



Legal update by reference to the months
of November & December, 2012

Legal Brief

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Banking

Banking, Finance and Capital Markets

Government Emergency Ordinance no. 93/2012 regarding the setting-up, organization and functioning of the Financial Supervisory Authority was published in the Official Gazette no. 874 dated 21 December, 2012

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According to the Ordinance no. 93/2012, the Financial Supervisory Authority („FSA”) will ensure the prudential supervision of the capital, insurance and private pension markets.

The three existing supervision authorities, the National Securities Commission, the Insurance Supervisory Commission and the Private Pension Supervisory Commission will be discharged and the prerogatives of the above mentioned commissions shall be transferred to FSA.

The aim of the FSA creation is to maintain stability, competition and good functioning of capital markets, promoting trust in

these markets and investment in financial instruments. FSA shall ensure protection for operators and investors against unfair and fraudulent practices. In addition, it shall promote stability in the insurance activity and protection of policy holders. With respect to private pensions, the FSA seeks to maintain efficient functioning of the private pension system and to protect interests of participants as well as of beneficiaries.

The deadline for taking over the responsibilities of the three existing commissions is 15 March, 2013.

Public

New regulations regarding the award of public procurement contracts

procurement

Emergency Government Ordinance no. 77/2012 (“**EGO 77**”) dated 27.11.2012 for the modification of Emergency Ordinance no. 34/2006 regarding the awarding of public procurement contracts, public works concession contracts and services concession contracts (Published in the Official Gazette no. 827 dated 10.12.2012)

EGO 77 redefines the public procurement contract as an administrative act instead of a commercial agreement, as per the old legal provisions. The direct consequence of this qualification is reflected in changes to the competent court to rule on disputes regarding public procurement contracts, such disputes being transferred from the previous commercial sections to the administrative dispute sections (note that

administrative disputes are subject to specific regulations).

Furthermore, EGO 77 brings several novelties by adding *regies autonomies* (a specific corporate structure



spun off from previous state owned companies) specifically to the category of contracting authorities, as well as any national companies whose share capital is held in whole or majority by another contracting authority.

EGO 77 introduces a new provision requiring contracting authorities to communicate to SEAP (the electronic system for public procurement) a notice regarding each direct acquisition which exceeds the RON equivalent of 5000 EUR (VAT excluded), within 10 days from receipt of the underlying documentation.

According to the new amendments, insofar as the awarding documentation is concerned, it is provided that any qualification and/or selection criteria which are included in the task book or descriptive documentation but are not included in the tender invitation/ announcement or the procurement file, as well as any evaluation factor which is included in the awarding documentation but is not included in the tender invitation/ notice, shall be considered unwritten.

EGO 77 also amends the thresholds above which it is mandatory for the contracting authority to publish a notice in the Official Journal of the European Union, as follows:

- for services and supply contracts awarded by contracting authorities classified under art. 8 letters a) – c) of Emergency Government Ordinance no. 34/2006 – from 125,000 EUR to 130,000 EUR;
- for supply and services contracts awarded by contracting authorities classified under art. 8 letters d) or e) of Emergency Govern-

ment Ordinance no. 34/2006 – from 387,000 EUR to 400,000 EUR;

- for works contracts – from 4,845,00 EUR to 5 million EUR.

Also, EGO 77 amends the reference threshold under which a price offer is considered unusually low, from 85% of the estimated value of the contract to 70% of the estimated value of the contract.

The thresholds up to which the contracting authority may apply a request for offers have also been amended, as follows:

- for supply and services contracts – from 125,000 EUR to 130,000 EUR;
- for works contracts – from 4,845,000 EUR to 5 million EUR.

It is provided further under EGO 77 that a certain percentage of the bid bond shall be retained by the contracting authority also in those cases where the applicant withdraws its contestation, and not only when the contestation is rejected.

In addition to the above mentioned modifications, the competence for solving a dispute seeking to determine that a public procurement contract is null and void, the Court of Appeal of Bucharest was replaced by the Tribunal of Bucharest, with the Court of Appeal being competent to solve appeals against the resolution delivered by the Tribunal.

The new amendments become applicable as of January 1, 2013.



Competition New secondary legislation regarding unfair competition

[Order no. 1098 issued by the Competition Council enforcing the Regulation regarding the procedure for identification and sanctioning of acts of unfair competition \(published in the Official Gazette no. 818 dated 5 December 2012\)](#)

The new regulation establishes the main steps and methods for the identification of the acts of unfair competition, as they are described in Art. 1 of Law no. 11/1991 regarding acts of unfair competition ("**Unfair Competition Law**").

The complaints regarding acts of unfair competition are analysed by the competent board within a 30 days deadline since their registration with the Competition Council. To the extent that, after reviewing the information provided by the complainant, the board finds the deed to be covered by the Unfair Competition Law, an in-depth investigation will be initiated through order of the President of the Competition Council. Unfair competition claims will be settled by Competition Council within 90 days from the moment when the authority is in possession of all the necessary documents and information.

Competition Council may also initiate ex-officio in depth investigations in order to identify acts of unfair competition, when

there is sufficient legal and factual background to justify the Competition Council's involvement.

During the in depth investigation, the competition inspectors can request statements, information and documents, as per the conditions applicable to antitrust investigations, as the latter are set out in Law no. 21/1996 ("**Competition law**"). Also, unannounced inspections can be conducted, but only when such are necessary for obtaining information which is not publicly available and is necessary for clarification purposes.

The result of the investigation (i.e. whether or not the circumstances which were investigated amount to an act of unfair competition or not) is specified in the conclusion notes drafted by the Competition Council's officers conducting the investigation.

New amendments in the commitments procedure of the Competition Council

[Order no. 1155 issued by the Competition Council amending the Instructions regarding the conditions, deadlines and procedure for the evaluation and approval of commitments in case of antitrust investigations \("Instructions regarding commitments"\) enforced by Order 724/2010 \(published in the Official Gazette no. 860 dated 19 December 2012\)](#)

The most relevant amendments brought to the Instructions regarding commitments by the above cited order are summarized below:

- The documents and information made available by the disclosing party to the
- Competition Council during the commitments procedure may be used by the authority only in the interest of the disclosing party and with express consent of the party;
- As a rule, the commitments procedure applies to minor infringements or



- severe infringements consisting of anti-competitive vertical agreements or abuse of dominant position when the quick re-establishment of the normal competitive environment is possible;
- To the contrary, the commitments procedure will not be applicable to horizontal agreements consisting of cartels, as prohibited by article 5 of the Competition Law and which are not subject to Art. 8 para (4) of the Competition Law and also to long term infringements which had substantial negative impact on competition, impossible to be restored with commitments;
 - The request for the commitments procedure cannot be withdrawn from the moment it has been registered with the Competition Council;
 - The Competition Council establishes a recommended deadline of 6 months for the submission of commitments by the parties involved;
 - The commitments request submitted by the party with the Competition Council will be accompanied by a synthetic presentation of the commitments, according to the indications of the Competition Council presented in the order opening the investigation;
 - Within a deadline of 3 months from the moment of receiving the request, the Competition Council will inform the parties about the opportunity to conduct discussions on the subject;
 - Upon sending the acceptance letter of commitments to the party, the Competition Council will also send a "letter of concerns" and provide a 30 day deadline (maximum 60 days) for the submission of the commitments proposal by the parties involved.
 - The maximum duration of the commitments procedure is of 6 months and may be extended with maximum 60 days;
 - The parties shall refrain from any conduct which may lead to circumstances similar to the ones that caused the initiation of the investigation;
 - The Competition Council may request the parties to appoint a monitoring agent. The monitoring agent will supervise the fulfilment of the commitments by the party/ies and will act under a contract approved by the Competition Council. The monitoring agent may not offer assistance or consultancy services to the parties involved, nor receive money or other benefits during the monitoring period or within 12 months after the monitoring period;
 - On exceptional basis, the parties may request amendment of commitments approved by the Competition Council if such amendments are independent of the parties' conduct.

Energy

New harmonized efficiency reference values for separate production of electricity and heat

The Romanian Energy Regulatory Authority (**ANRE**) issued **Order no. 38/2012** establishing harmonized efficiency reference values for separate production of electricity and heat and national correction factors (Published in the Official Gazette of Romania, Part I no. 756 of 9 November 2012)

The aforementioned Order was issued in Commission Implementing Decision of 19 application of the 2011/877/EU- December 2011 establishing harmonized



efficiency reference values for separate production of electricity and heat in application of Directive 2004/8/EC of the European Parliament and of the Council and repealing Commission Decision 2007/74/EC.

As stated in the Decision Preamble, the Commission has reviewed the harmonized efficiency reference values for separate production of electricity and heat, taking

into account data from operational use under realistic conditions, provided by the Member States. Moreover, on the basis of recent experience and analysis, the review confirmed that correction factors relating to the climatic situation and avoided grid losses, according to the EU Commission, should continue to be applied, ANRE Order 38/2012 having consequently taken into account these aspects.

Amendments brought to the Procedure concerning the designation of a license holder for the distribution of electricity

The Romanian Energy Regulatory Authority (**ANRE**) issued **Order no. 40/2012**, amending the provisions of the ANRE president's Order no. 4/2011 concerning the designation of a license holder for the distribution of electricity (Published in the Official Gazette of Romania, Part I no. 774 of 16 November 2012)

The minor amendments brought by Order no. 40/2012 consist of ensuring uniformity between the definition of „universal service” in Order no. 4/2011 and that provided by the new legal framework in the Energy field, namely Law no. 123/2012 concerning electric energy and natural gases, accurate references to present legislation and more flexible procedural terms in the case of replacing energy distribution agents.

Labor

Appeal in the interest of the law on construing the 30 days legal term for imposing a disciplinary sanction

Decision no. 16 dated 12 November 2012 related to the appeal in the interest of the law on construing and implementing article 252 par. 1 of the Labour Code (published in the Official Gazette no. 817 dated 5 December 2012)

According to article 252 par. 1 of the Labour Code, the employer must apply a disciplinary sanction through a written decision, taken within 30 calendar days from the acknowledgement of the disciplinary offence, but not later than six months after the misconduct occurred.

Conflicting jurisprudence had developed with respect to the moment from which the legal term of 30 calendar days to implement the disciplinary measure begins to run, respectively:



- some courts considered that the 30 days term must be computed as of the moment when an informative report with respect to a potential disciplinary misconduct is registered with the employer and therefore the disciplinary investigation and the decision of sanctioning must be issued within 30 days from such moment;
- other courts considered that the legal term of 30 days starts to run only when the employer's representative, empowered to implement such disciplinary measures, determines, following the disciplinary investigation procedure, that the employee has in fact committed a disciplinary offense.

tion is aware of the outcome of the prior disciplinary investigation and provided that the latter found all the necessary elements for the existence of such disciplinary offence.

In this respect, only after analysing the complete report on the prior disciplinary investigation, the employer is entitled to determine whether the "incident" has the particular nature of a "disciplinary offence", given that up to that moment, the employee benefits from the presumption of innocence. As such, the "acknowledgement" on the existence of a "disciplinary offence" occurs only following the completion of the disciplinary investigation by means of the disciplinary investigation report. It is from this moment that the 30 days legal term necessary for the employer to issue the sanctioning decision starts to run.

This decision issued by the Romanian High Court of Cassation and Justice finally puts an end to further debates. As such, under the argumentation contained in the appeal in the interest of the law, the supreme court ruled that the 30 days term runs only after the person entitled to issue a decision related to the disciplinary sanc-

The decision no. 16/2012 issued by the Romanian High Court of Cassation and Justice is binding on all Romanian courts as of the date of its publication in the Official Gazette, namely starting from 5 December 2012.

Environment & state aid Order no. 3970/03.12.2012 on the modification and addition to the Procedure for the integrated environmental authorization emission, approved by the Order no. 818/2003 of the Minister of Agriculture, Forests, Water and Environment

[The procedure for the integrated environmental authorization emission is modified by the Order no. 3970/03.12.2012, as follows:](#)

The competent authority for applying the integrated environmental authorization emission is the competent authority for environmental protection at county level in whose jurisdiction the emplacement is located.

The county authority for environmental protection establishes the measures and conditions for the integrated environmental authorization emission for the existing activities, after the assessment of the operating conditions that go against



the Government Emergency Ordinance no. 152/2005.

The business owner will submit his application for the integrated environmental authorization on the location of his activity/installment.

The competent authority for environmental protection responsible for the integrated environmental authorization emission is the county authority for environmental protection.

The county authority for environmental protection informs the National Environment Protection Agency before taking the final decision of issuing the integrated environmental authorization.

In order to obtain the integrated environmental authorization, business owners are obliged to submit the following to the county environmental protection authority:

- the application form;
- the emplacement report;
- proof of having posted the ad with the submission of the application for the integrated environmental authorization;
- proof of payment of the fee for verification/preliminary assessment of the filed application.

The preliminary assessment completed by the county environmental protection authority determines whether the application is drawn correctly or not and if it complies with the legal conditions, in order to be the subject of a proper assessment. An application is not drawn correctly if:

- not all the documents that support the application have been submitted
- it refers to an installation that does not correspond to the field regulated by the integrated environmental authorization
- the necessary fees have not been paid

After the preliminary assessment of the application's documentation, the county environmental protection authority sends a written response with the approval of the application or a justified rejection, to the business owner, within 10 working days.

The supporting documentation of the application needs to be prepared correctly and it needs to present to the county environmental protection authority all the information required to make a decision.

All the supporting documents of the application that have passed the preliminary assessment are submitted to the detailed analysis by the county environmental protection authority.

The county environmental protection authority, following a detailed analysis, concludes:

- the continuation of the procedure;
- the rejection of the application, if the supporting documents of the application are not prepared correctly;
- the completion, over the CAT analysis report, if all data and information needed to make a decision are provided.

Within 15 working days from the date of approval of the application, the county environmental protection authority disposes and watches over the achievement of the following stages:

- it appoints the CAT components, where all the authorities involved in the authorization and regulation of the operation of the activity/installation are represented;
- it sends the copies of the application to the other authorities;
- informs the applicant over the date settled for the start of



the procedure of analyzing the authorization application

- presents to the CAT the business owner's application and the competent environment protection authority's suggestion for the continuance of the procedure
- presents to the CAT the competent environment protection authority's suggestion over

the necessary additions to the supporting documentation of the application

- finalizes the list of regulatory documents that need to be issued by other authorities, previously to issuing the environmental protection authorization, according to the observations and suggestions received from the other authorities.

The procedure of emission of the environmental authorization has been modified

The Ministry of the Environment and Forests issued the Order no. 3839/2012 of modifying and completing the Procedure of emission of the environmental authorization, approved by the Order of the Minister of the Environment and Durable Growth no. 1798/2007, (published in the Official Gazette no. 0795 of 2012).

The procedure of emission of the environmental authorization has been modified, the main novelty being the following:

- the regional environmental protection agencies are dissolved, their activity being overtaken by the National Environmental Protection Agency (NEPA);
- the emission of the environmental authorization can be the object of the delegation of competence from

NEPA to the authority responsible with the emission of the environmental authorization (ACPM), through a decision of the NEPA president, who can also set the procedure of applying it;

- the activities established by the environmental authorization can be undertaken for different beneficiaries, if the holder has a valid environmental authorization.

The deadline for attending the signing of the financial support contract for the Program of the protection of water supplies, water supply integrated systems, treatment plants, piping and wastewater treatment plants has been modified



Order no. 3701/2012 issued by the Ministry of the Environment and Forests of modifying the Financial Support Guide for the Program of the protection of water supplies, water supply integrated systems, treatment plants, piping and wastewater treatment plants, approved by the Order of the Minister of the Environment and Forests no. 1450/2010 (published in the Official Gazette no. 0759/2012)

According to the new conditions, the applicant must present himself to the Authorities (The Environmental Fund Administration) within 30 days from the day of receiving the invitation, to sign the financial support contract.

Previously, this time limit was 12 months from the date of receiving the letter of approval.

The Romanian Government set the quantum of additional national direct payments for agriculture in the vegetable sector

Decision over the setting of the quantum of additional national direct payments for agriculture in the vegetable sector, for 2012, issued by the Romanian Government (published in the Official Gazette no. 0735/2012)

According to this act, it was determined that:

additional national direct payments diagram, is 1.006.912 lei;

- the total amount assigned for the quantum of payments for the year of 2012 in the vegetable sector, through the implementation of the
- the total area for which payments are granted as established by the payment diagram is of 6.174.820 ha.

The amount of state aids allocated to the farmers over the period 2011-2012 has been decreased

Romanian Government issued the Decision no. 1131/ 2012 for modifying the Government Decision no. 975/2011 on the approval of the state aids for the farmers (published in the Official Gazette no. 0800/2012).

The amount of state aids allocated to the farmers over the period 2011-2012 has been decreased from 1.004.839 thousands lei, as it had been set on 1.10.2012, to 982.015 thousands lei



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