

Recapitalisation time limit

According to the ad hoc decision of the Metropolitan Court of Appeal, there is no obstacle to the payment of outstanding cash contribution over 2 years in case of the establishment or recapitalisation of limited liability companies, in light of the provisions of the new Civil Code.

The ad hoc decision – which is important for the practice – passed by the Metropolitan Court of Appeal acting as the second instance court against the former first instance decision of the Metropolitan Regional Court as Court of Registration ruled and clarified that there would be no obstacle to set a deadline of 2 years or more for the payment of outstanding cash contribution payable by the members in course of the foundation or recapitalisation of limited liability companies.

In the specific case, the members set this deadline on 31 December 2030, which was qualified contrary to legislation by the Regional Court acting at first instance, and the related application for the registration of amendment submitted by the concerning company was finally rejected.

Essentially, the Regional Court found the clause in question contrary to legislation based on the provision stating that if the equity of a company did not reach the level of the registered capital prescribed for the specified corporate form for two (2) consecutive business years, the owners of the company are obliged to take measures in order to ensure the required level of equity of the company within three (3) months following the approval of the second annual accounts. In the absence thereof, the owners shall adopt a resolution regarding the transformation, termination without legal successor or merger of the company within 60 days following the expiration of the above-mentioned deadline.

According to the point of view of the Regional Court, in respect of the payment of the outstanding cash contribution, it is not admissible to set a deadline longer than the aforesaid deadline for the protection of the interests of creditors; it is in conflict with the relevant provision of law.

In contrast, in course of deciding regarding the appeal against the decision of the Regional Court, the Metropolitan Court of Appeal ruled that the statutory provision on the provision of equity is not in direct connection with the issue of the payment of the outstanding cash contribution, as the cash contribution paid this way only affects the company's registered capital the referred obligation of capital supplementation relates to the level of the equity of the company and the registered capital of the company is not the only element of the equity of the company, which also includes among others the capital reserve, retained earnings, profit or loss of the current year etc. of the company.

Accordingly, the provision of the equity, if necessary, is possible not only by the payment of the outstanding cash contribution, but by other ways as well. It is important to note, as it was also stressed in particular in the decision of the Metropolitan Court of Appeal, that until the outstanding cash contribution is paid, the company has limited option to distribute dividends. On the other hand, the member concerned is liable for the debts of the company up to the amount of the cash contributions not yet paid. In addition that this restriction and the obligation of the member replies to the concerns related to the protection of the creditors, the members intending to establish a limited liability

company by considering deferred payment, and owners intending to recapitalise a limited liability company in such way, it's worth considering these points before any final decision is made.

Certainly, in making such a decision, it still cannot be left out of consideration that the registered but not yet paid capital decreases the equity of the company according to the relevant accounting provisions, which means that it cannot be taken into consideration as registered capital from accounting perspective.

Therefore, in addition to legal aspects, neither financial nor accounting dimensions can be ignored in making such decision.

In summary, the ad hoc decision of the Metropolitan Court of Appeal is important because, in respect of the relevant practice of law developing earlier at first instance and in doing so giving rise to uncertainty, it will hopefully provide clarity and last but not least, provides for more favourable and flexible opportunities for the owners. Throughout company registration procedures, uniform and clear practice of law is of great importance because market needs usually cannot tolerate uncertain situations dragging on for months arising from possible appeal proceedings.

Thus, practical considerations often take precedent over the recourse to theoretical legal options and in doing so typically result in the alignment with the judicature of the courts of first instance. So, the practice of the courts of first instance can never be ignored since as mentioned before the market adapts to it also for the aforesaid pragmatic reasons.

Let us remember that a huge number of companies may be affected by the obligation of recapitalisation postponed until 15th of March next year and by the implementation thereof which also escalates the importance of the decision of the Metropolitan Court of Appeal.