Romanian Civil Code in force as of 1 October 2011 (Romanian Civil Code). Listed companies must additionally observe capital market regulations.

2. Which types of legal entities may be incorporated under Romanian law?

As a rule, business activities in Romania may be carried out mainly by companies (owned by Romanian or foreign shareholders without any restriction) or by other forms of business organisations established in accordance with the law, such as authorised individuals, individual undertakings or family undertakings.

The main forms of business organisation in Romania are the following: general partnership (Romanian: *societate în nume colectiv*), limited partnership with shares (Romanian: *societate în comandită simplă*), limited stock partnership (Romanian: *societate în comandită pe acțiuni*), joint stock company (Romanian: *societate pe acțiuni*) and limited liability company (Romanian: *societate cu răspundere limitată*).

3. Which types of legal entities are most frequently incorporated under Romanian law? Joint stock companies versus limited liability companies

The types of company most frequently incorporated in Romania are the limited liability company (LLC) and the joint stock company (JSC), due to the flexible rules governing their running and to the limitation of liability to the value of their subscribed share capital that these two types of companies afford shareholders.

LLCs may have up to 50 shareholders and are based on mutual trust among the shareholders. LLCs with only one shareholder are permitted by the Companies Law; such LLC will be governed by the same rules applicable to LLCs with two or more shareholders. After the elimination of a minimum threshold of RON 200, LLCs may currently have a share capital of RON 1 (approximately EUR 0,20) consisting in contributions in kind or cash. Contributions in receivables held towards third parties are not accepted for the purpose of setting up LLCs. The entire amount of the registered capital must be paid up upon registration.

In JSCs, it is the stockholders' contributions to the company's share capital that are essential, while the personal features of each stockholder are less important. JSCs must have at least two shareholders and a share capital of at least RON 90.000 (approximately EUR 20,000). The share capital may be comprised of contributions in kind, in cash and/or in receivables (admitted only where the JSC is established by simultaneous subscription). Cash contributions are always mandatory upon registration. Where the JSC is established by simultaneous subscription, at least 30% of the subscribed capital must be paid upon incorporation, while the remaining 70% must be paid within 12 months (for cash contributions) or within two years from the registration of the company (for contributions in kind).

According to Law No. 129/2019 for preventing and combating money laundering and terrorism financing, and for amending and supplementing certain acts (AML Law), the issuance of bearer shares is currently forbidden. Under previous regulations, bearer shares were titles that did not identify the stockholder, and were presumed the property of their possessor. Consequently, the rights related to the shares were exercised by the natural or legal person holding the shares, and ownership transfer operated by mere handover of the title.

Bearer shares issued prior to the entry into force of AML Law are to be converted into nominal shares and the updated articles of association reflecting the conversion submitted to the Trade Registry.

4. Which business vehicles are most frequently established by investors in Romania? Which are the distinctive features of a branch?

Most often, investors choose to establish an LLC with a sole shareholder. However, depending on the scope of the business activities, establishing branches is also a common alternative.

Under the Companies Law, a branch constitutes a sub-division of a company (a

secondary office), having the following distinctive features:

- The branch has no legal personality of its own and therefore it is not able to establish legal relationships on its own behalf;
- The branch will not have its own debtors and/or creditors, and the parent company will be held directly liable for all operations performed by the local branch;
- The branch is economically dependent on the parent company hence the activities performed by the branch are entirely based on the material endowments provided by the parent company;
- Activities carried out by the branch will not exceed the parent company's scope of business, as authorised under the latter's domestic law;
- The branch may have its own governing bodies even though such bodies are necessarily subordinated to the governing bodies of the parent company.

Despite these limitations, the legal regime governing branches is similar in many respects to that applicable to companies, as branches have several obligations normally incumbent upon legal entities (e.g. the obligation to register with the Trade Registry Office and with the fiscal authorities, similar tax obligations, the yearly accounting obligations).

5. What are the procedure, timing and costs for incorporating a business vehicle in Romania?

Romanian companies are incorporated by registration with the Trade Registry Office. First, one must obtain/draft the documents required for the registration procedures (e.g. certificate issued by the Trade Registry Office proving the availability and reservation of the company name, articles of association of the company, documents attesting to the payment of the subscribed share capital, etc.). The incorporation certificate will be issued within three days as of submitting the required documentation with the Trade Registry Office. The registration costs are about EUR 200. After the registration formalities with the Trade Registry Office are completed, the company must also be registered for VAT purposes with the competent fiscal authority, if the case, and with the labour authorities before starting to employ personnel.

6. Can the corporate structure be changed further to establishing the business vehicle?

Yes, it is possible to change the legal form of a company during its operations, provided that the legal requirements for the new legal form are met. For instance, where the corporate form is changed from LLC to JSC, the share capital of the company must be

brought to at least the minimum legal threshold required for a JSC.

7. What are the obligations to be fulfilled regarding the UBO identification?

As per AML Law, the "ultimate beneficial owner" (the "UBO") means any natural person who ultimately owns or controls a legal entity, and/or the natural person on whose behalf a transaction, operation or activity is performed. This criterion is deemed fulfilled in the case of a natural person holding at least 25% + 1 of the shares within a company, or the participation in the equity of the legal entity in a percentage of over 25%.

Article 56 of the AML Law provides that legal entities subject to registration with the Trade Registry (except for regies autonomes, national companies, companies owned in full or preponderantly by the state and legal entities owned by natural persons only, provided these are the only ultimate beneficial owners), must submit to the Trade Registry an affidavit concerning the UBO of the legal entity upon incorporation, annually throughout its existence, and each time a change occurs in the UBO relevant data (e.g. direct or indirect change of control).

Initially, companies already in existence had 1 year as of the entry into force of the AML Law to comply with these requirements (i.e., by 21 July 2020). However, in the context of the COVID-19 crisis, the Government of Romania extended the deadline; currently, under Government Emergency Ordinance no. 191/2020, the deadline for submitting the UBO affidavit is of 90 days as of the end of the national state of alert, which has been recently extended to 14 April 2021.

8. Are shareholders' agreements permitted by Romanian legislation?

Shareholders' agreements are not explicitly regulated under Romanian law. Unlike the articles of association, shareholders' agreements are deemed as a confidential matter among the shareholders, rather than a public deed subject to publicity requirements. Consequently, a shareholders' agreement may not be opposed to third parties unless they were aware of the agreement. In the absence of a legal framework to condition the contents of a shareholders' agreement, shareholders enjoy absolute freedom to stipulate in their agreement any provisions they consider necessary for the good functioning of the company, to the extent they do not contradict or violate the Companies Law or the company's articles of association.

A shareholder failing to observe a shareholders' agreement may be held liable for damages towards the other shareholders.

9. Can a company acquire its own shares?

As a rule, a company may not subscribe its own shares. The Companies Law provides however for two exceptions where a JSC may acquire its own shares (i) in a restricted manner, and (ii) in an unrestricted manner.

JSCs may acquire up to 10% of their own shares provided certain conditions are met:

- That the acquisition is authorised by the extraordinary General Meeting of Shareholders (GMS) (the authorisation must provide the terms of the acquisition, the maximum number of the shares to be acquired, the duration of the authorisation which may not exceed 18 months as of the publication of the resolution in the Official Gazette, and where the acquisition is made for consideration, the minimum and maximum value of the shares to be acquired);
- That the shares are fully paid; and
- That the payment of the acquired shares is made only from certain sources allowed by the law (e.g. the distributable profit registered in the previous annual statements).

JSCs may acquire their own shares without the obligation to observe the above conditions when the acquisition is performed:

- With a view to decreasing the share capital; or
- By way of a transfer with universal title (e.g. following a merger or a de-merger procedure); or
- Within the enforcement proceedings taken against a shareholder for debts owed to the company; or
- For no consideration (freely).

In all cases, for as long as they are held by the company itself, the acquired shares do not give rise to the right to vote or to the right to receive dividends.

10. Piercing the corporate veil. Which are the premises of the shareholders' liability?

Piercing the corporate veil is expressly regulated, so that shareholders abusing the limitation of their liability and the distinct personality of the company, thus deceiving the company's creditors, will be held liable without limitation for the company's

outstanding debts. The law deems abusive the shareholder's use of company assets as if they were his own, or diminishing the company's assets for his own or third parties' benefit, while aware that in doing so the company is hindered in performing its obligations. Furthermore, there are specific rules for triggering shareholders liability under insolvency laws and with regards to tax matters.

11. Are there any restrictions on the transfer of shareholdings?

In JSCs, shares may be transferred freely, unless the shareholders agree otherwise.

In LLCs, shares may be freely transferred among shareholders; unless otherwise provided in the articles of association, the transfer to persons outside the company is only allowed if approved by the shareholders representing at least ¾ of the registered share capital.

12. Does Romanian law permit a company to advance funds, extend loans or provide security for the purpose of the acquisition of its shares by a third party?

The Companies Law expressly prohibits a JSC from performing such type of operations. The interdiction is however not applicable to (i) transactions performed by credit institutions and other financial institutions in their ordinary course of business; and (ii) transactions intended for the acquisition of shares by or for the company's employees, provided in both cases that such transactions do not cause the company's net asset worth to fall below the threshold of the cumulated value of the subscribed share capital and the reserves that cannot be distributed according to the law or under the articles of association.

Absent an express interdiction, in practice it has been considered that an LLC may advance funds, extend loans, or provide security for the purpose of the acquisition of its shares by a third party.

13. Which are the main bodies of a company?

The main management body of a JSC is the GMS. Depending on the matters to be submitted for the shareholders' approval, the GMS may be ordinary (e.g. for the appointment or dismissal of directors or auditors, for the approval of the yearly financial statements and of the management report, etc.) or extraordinary (e.g. for

the increase/decrease of the share capital, for changes in the company's legal form, mergers, spin-offs, as well as for any other matter which does not fall under the exclusive competence of the ordinary GMS).

The Companies Law provides for two types of management systems available for JSCs: (i) the one-tier management system, where the effective management is entrusted to a board of directors (Romanian: *consiliu de administrație*) which can, or in certain cases is obliged to, delegate management powers to several managers (Romanian: *directori*), and (ii) the two-tier management system, where the effective administration of the company is ensured by an executive committee (Romanian: *directorat*) under the control of a supervisory council (Romanian: *consiliu de supraveghere*). In practice, the majority of the Romanian JSCs adopted the one-tier management system.

Decision-making in an LLC belongs to the GMS. There is no statutory provision distinguishing between ordinary GMS and extraordinary GMS. However, shareholders may establish through the articles of association the two types of GMS with different duties and voting requirements. The LLC is managed by one or several directors.

14. Are there any legal restrictions on the quorum and majority necessary in the GMS and may the shareholders derogate therefrom?

In the case of JSCs, the ordinary and the extraordinary GMS have different statutory quorum and voting requirements.

On first call (i.e. the first convening of the GMS), the ordinary GMS may duly pass resolutions only (i) in the presence of the shareholders (or their representatives) holding at least ¼ of the total number of voting rights and (ii) with the majority of the voting rights exercised in the meeting. The articles of association may provide higher quorum and voting requirements regarding the first call. On second call (which takes place when the necessary quorum is not met upon the first call), there is no minimum quorum and the decision will be taken with the majority of the voting rights exercised in the meeting. The articles of association may not provide a minimum quorum or a higher majority for the second call of the ordinary GMS.

In the case of LLCs, there are no quorum conditions for either the first or second call. As regards decision-making, unless otherwise provided in the company's articles of associations, decisions may be passed at the GMS with double majority: over 50% of the shareholders and over 50% of the share capital. A unanimous vote is required for amendments to the articles of association, except otherwise provided by the incorporation document. In the event that the GMS cannot validly take a decision due

to lack of quorum, the GMS may make a final decision on the second call, irrespective of the number of the shareholders attending the meeting and of their shareholding percentage.

15. Which are the main rights of minority shareholders?

The main rights that ensure the protection of the minority shareholders in JSCs are:

- The shareholders holding at least 5% of the share capital may request that a GMS be called, or that the agenda of an already-convened GMS be supplemented;
- Any shareholder may request the auditors to review any act or operation of the company;
- One or several shareholders holding, severally or jointly, at least 10% of the share capital may request the court to appoint one or several experts for analysing certain operations in the management of the company and draft a report to be submitted to the board of directors, directorate and the supervisory council, respectively, as well as to the in-house auditors and the internal auditors of the company, as the case may be, for analysis and in order to propose adequate measures;
- In certain limited cases, the shareholders that did not vote in favour of one of the resolutions of the GMS have the right to withdraw from the company and request the purchase of their shares by the company;
- The shareholders representing, separately or jointly, at least 5% of the share capital, may file an action for damages, in their own name but on behalf of the company against the founders, directors or managers of the company for damages they caused the company.

Although expressly stipulated only for JSCs, most of the above rules are, in practice, equally applicable to LLCs, unless otherwise provided in the Companies Law (for example, the shareholders of an LLC holding ¼ of the share capital may request the call of the GMS).

16. Are there any restrictions as regards transactions between the company and its shareholders or its directors in case of conflict of interests?

The shareholder of a JSC or LLC who, in a certain operation, has personal interests or represents the interests of another person that are contrary to those of the company, cannot take part in any deliberation or resolution taken with regard to such operation. In case of breach, the shareholder is liable for the damages caused to the company if the required majority had not been met without its vote.

Moreover, in LLCs, the shareholder may not vote where the decision refers to its own contribution to the share capital or to its own agreements concluded with the company. The interdiction also applies to directors, who are not allowed to take part in any resolution concerning a transaction in which they have a direct or indirect interest contrary to those of the company.

The law provides expressly for an example of conflict of interests between the directors and the JSC, where the company is not allowed to extend loans to its directors (or their spouses and relatives up to the forth degree). The crediting restriction also applies to companies in which the aforementioned persons are directors or hold at least 20% of the subscribed share capital, alone or together with one of the aforementioned persons.

However, such crediting restrictions do not apply to: (i) operations with a cumulated enforceable value of which is lower than the RON equivalent of EUR 5,000; (ii) operations concluded by the company in its ordinary course of business, and where the terms of the operation are not more favourable to the abovementioned persons than those usually applied by the company in its dealings with third parties.

17. Are there specific approval requirements for certain company transactions?

There are legal provisions requiring GMS approval for certain operations (such as acquisition, transfer or lease of assets amounting to over half of the book value of the company's assets) before the JSC's directors are allowed to conclude them. In addition, the articles of association may provide several other operations which require the GMS prior approval before allowing the management to conclude a transaction. The capital markets legislation provides for lower thresholds on certain company transactions.

Transactions with affliates must always be concluded at arm's length and it is advisable to be documented by valuation reports and/or transfer pricing files. The latter are mandatory where such transactions exceed a certain value in a financial year or are requested by the tax authorities during tax audits.

18. What are the rules for challenging the company's resolutions?

GMS resolutions compliant with the applicable laws and the articles of association are binding even for the shareholders that did not take part in the meeting or voted against them.

Shareholders that did not attend the general meeting or voted against and requested their opposition to be recorded in the minutes may object against GMS resolutions contrary to the law or to the articles of association within 15 days from their publication in the Official Gazette of Romania or, in the case of LLCs, from the date when the shareholder was informed about the GMS resolution.

A challenge seeking to obtain the absolute nullity of the resolution may be filed at any moment and by any person (including third parties).

Within 30 days as of the publication of the GMS resolution in the Official Gazette of Romania, the company's creditors and any other persons prejudiced by it may request the court to hold the company or the shareholders liable for the damages caused.

19. How are directors appointed and removed? Are there special requirements to be observed?

The directors of a company are appointed through the articles of association at the time the company is incorporated, and may be replaced or removed by the GMS throughout the company's existence.

In JSCs, further requirements must be observed, such as:

- The appointed director must expressly accept his/her designation, and must provide professional liability insurance;
- The duration of the term of office of the directors or members of the directorate or supervisory council is established by the articles of association and may not exceed a period of four years. However, they may be re-elected unless otherwise provided in the articles of association. The duration of the term of office of the first members of the board of directors and of the first appointed members of the supervisory council, respectively, shall not exceed two years;
- An individual may be director and/or member of the supervisory board in no more than five Romanian-based joint-stock companies, at the same time. This restriction equally applies to the individual that is a director or member of the supervisory board, and to the individual that is the permanent representative of the legal entity appointed as director or member of the supervisory board. The prohibition does not apply where the individual elected in the board of directors or the supervisory board own at least ¼ of the total shares of the company, or is a member of the board of directors or the supervisory board of a joint-stock company holding the aforementioned shareholding quota.

20. Can a director be also an employee of the company?

In the case of JSCs, the members of the board of directors, the managers (in the one-tier management system), and the members of the executive and supervisory committee (in the two-tier system), may not be employees of the company at the same time; their relationship with the company is regulated by a management contract.

In the absence of an express interdiction, the general view is that a director of a LLC can also be an employee of the company.

21. What is the extent of the directors' liability towards the company, shareholders and outsiders?

The directors' duties and liability are regulated by the Companies Law and established on a case-by-case basis in the appointment documents. As a rule, directors are jointly liable towards the company for the following: (i) payments made by the shareholders; (ii) payment of dividends; (iii) existence and correct maintenance of company ledgers as required by law; (iv) appropriate enforcement of the resolutions of the general meetings; (v) strict fulfilment of the duties imposed by the law and the articles of association.

Directors are liable towards the JSC for the prejudices caused by the actions of the managers or of the hired staff, when the damage would not have taken place if they had exercised the supervision imposed by the duties of their position. Moreover, directors will be jointly liable with their immediate predecessors if, having knowledge of the violations committed by their predecessors, they fail to disclose them to the in-house auditors or to the financial auditors, as the case may be. Also, in the case of JSCs managed by a number of directors, the liability for actions or omissions does not extend to directors who have had their opposition to such action/omission recorded in the registry of resolutions of the board of directors and who notified such opposition in writing to the in-house auditors or the internal auditors and the financial auditor.

Also, the directors can be held criminally liable for embezzlement, forgery, use of forgery, bribery and fraudulent management.

22. Who can initiate legal proceedings against the company's directors?

As a rule, management members could be held liable only by the GMS for their management operations, according to the applicable rules of quorum and vote.

However, shareholders holding more than 5% of the share capital may engage the liability of the management members in case the GMS does not exercise such right.

23. Which methods for increasing and decreasing the share capital of the company can be used?

The registered share capital may be reduced by:

- Reducing the number of shares;
- Reducing the nominal value of shares or participations;
- Purchasing the company's own shares, followed by their cancellation (in the case of JSC).

Also, should the decrease not be caused by losses, the registered share capital may also be reduced by:

- Total or partial exemption of the shareholders from their obligation to perform their contributions to the share capital;
- Refund to the shareholders of a share of their contributions, proportionally to the reduction of the registered share capital equally calculated for each share or participation;
- Other methods provided by law.

The registered share capital can only be reduced two months after the day in which the resolution was published in the Official Gazette of Romania. Company's creditors whose receivables existed before the publication of the GMS resolution deciding on the decrease of the registered share capital will be entitled to obtain securities for the receivables not due at the date of publication.

The registered share capital may be increased by issuing new shares or by increasing the nominal value of the existing shares in exchange for new contributions in cash and/or in kind. Also, the new shares will be fully paid-up by incorporating the reserves, except for the legal reserves, as well as the profit or share premiums, or by setting off liquid and payable claims against the company with shares thereof. The articles of association or the GMS may authorise the board of directors or the directorate to increase the registered share capital of the company, within a period of time which cannot exceed five years from the date of its incorporation, up to a determined face value (authorised capital), by issuing new shares in exchange for contributions. The face value of the authorised capital cannot exceed half of the registered share capital existing at the authorisation above.

24. Do shareholders have a pre-emption right to the shares issued in the process of increasing the registered capital share?

The shares issued for the increase of the registered share capital will be first offered for subscription to the other shareholders, proportionally to the number of shares they hold. The call option of the shareholders can be limited or revoked only by resolution of the extraordinary GMS. The call option may only be exercised within the deadline established by the GMS or by the board of directors, or by the directorate, but after at least one month has passed from the publication in the Official Gazette of Romania of the resolution on the share capital increase.

25. Which companies have to ensure the external audit of their annual financial statements?

Companies that meet for a consecutive period of two years at least two of the following criteria have to prepare their financial statements in accordance with the EC IVth Directive and have them audited:

- The aggregate value of the assets is at least RON 16.000.000 (approximately EUR 3.5 million);
- Net turnover amounts to RON 32.000.000 (approximately EUR 7 million); or
- The average number of employees within the financial year is 50.

The same obligation applies to the annual financial statements of medium-sized and large-sized companies, companies of public interest or those which conduct their business in certain specified sectors (i.e. credit institutions, insurance companies, national companies, listed companies, etc.), as well as companies opting for the two-tier management system.

26. What were the major changes brought by the COVID-19 crisis in the field? Will these changes last?

The COVID-19 crisis has accelerated the path towards digitalization of processes within public authorities. Digital applications and interaction with the Trade Registry have become preferable and is broadly used. In the COVID-19 context, Romanian authorities passed several preventive measures to allow the calling and holding of the GMS for both LLCs and JSCs by correspondence or long-distance communication methods. It remains to be seen whether these measures will stay in place or were just temporary and taken out of necessity.

As already noted, the term provided by the AML Law for the submission of the UBO affidavit by already existing companies subject to the reporting obligation has been extended against the background of the COVID-19 crisis. This extension is conditional upon the state of alert being established on the Romanian territory: companies will have to comply within 90 days as of the termination of the state of alert ceases, whenever that may be. Failure to do so is punishable by administrative fine of RON 5.000 - RON 10.000.