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ROMANIAN JOINT STOCK COMPANIES: BOARD DECISIONS ON SHARE CAPITAL INCREASE CAN BE CHALLENGED

I. General Context

Law no. 31/1990 on companies (the „**Companies Law**") provides three powers that the Extraordinary General Assembly of Shareholders of Romanian joint-stock companies can delegate to the company's Board of Directors or Management Board (depending on whether the company's management is organized as a single-tier management system or as a two-tier management system), as follows:

(i) changing the company's registered office;

(ii) changing the company's business object;

(iii) increasing the company's share capital.

Until recently, only the board decisions regarding the aspects mentioned at (i) and (ii) above could be challenged by any of the company's shareholders by an action for annulment filed in court.

Pursuant to a decision of the Romanian Constitutional Court published on August 1, 2018, board decisions regarding share capital increases can now be subject to an action for annulment as well.

II. The decision of the Constitutional Court

By said decision, the Constitutional Court has declared article 114 paragraph (3) of the Companies Law as unconstitutional as regards its indirect prohibition of challenging a board decision increasing the share capital of a Romanian joint-stock company.

The possibility for a Romanian joint-stock company's board to increase the company's share capital is subject to a special authorization included in the company's articles of association. Such authorization grants the board the power to increase the share capital during a pre-established period, no longer than 5 years from the date when such authorization is included in the articles of association. Moreover, such authorization must state the maximum amount of the increased share capital.

While such decisions are thus subject to restrictions established by the company's shareholders (as opposed to decisions changing the company's registered office or business object, which are not), the Constitutional Court considered that the lack of a possibility to challenge in court the board decisions increasing the share capital can affect the free access to justice of the company's shareholders.

The Constitutional Court stated in its decision that the increase of a company's share capital is no less important than the change of its headquarters or business object and thus should not be subject to a different regime.

While the free access to justice can be limited and conditioned by law, the Constitutional Court flagged out that article 114 paragraph (3) of the Companies Law did not establish limits and conditions, but actually prohibited the shareholders from exercising a fundamental right against decisions that can adversely affect their rights.

III. Conclusions

While delegating the possibility of increasing the company's share capital to the board can reduce the level of formality necessary to undertake such actions, at the same time it can generate tensions between the management deciding such increase and the shareholders that must bear the increase by subscribing new capital.

Thus, while such mechanisms will continue to be successfully used in companies where there is a certain level of harmony between shareholders and management, it is important to take note of the fact that such decisions can now be challenged in court. Thus, shareholders and management should ensure the necessary level of communication before decisions on share capital increases are passed by the board.

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This article contains general information and should not be considered legal advice.

Daniel Alexie

Senior Associate

daniel.alexie@maravela.ro