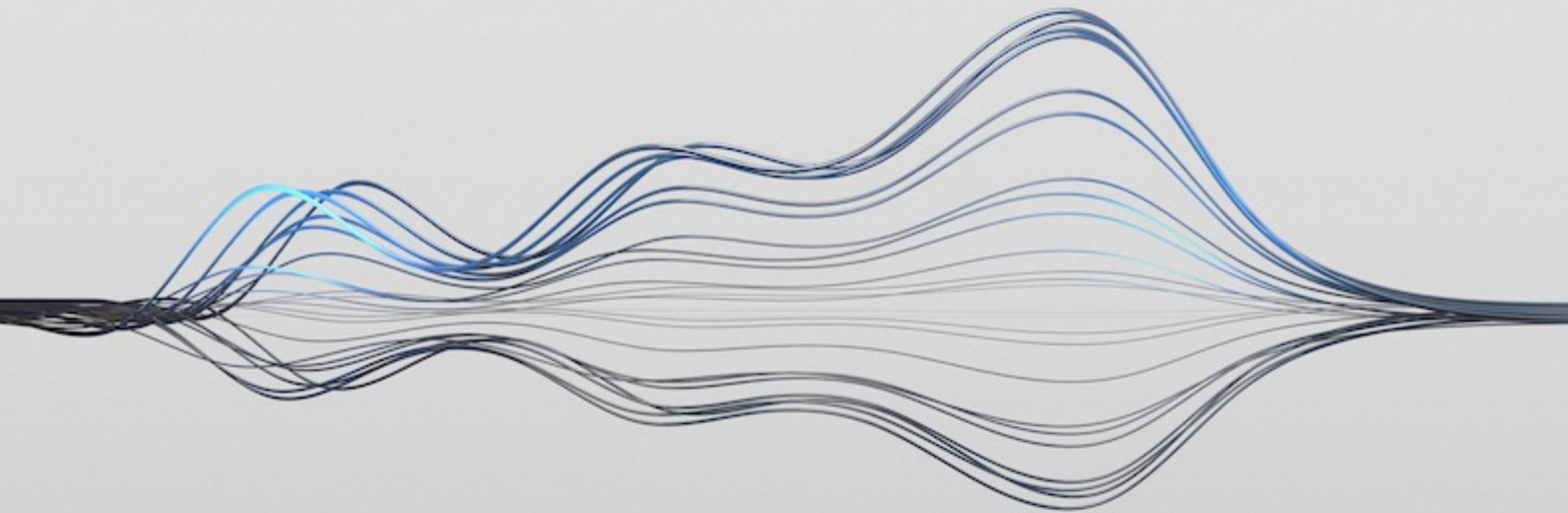


ROMANIA

Global Guide to Directors' Duties





Romania

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Corporate entities

What type of company is typically used in group structures?

In Romania, the types of corporate vehicles typically used in group structures are limited liability companies (in Romanian *societate cu raspundere limitata*) (LLCs) and joint-stock companies (in Romanian *societate pe actiuni*) (JSCs), mainly due to their flexible incorporation procedure and the limitation, in principle, of the shareholders' liability (in certain situations, their liability may be extended, e.g. by piercing the corporate veil). In practice, LLCs are the most common type of company.

Therefore, this guide focuses on the management of Romanian LLCs and JSCs.

Types of director

What is a "director"?

Romanian law does not provide for an express definition of the term "director" (in Romanian *administrator*), but it addresses the eligibility criteria to be observed by the person to be appointed as director, as well as the duties, liabilities and the organization/functioning requirements of the various board of directors/management structures. In a nutshell, the director manages the affairs of the company and represents the company towards third parties.

What are the different types of director?

In the case of LLCs:

Romanian law does not distinguish between different types of directors. More exactly, under Company Law No. 31/1990 (Company Law), the director is the statutory body having management and representation duties.

In the case of JSCs:

Romanian JSCs can be managed either under a one-tier management system or a two-tier management system.

The one-tier system is the most common. In such system, the sole director/board of directors (in Romanian *administrator unic / consiliu de administratie*) ensures the general management of the company, either directly or by way of delegating certain of its powers to the managers (in Romanian *directori*). The board of directors has both an executive and supervisory function. While the delegation of the company's management to managers is generally optional, in the case of JSCs whose annual financial statements are subject to legal auditing obligations, the delegation is mandatory. If management (executive) duties are delegated, such duties pertain to the managers and the majority of the members of the board of directors shall be formed by non-executive directors (i.e. directors who have not been appointed as managers).

As opposed to the one-tier management system, in the two-tier management system, the two functions, executive and supervising, belong to different bodies. The executive board (in Romanian *directorat*) is the executive body of the company. The executive board performs its duties under the control of the supervisory board (in Romanian *consiliu de supraveghere*).

To sum up, in the case of JSCs:

- With a one-tier system – in the absence of management duties being delegated, such duties pertain to the sole director / board of directors. Otherwise (if management duties are delegated by the board of directors), such duties pertain to the managers.
- With a two-tier system – the sole manager / executive board has management duties (as opposed to the supervisory board which only appoints the sole manager / executive board and supervises their activity).

Eligibility

Who can be a director?

A director and a member of the supervisory board, respectively, may be either a legal entity or an individual with full legal capacity. If a legal entity is appointed as director or as member of the supervisory board, such entity must designate an individual to act as its permanent representative.

The managers and the members of the executive board, respectively, may only be individuals with full legal capacity.

Persons who, according to the law, are incapable or have been denied by final court judgment the right to exercise the capacity of director as a complementary sanction for crimes involving breach of trust, corruption, embezzlement, forgery, tax evasion, money laundering, as well as for other criminal offences provided by the Company Law, cannot be appointed as directors. If such persons have already been appointed as directors, they must be revoked. The same rules apply to managers and members of the executive board or of the supervisory board.

Minimum / maximum number of directors

In the case of LLCs: minimum one director.

In the case of JSCs:

- With a one-tier system – minimum one director (or minimum three directors, if the company's annual financial statements are subject to a legal auditing obligation); the total number of directors must be an odd number. In the case of delegation of management duties - minimum one manager.
- With a two-tier system – minimum one manager (or minimum three managers, if the company's annual financial statements are subject to a legal auditing obligation); total number of managers must be an odd number. Supervisory board - minimum three and maximum 11 members.

Other than for the supervisory board, Romanian law does not establish a maximum number of directors/managers.

Appointment and removal

How are directors appointed?

In the case of LLCs: Directors are appointed by the General Meeting of Shareholders (GMS), except for the first directors who are appointed through the Articles of Association (AoA).

In the case of JSCs:

- With a one-tier system – the sole director/board of directors is appointed by the GMS, except for the first director/members of the board of directors, who are appointed through the AoA. If management duties are being delegated, the managers are appointed by the board of directors.

- With a two-tier system – the sole manager/executive board is appointed by the supervisory board. The supervisory board is appointed by the GMS, except for the first members, who are appointed through the AoA.

For appointments to be binding on third parties, they have to be registered with the Trade Registry.

How are directors removed?

In the case of LLCs: Directors are removed by decision of the GMS.

In the case of JSCs:

- With a one-tier system – the sole director/members of the board of directors is/are removed by decision of the GMS. The managers are removed by decision of the board of directors.
- With two-tier system – the sole manager/members of the executive board is/are removed by decision of the supervisory board (or by the GMS in case the AoA expressly provides this possibility). The members of the supervisory board are removed by decision of the GMS.

For removals to be binding on third parties, they must be registered with the Trade Registry.

Board / management structure

Typical management structure

In the case of LLCs: The management body is formed by directors. The directors are not required by law to establish a board of directors.

In the case of JSCs:

- With a one-tier system – typically, the management body (having executive duties) is represented by the board of directors. However, in the case of delegation of management, the management structure comprises the board of directors and the managers (only the latter having executive powers);
- With a two-tier system – the management structure comprises the executive board (having executive powers) and the supervisory board (which supervises the activity of the executive board).

When it comes to the management of JSCs, the one-tier system is the most common – however, special provisions apply to publicly listed companies. While the delegation of the company's management to managers is generally optional, for JSCs whose annual financial statements are subject to legal auditing obligations, the delegation of the directors' powers to the managers is mandatory.

How are decisions made by directors?

In the case of LLCs: the Company Law does not specify how decisions may be adopted by the board of directors (*e.g.* how meetings are convened, quorum and voting requirements). These may be provided for in the AoA.

In the case of JSCs:

- Quorum requirements for the meeting of the board of directors/executive board/supervisory board: at least half of the total number of members, unless the AoA provides for a higher number.
- Voting requirements for the meeting of the board of directors/executive board/supervisory board: vote of the majority of the present members. Decisions regarding the appointment / revocation of the chairperson of such corporate bodies are taken with the vote of the majority of the members.

The rules for adopting decisions by managers of JSCs with a one-tier system are established by the AoA or by a decision of the board of directors.

Authority and powers

As a general note, the directors may perform all the operations required to carry out the company's scope of activity (except for the restrictions set forth by law or in the AoA) and may represent the company towards third parties provided that such right was granted to them by law or, as the case may be, by the GMS/AoA.

The company is bound by the acts of its statutory bodies (e.g. directors/board of directors), even if such acts exceed the company's scope of activity, unless it proves that the third party knew or, given the circumstances, had to know that the acts exceeded the scope of activity, or when such acts exceed the limits of the powers provided by law for the respective bodies. Publication of the AoA does not constitute, alone, the proof of knowledge. The provisions in the AoA or the decisions of the company's bodies limiting the powers granted by law to the statutory bodies are not enforceable against third parties, even if published.

Delegation

In the case of LLCs: Directors are allowed to delegate representation powers provided that such right was expressly granted to them by the GMS/AoA.

In the case of JSCs:

- With a one-tier system - while delegation by the board of directors of company's management to managers is generally optional, for JSCs whose annual financial statements are subject to legal auditing obligations, the delegation of the directors' powers to managers is mandatory.

Company Law specifies certain duties that cannot be delegated to managers, e.g. summoning the GMS, drafting the annual report, approving the financial planning, etc.

- With a two-tier system - the management and representation powers belong exclusively to the executive board, which may perform all the operations required to carry out the company's scope of activity (except for those belonging to the GMS and the supervisory board).

Duties and obligations of directors

What are the key general duties of directors?

Directors' rights, duties and liabilities are governed by the civil law provisions regarding the mandate agreement and by the special rules set out under the Company Law.

Directors' rights (e.g. the right to manage the company and the right to represent the company towards third parties) set out by the Company Law are designed in a quite broad manner in order to allow a flexible management of the company.

According to the Company Law, the directors represent the company towards third parties and may undertake all actions required to carry out the company's business. Directors are empowered to make any necessary decisions in relation to the company's activity, within the limits set out by the Company Law, shareholders' resolutions and the AoA of the company.

Directors have several duties related to the internal management of the company, such as the duty to convene and attend the shareholders' meetings, the duty to draft the annual report accompanying the annual financial statements of the company and business plan, the duty to keep the company's registries.

- **Convening and attending the shareholders' meeting.** The directors are obliged to convene the GMS at least once a year or as many times as necessary.
- **The annual report.** The annual report should comprise an accurate presentation of the business performance and financial position of the company, together with a summary of the main risks and uncertainties faced by the company. In addition, explanations and details on the figures within the annual financial statements should also be included.
- **Keeping the company's registries (which includes the shareholders' register).** The obligation of the directors to maintain and update the shareholders' register is compulsory. Such shareholders' register should reflect:
 - The shareholding history of the company, including the identification details of the former and existing shareholders and their participations in the share capital.

- All the transfers of shares that have occurred in the company, if the case.
- Any other changes that have occurred in relation to the shares of the company (e.g. any pledges over the shares, share capital increases, etc).

What are directors' other key obligations?

- **Duty of loyalty/ confidentiality.** Directors not only have the right but also the duty to manage the company in compliance with the high standards set out for a prudent and diligent competent director in the best interest of the company.

Directors have a general duty of loyalty towards the company and must exercise their powers in an honest and faithful manner. Directors cannot act in their own interest to the detriment of the company.

Company Law also provides that directors of JSCs must not divulge confidential information and business secrets of the company, both during and after the expiry of their mandate. While not expressly provided by the Company Law, this duty should apply by analogy in case of directors of LLCs, on the basis of their general duty of loyalty.

- **Avoiding conflicts of interests.** The Company Law provides specific rules as regards the directors' conflicts of interest but only in case of JSCs. Thus, any director who, directly or indirectly, has interests contrary to the interests of the company in a certain operation, must inform the other directors and the censors or internal auditors about it and refrain from participating in any deliberations on the operation in question.

The director is under the same obligations if they are aware that their spouse, relatives or kindred up to the fourth degree included have an interest in a certain operation.

While not specifically provided by the Company Law as regards LLCs directors, the loyalty obligation should also imply that the director of a LLC informs the shareholder(s) in case of a conflict of interest and abstains from taking a decision.

In any event, the Civil Code provides, as a general rule, for any type of company, that the director having a personal interest in a matter must inform about it the company and refrain from participating in any deliberations on the operation in question.

- **Non-competition with the business.** According to the Company Law, unless authorised by the shareholders, a director cannot be a director in competing companies or in companies having the same business object, nor exercise the same trade or other competing trade, on the director's own account or on account of others, under the penalty of being dismissed and held liable for damages.

Transactions with the company

Unless the AoA of the company provide otherwise, the director is only allowed on their own account, to dispose of, or acquire, assets to or from the company, having a value of more than 10% of the value of the company's net assets, with the prior approval of the GMS, under the sanction of nullity.

The Company Law does not contain similar provisions for the case of LLCs. However, it may be construed that the same limitation applies by analogy.

The considerations provided above in relation to the conflict of interests should also be taken into account.

Liabilities of directors

Breach of general duties

Under Romanian law, the failure of directors to fulfil their duties may trigger both civil or criminal liability.

Civil liability

The directors' civil liability may be held both towards the company and its shareholders and towards third parties.

CIVIL LIABILITY TOWARDS THE COMPANY AND ITS SHAREHOLDERS

Directors are liable for breach of their duties under the Company Law, the AoA and the shareholders' resolutions, such as breaches resulting from the transfer of powers to other persons without being permitted to do so and acts exceeding the limits on the powers granted to the directors by way of the AoA/shareholders' resolutions, etc.

As a general rule, each director is to be held civilly liable only for the damages which that director has personally caused to the company or to the shareholders. By way of exception, the Company Law expressly provides for certain situations where directors are to be held jointly liable, towards the company, as follows:

- The existence and accuracy of payments made by the shareholders.
- The true existence of the paid dividends.
- The existence of the registries required by law and their accurate keeping.
- The correct fulfilment of the resolutions of the GMS.
- Strict compliance with the obligations prescribed by the law and the AoA.

If the directors exceed their powers when acting in relation with third parties and provided that the agreement concluded as such could be considered binding and valid with regards to the company, the company is entitled to claim compensation from the respective directors for the damages incurred as a result of such act.

CIVIL LIABILITY TOWARDS THIRD PARTIES

In the event that third parties were aware or, given the circumstances, should have been aware that the directors were acting without proper corporate authority, or if the directors exceeded the powers conferred to them by the law, and the agreement concluded as such could not be considered binding and valid with regards to the company, third parties would be entitled to claim damages from the directors as if they acted in their own name.

Criminal liability

The Company Law provides for a number of criminal offences applicable to directors. However, if the actions of such directors may qualify as offences more serious than those provided in the Company Law, the provisions of the Romanian Criminal Code become applicable. Moreover, directors may be held liable for offences under other special laws.

The director committing a criminal offence provided by the Company Law can be imprisoned (for a minimum of one month and a maximum of five years) or may be ordered to pay a fine. The amount of the penalty differs for each type of criminal offence. The criminal offences regulated under the Company Law refer mainly to breaches of the directors' duties, such as:

- Providing misleading information to the shareholders/the public in relation to the financial status, economic or legal standing of the company.
- In certain cases, benefitting in any form, directly or through an intermediary, from loans or guarantees granted by the company managed by the director (or by a company controlled by or controlling the company managed by the director).
- Collecting or paying dividends, in any form, out of fictitious profits or which could not have been distributed, in the absence of a financial statement or contrary to the results thereof.
- Violating the provisions of the Company Law which state that at least 5% of the company's profits must be set aside each year for the purpose of establishing a reserve fund until such fund reaches a minimum of 20% of the share capital.
- Failure to convene the GMS in the cases provided by the law etc.

Liabilities on insolvency

Law no. 85/2014 on insolvency proceedings (Insolvency Law) extends, under certain specific conditions, the liability for part or the entirety of the uncovered debts of the insolvent company to the members of the management bodies and any other person to which the company's insolvency may be imputed, to the extent they performed certain unlawful actions, such as:

- Using the company's assets or credit in their own benefit or that of another person.
- The decision (in their own interest) to continue an activity which has the evident result of the company's insolvency.

- Maintaining fictitious accounting documents, deleting or disposing of accounting documents or not keeping the accounting books and records according to the law.
- Using ruinous methods to obtain funds, in order to delay the insolvency, etc.

The Romanian Criminal Code provides that the failure of the legal representative of an insolvent company to file for insolvency within six months after the term provided by law from the onset of insolvency is punishable by imprisonment ranging from three months to one year or a fine. In addition, the Romanian Criminal Code provides that the person who, to the detriment of the creditors, counterfeits, takes away or destroys the debtor's documents, hides a part of its assets, provides fictitious debts or indicates in the debtor's documents amounts that are not owed or, in case of insolvency, sells part of the debtor's assets, is punishable by imprisonment ranging from six months to five years.

Other key risks

Consideration should also be given to the fact that shared/common directors could, in certain circumstances, be considered as evidence in support of piercing the corporate veil.

The directors' liability may also be triggered if regulations within various sectors are breached such as competition legislation, anti-corruption legislation, tax-related legislation, etc.

Protection against liability

How can directors be protected from liability?

- **The business judgment rule.** The Company Law has introduced the common law concept of the "business judgment rule" as a legal limitation of the directors' liability. Thus, in the case of a decision based on adequate information, where it is reasonable to consider that the director has acted in the interest of the company, the director will not be held liable for damages suffered by the company. However, the director is not exempted from liability in case of fraud or gross negligence.
- **Possibility to contractually limit directors' liability.** The Company Law does not regulate the possibility of limiting director's liability. To the contrary, according to the law, failure to perform or inadequate performance of any of the duties bestowed on directors by the shareholders shall be assessed based on the highest standard of care and diligence (subject to the above-mentioned business judgment rule).

However, taking into account that the directors' duties and powers are regulated by the rules of the mandate agreement, such limitations of liability are conceivable, but only as regards the liability of the directors towards the company (theoretically, the director's liability towards the company may also be limited through the articles of association or the management agreement) and not against third parties. Nevertheless, the limitation of liability for fraud, gross negligence or wilful misconduct is not possible under Romanian law. In addition, criminal liability cannot be limited.

- **Liability insurance.** While, in case of JSCs, it is mandatory for the directors to have insurance for professional liability, in case of LLCs, there is no such legal requirement. If deemed necessary, such an insurance may be concluded.

What practical steps can directors take to avoid liability?

Please see [How can directors be protected from liability?](#) for considerations related to the possibility of contractually limiting liability and liability insurance.

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