LINA & GUIA
ATTORNEYS AT LAW

Legal update by reference
to the months of **March** and **April 2011**

Legal Brief
Lina & Guia SCA

Banking, Finance and Capital Markets

Regulation of the National Securities Commission

Order no. 12/2011 of the National Securities Commission for the approval of the Regulation no. 3/2011 on the Accountancy Rules set up in conformity with European Community Directive No. VII applicable to entities authorized, regulated and supervised by the National Securities Commission, published in the Official Gazette no. 156/ 3 March 2011

The Regulation transposes into the Romanian legislation the provisions of the European Economic Community Directive no 83/349/EEC on consolidated accounts and it contains provisions on the form and content of the consolidated annual financial statements (conditions on how they should be drafted, approved, audited and published) and also the consolidated report of the directors applicable to the companies supervised by the National Securities Commission.

The Order shall start to apply for the financial statements corresponding to the 2011 financial year.

Regulation of the National Bank of Romania

Regulation no. 1/2011 ("the **Regulation**") for the amendment of Regulation no. 6/2002 issued by the National Bank of Romania ("**NBR**") regarding the regime of the minimum reserves published in the Official Gazette no. 283/21 April 2011

The Regulation stipulates that the Romanian credit institutions as well as the Romanian subsidiaries of the foreign credit institutions as such are identified under the Emergency Government Ordinance no. 99/2006 regarding the credit institutions, must hold minimum required reserves in lei and foreign currency in the accounts opened with the NBR.

Energy

New changes brought to the thresholds for green certificates trading

Order no. 8/2011 issued by the Romanian Energy Regulatory Authority updating the thresholds for trading green certificates applicable in 2011, published in the Romanian Official Gazette, Part I, no. 156 of 3 March 2011.

According to the provisions of the Order no. 8/2011 issued by the Romanian Energy Regulatory Authority ("**ANRE**") and of the Law No. 220/2008 (Art. 11 (3) and Art. 12 (3), starting from 2011, ANRE is indexing annually the limits between which green certificates should be traded (the minimum limit of 27 EUROS/certificate and maximum limit of 55 EUROS/certificate). Such indexing is made based on the average inflation rate registered in the month of December of the previous year.

For suppliers failing to meet the mandatory quota for the purchase of green certificates, ANRE established an indexed amount of RON 482.09, the equivalent of EUR 112.31 for each green certificate that has not been purchased.

New rules with respect to the compulsory quota for the purchase of green certificates

Order no. 13/2011 issued by Romanian Energy Regulatory Authority, adjusting the compulsory quota for the purchase of green certificates by electricity suppliers in 2010 published in the Romanian Official Gazette, Part I, no. 165 from 8th of March 2011

According to the provisions of the Order no. 13/2011 issued by Romanian Energy Regulatory Authority ("**ANRE**") and of the Law no. 220/2008 regarding the system of promoting the energy generation from renewable sources, republished and further amended, ANRE is adjusting, at the beginning of each year, the compulsory quota for the purchase of green certificates for the previous year.

In 2010 the compulsory quota for purchase of green certificates was fixed at 1.56689% of the electricity supplied to end users. In achieving this quota, OPCOM held an additional green certificate trading session during 18 March - 23 March 2011. By way of derogation from the rules governing the green certificate market, undertakings which had to fulfil their mandatory quota may also participate in this additional session as sellers, and the trading price shall be the closing price of the green certificate centralized market.

At the same time, Order No. 13/2011 provides that the certificates for which an offer was made and remained unsold during the additional trading session referred to above shall be carried forward in the following years.

Real Estate

Methodology for establishing the land value and the pecuniary obligations incumbent to the holders of such authorisations approving the removal or the temporary occupation of the lands pertaining to the national forest fund

Order no. 924/2011 of the Ministry of Environment and Forest approving the Methodology for establishing the equivalence of the land value and the pecuniary obligations in relation to the removal or the temporary occupation of the lands pertaining to the national forest fund (published in the Official Gazette no. 149/01.03.2011)

Most relevant provisions of the new decision refer to the following:

- Definitive removal of land pertaining to the national forest fund without equivalent compensation;
- Definitive removal of land pertaining to the national forest fund with equivalent compensation;
- Temporary occupation of particular land pertaining to the national forest fund by clearing the forest vegetation;
- Temporary occupation of particular land pertaining to the national forest fund without clearing the forest vegetation;
- The content of the documentation to be submitted in order to obtain the necessary approvals for removing or for temporary occupation of the lands pertaining to the national forest fund.

Discipline in constructions

Law no. 3/2011 approving Government Emergency Ordinance no. 41/2010 on certain measures to consolidate discipline in constructions (published in the Official Gazette no. 158/04.03.2011)

According to Law no. 3/2011, not only buildings intended for tourism and buildings located within a 200-meter range from the coastline, but *„all buildings intended for tourism in areas with a potential for tourism, resorts, protected built areas, protection areas near historical monuments, natural reservations and others alike, and buildings intended for tourism and buildings located within a 200-meter range from the coastline, resorts and localities on the coast of the Black Sea, built without a construction permit or in breach of the provisions thereof, on public or private properties, completed or in progress*" are to be demolished according to law.

For the implementation of such legal provisions, the representatives of the State Inspectorate in Constructions shall establish the breach of the implementation of specific construction works, i.e. the performance thereof without a permit or in breach of the provisions thereof, and, to this end, shall notify the General Directorate for Public Works acting within the Ministry of Regional Development and Tourism.

The latter shall notify the owners of such works to demolish them within 48 hours from the time the notice is served or posted in a visible place on the building, and, should such term not be complied with, the buildings constructed in breach of the legal provisions shall be demolished within 24 hours by the Ministry of Regional Development and Tourism.

Special contractual conditions provided by the agreements on equipment and constructions

Order no. 146/2011 regarding the approval of the special contractual conditions provided by the agreements on equipment and constructions (published in the Official Gazette no. 188/17.03.2011)

Such order approved the special contractual conditions provided by the agreements on equipment and constructions, including design and by the agreements on building construction and engineering works designed by the beneficiary, agreements concluded by the International Federation of Consulting Engineers (FIDIC) for the investment objectives of the national interest transport infrastructure, financed from public funds.

Such special contractual conditions are an integral part of Schedule no. 1 and Schedule no. 2 which have been published in the Official Gazette no. 188 bis.

By way of example we refer to some of these special contractual conditions, as follows:

- The disputes among the parties shall be settled by the so-called Dispute Adjudication Board and, if the parties are not satisfied with its decision, the dispute shall be referred to arbitration;
- If the beneficiary fails to pay upon the due date, the contractor shall be entitled to ask for delay expenses, which expenses shall be calculated on a monthly basis, at the interest rate established by the National Bank of Romania for the main re-financing operations; however, the contractor shall grant to the beneficiary a grace period of 45 days for the outstanding amounts;
- The contractor shall provide the beneficiary with a letter of bank guarantee for the amount equivalent to 10% of the agreed contractual value in order to guarantee the execution of works;
- The guarantee period of the works shall be at least 730 days;
- The Beneficiary shall return the performance bond to the Contractor, within 21 days following the receipt of a copy of the final acceptance certificate;

The use right and the servitude right on private properties affected by energy capacities

Government Decision no. 135/2011 approving the conditions regarding the duration, content and limits for exercising the use right and the servitude right on private properties affected by energy capacities, the framework agreement and the procedural rules in order to determine the amount of indemnity and compensations to be paid (published in the Official Gazette no. 236/05.04.2011)

This Government Decision and the provisions of the framework convention refer to such energy capacities to be developed on private properties after this Government Decisions enters into force (namely, 5th of May 2011).

The use right and the servitude right shall be exercised in relation to repair and maintenance works, revisions, interventions in case of emergencies and any other necessary interventions in order to ensure a normal functioning of the energy capacities developed on private properties.

In accordance with the provisions of this Government Decision, the property owners over the plots of land upon which are to be developed energy capacities may request to the licence' holders the execution of the framework agreement, under the form provided in the schedule attached to this Government Decision.

Nevertheless, the property owners over the plots of land upon which have been developed energy capacities with the observance of the electricity law no. 13/2007, may also request to the licence' holders the execution of the framework agreement, under the form provided in the schedule attached to this Government Decision (so that the use right and the servitude right to be proper exercised).

The framework agreement contains, *inter alia*, clauses referring to:

- the party' rights and obligations;
- duration of such agreement;
- termination clauses (please note that the unilateral termination is expressly prohibited);
- payment of indemnities to the property owners in exchange for the use right and the servitude right granted to the holders of energy capacities, etc.

Permanent Technical Council for Construction

Order no. 1269/2011 of the Ministry of Regional Development and Tourism approving the Regulation for establishing the activity of the Permanent Technical Council for Construction (published in the Official Gazette no. 267/15.04.2011)

The Permanent Technical Council for Construction (hereinafter the "**Council**") is an entity without legal personality, subordinated to the Ministry of Regional Development and Tourism, which performs specialized activities in the field of construction products.

The Council performs specialised activities in accordance with the provisions of the Government Decision no. 622/2004 regarding the construction products, as republished.

The Council has, mainly, the following attributions:

- implementation of the European rules and regulations regarding the construction products;
- organising and conducting the activity regarding the construction quality certificates;
- assessment both of the testing laboratories and the national bodies which have been accredited for attesting the conformity of the construction products having common technical specifications, and supervising such bodies as well;
- assessment of the authorities to issue the European quality certificates for the construction products, and supervising such authorities as well;
- assessment, for accrediting purposes, the authorities to issue the quality construction certificates, including the so-called special groups, and supervising such authorities as well;
- developing / updating technical documents in the field of construction products, following the express request of the competent authority in the field;
- managing the national information system regarding the construction products.

Competition

Application of competition rules in the electronic telecommunication sector

Order no. 424/2011 of the Competition Council applying the Instructions for application of the competition rules to access agreements in the electronic telecommunication sector - general framework, relevant markets and principles (published in the Official Gazette no. 197 of 22 March 2011)

The access agreement represents making available to a third party, on an exclusive or non-exclusive basis, premises, equipments or services necessary to provide electronic communication services. The operators which are active in the sector must be allowed and encouraged to establish the agreements necessary to create or grant interconnectivity between the various communications networks and, as case may be, services.

The new instructions repeal the ones in existence since 2004 and (i) detail the method the Competition Council will use to protect the rights of undertakings and users in accordance with the competition rules, (ii) define the relevant market and (iii) detail the principles the Council will follow in assisting the undertakings active on the market to comply with the law when concluding access agreements.

New rules of access to the Competition Council file

Order no. 421/2011 of the Competition Council applying the Instructions for rules of access to the Competition Council file in the cases referring to articles 5, 6 and 9 of the Competition Law no. 21/1996, articles 101 and 102 of the Treaty on the Functioning of the European Union, as well as in cases of economic concentrations (published in the Official Gazette no. 189 of 18 March 2011)

The access to the file represents the access allowed to representatives of the authorities and institutions of the central or local public administration, persons, undertakings and associations of undertakings, whose behaviour is object of the Competition Council's investigation report and whose hearing is ordered by the Council.

The access right is meant to assure an effective right to defence against the conclusions and proposals in the investigation report. The instructions clarify who, when, and to what documents has access, as well as the procedure of granting access to the file (including the treatment of confidential information). Separate provisions refer to providing documents to authors of the complaints or other parties involved in the procedures regarding the economic concentrations.

Employment and Social Security Law

Significant changes to the Labour Code

Law no. 40/2011 amending and completing the Labour Code, published in the Official Gazette no. 225 of March 31, 2011

Law no. 40/2011 amending and completing the Labour Code entered into force on 1 May 2011 and brought some important changes to the Labour Code (primarily in favour of the employer/private entrepreneurship).

The most important amendments are briefly listed below:

- the list of mandatory prior information which the employer is bound to communicate to the employee has been supplemented with the job description (now expressly provided for) and with the general criteria for professional assessment at the level of the employer;
- the maximum duration of the trial/ probation periods has been increased from 30 calendar days to 90 calendar days for non-executive (non-management positions) and from 90 calendar days to 120 calendar days for executive (management) positions;
- it has now been clarified that, during the trial period or at the end thereof, either of the employer or the employee shall be entitled to terminate the employment agreement, without any other formality or notice and without the need to justify such termination;
- the ability of the employer to use hired employees on the basis of trial periods has been amended to read that the period for which an employer can successively hire employees on the same position is of maximum 12 months;
- a new prerogative has been introduced in the list of the employer's rights, namely the right to determine the tasks/duties of each position and the right to set forth the criteria for professional evaluation of the employees;
- the employer's prohibition to carry out new hires following a collective redundancy procedure for a period of 90 days thereafter (except when offering the dismissed employees the opportunity to fill such positions) has been amended to read that employees dismissed through a collective redundancy procedure may be hired back within a term of 45 days following dismissal, without any exam or trial period if the employer resumes hiring within the said deadline for the previously terminated positions;
- the maximum termination notice period upon resignation by the employee has been increased from 15 calendar days to 20 working days for non-executive (non-management) positions, and from 30 calendar days to 45 working days for executive (management) positions;
- several changes were brought to the regime of leased personnel and temporary work agents;
- the maximum working time has been set at 48 hours per week (including overtime) – the maximum weekly working time may be increased to over 48 hours per week, provided that the average weekly working time (calculated over a reference period of 4 calendar months, or 6 months or even – exceptionally, 12 months) does not exceed 48 hours per week (under the terms and conditions of the applicable collective bargaining labour agreement);
- compensation of overtime with free paid time may be done within the 60 days following the performance of overtime (as opposed to the previous 30 day term);
- the minimum duration of uninterrupted annual leave which the employer must grant to the employee is of 10 working days (as opposed to the previous 15 working days term);

- the protection granted previously to union leaders and employee representatives (i.e. protection from dismissal for reasons unrelated to the employee, for professional inadequacy and for reasons pertaining to the exercise of their mandate) has been limited solely to protection against dismissal for reasons pertaining specifically to the exercise of their mandate (though note that miscorrelations with other legislation persists);
- the sanctions provided by law for employers hiring employees without concluding employment agreements have been strengthened i.e. any employer receiving for work up to 5 workers without concluding employment agreements shall be sanctioned by a fine of 10,000 RON to 20,000 RON for each identified employee (for an excess of 5 workers hired without legal forms, the employer is held criminally liable);
- in addition to criminal liability for hiring more than 5 workers without concluding employment agreements, the employer shall also be bound to pay (a) all amounts owing to the illegally hired employees; (b) the amount of all taxes, contributions and imposts which the employer would have paid had it legally employed the respective workers, including delay penalties on such amounts and any applicable fines;
- the entire chapter of the Labour Code regulating collective bargaining agreements has been repealed (to be subsequently regulated extensively through a framework regulation – the so-called "Social Dialogue Law")

New law for daily workers

Law no. 52/2011 on the exercise of occasional activities by daily workers, published in the Official Gazette no. 276 of 20 April 2011

Law no. 52/2011 is an innovative piece of legislation in Romania, seeking to address those individuals retained for occasional activities (who have generally been left outside the scope of employment relations up to now). The main elements of the new piece of legislation are:

- the law provides for a limited list of fields in which occasional activities may be carried out by daily workers: agriculture, hunting and fishing, forestry, beekeeping, animal breeding, fish farming, vineyard, artistic shows, cinema productions, cultural activities, handling of merchandise, maintenance and cleaning services;
- hiring daily workers is not conditional on the conclusion of an employment agreement;
- no daily worker may carry out occasional activities for the same beneficiary for a period exceeding 90 days aggregated over a one year period;
- the duration of the occasional activity which may be exercised by a daily worker is of at least one day, corresponding to 8 hours of work;
- the duration of the working day shall be determined conventionally between the parties but shall not in any event exceed 12 hours (or 6 hours for underage workers) – in the event that the parties agree on a duration of the work day of less than 8 hours, the remuneration received by the daily worker shall not be less than the equivalent of 8 hours of work;
- the remuneration shall be set freely by negotiation between the parties, and cannot be less than 2 RON/hour or more than 10 RON/hour – payment of the remuneration must be done at the end of each working day and must be confirmed by the daily worker in the Registry of daily workers maintained by the beneficiary of the work;
- the beneficiary of the work executed by the daily worker must retain and pay the latter's income tax – however, no social contribution (pensions) or health insurance contributions are due in relation to income derived from daily work from either the daily worker or the beneficiary of the work.

Dispute resolution

Amendments brought to the arbitration procedure of the International Commercial Arbitration Court attached to the Romanian Commercial and Industrial Chamber

Decision no. 4/2011, of the International Commercial Arbitration Court, published in the Official Gazette, Part I, no. 160 form 4th of March 2011, decision that amends and supplements the governing rules concerning the function and organisation of the International Commercial Arbitration Court attached to the Romanian Commercial and Industrial Chamber

The most significant amendments and supplements refer to:

- A new mention, concerning the evidentiary regime, is introduced. Now the plaintiff, in order to prove his claim, has to indicate from the start the documents his case is relying upon, their relevance to the case, the name and the address of the witnesses, the factual matters that are going to be proved with their testimonies, if an expert's report is considered necessary by the claimant, he must mention the objectives, the name of the expert. Also if the interrogatory is requested, the questions must be submitted to the court (if the defendant is a company).
- The claim and the enclosed documents will be presented to court in a sufficient number of copies for all parties and for all the court. Also for all the arbitrators, the documents must be presented in electronic format.
- The claims that are submitted to the court are not going to be registered and will be immediately returned to the plaintiff if the receipt for payment of the registration tax is not attached to the claim. If the petition was sent by post, without having the receipt for payment of the registration tax attached, the secretariat of the arbitration court will immediately communicate by phone, fax, or e-mail, the plaintiff that he is supposed to present the proof of payment within the next 5 days. If the plaintiff doesn't comply, the claim will be returned to him.
- Another provision refers to the fact that the arbitral assistant will contact the parties, at least 5 days before the first court hearing, in order to check the file`s status and to make sure it is complete. The parties may be contacted by phone, fax, or e-mail, but the arbitral assistant must submit to the file a minute of the discussions with the parties or in case the arbitral assistant couldn't reach the parties, this must be mentioned in the minute.
- New modifications concerning the change of an already scheduled hearing date. It is now mentioned that, after an initial hearing was scheduled and parties was subpoenaed, it can be rescheduled only if all parties are summoned for this purpose, or for exceptional reasons.
- New provisions, establishing the possibility to contest some intermediate decisions of the Arbitration Court were also introduced. Now, the parties can challenge the intermediate decisions that (*i*) Suspended the trial`s course, (*ii*) imposed temporary enforcement measures or (*iii*) rejected, as inadmissible, the non-constitutional exception.
- New grounds for appealing the Arbitral Court's decisions were introduced. Therefore, if after the arbitrary decision is rendered, the Constitutional Court has declared that the legal provisions applied in the case are non-constitutional, the arbitrary judgement can be over turned.

Schedule of tax duties

Payments rescheduling

Government Emergency Ordinance no. 29/2011 on granting of payment rescheduling, published in the Official Gazette no. 200/22 March 2011 ("**Ordinance no. 29/2001**")

The Ordinance no. 29/2001 stipulates that the competent fiscal authorities may grant to taxpayers, individuals or public/ private entities, at the taxpayer's request, facilities under the form of payment rescheduling for a period of maximum 5 years.

The payment rescheduling shall not be granted for tax liabilities of less than 500 RON for individuals and of less than 1.500 RON in case of legal persons.

Also, certain conditions are stipulated for the approval of the payment rescheduling: the taxpayer should have submitted all its tax statements, the taxpayer should be in financial difficulty due to the temporary lack of cash but the taxpayer should not be the subject of an insolvency / dissolution procedures.

Also, within maximum 30 days from the date of receiving of the tax authorities' preliminary decision approving the payment rescheduling, the taxpayers (with the exception of public institutions) must create a guarantee, in case the fiscal liabilities exceed RON 5,000 in case of individuals and respectively RON 20,000 in case of legal persons. The guarantee may consist of sums of money established by the taxpayer at the fiscal authorities' disposal, of a letter of bank guarantee, of a seizure on the taxpayer's good or of a mortgage or pledge in favor of the fiscal authorities having as object a third party's goods.

The guarantee must cover the rescheduled payments, the interests owed during the payment rescheduling period and a percentage of up to 40% of the rescheduled amounts, depending on the rescheduling period.

LINA & GUIA
ATTORNEYS AT LAW

Contact Information

Lina & Guia SCA

Victoria Center, 9th floor
145 Calea Victoriei, 010072 Bucharest 1

Phone: +40 21 311 2561
Fax: +40 21 311 2562
E-mail: **office@lina-guia.ro**
Web: **www.lina-guia.ro**

Mihai Guia
Managing Partner
Mihai.Guia@lina-guia.ro

Cristian Lina
Managing Partner
Cristian.Lina@lina-guia.ro

Adrian Iordache
Partner
Adrian.Iordache@lina-guia.ro

Cristian Guia
Partner
Cristian.Guia@lina-guia.ro

*You will also be able to consult this Legal Brief, and our other newsletters, in the **News/Publications** section of our website.*