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Legal Brief
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Corporate/ Commercial

Law on Public-Private Partnership

The law on public-private partnership no. 178/2010 ("**Law**") published in the Official Gazette of Romania, Part I no. 676 of October 5, 2010.

The purpose of the Law is to establish rules for the initiation and performance of public-private partnership projects for public works in various domains of activity having as scope the design, financing, construction, rehabilitation, modernization, operation, maintenance, development and transfer of a public good or service, as the case may be, with private financing.

As per the types of activities in the projects of public-private partnership, it results that public-private partnership can be achieved by means of various types of contracts under which the duties of the public partner are transferred to the private investor, such as: design, construction, development, rehabilitation, modernization, operation, maintenance, financing. Upon the completion of the contract, the public good is transferred, free of charge, to the public partner, in good condition and free of any charge obligation.

It is also provided that the law on public-private partnership applies to:

- the development of a of public-private partnership project between a public partner and a private investor, pursuant to the application of one of the assigning proceedings of the private partner, as provided by law;
- the conclusion of the project agreement;
- incorporation and regulation of the project company's functioning.

The Law specifically stipulates the types of contracts excluded from the applicability of the Law, namely:

- the concession of public works' contracts and services concession contracts ruled by the Government Emergency Ordinance no. 34/2006 regarding the award of public procurement contracts, concession of public works' contracts and services concession contracts („**EO 34/2006**");
- the concession contracts regarding public assets ruled by the Government Emergency Ordinance no. 54/2006 regarding the regime of concession of public property goods' contracts;
- the joint venture agreements

Also, the Law does not apply to the conclusion of public-private partnership contracts which:

- have as object the rental, by whatever financial means, of land, existing buildings and other immovable property or rights thereon;
- refer to the acquisition, development, production or co-production of programs for broadcast, by institutions and television broadcasting;

- refer to rendering arbitration and conciliation services;
- refer to the employment of personnel and correspondingly to the conclusion of labor contracts;
- refer to rendering research and development services paid entirely by the public partner and whose results are not intended, exclusively, for its own benefit.

Moreover, the law does not apply also when the public-private partnership is concluded as a result of:

- an international agreement concluded in accordance with the Treaty with one or more countries not members of the European Union and which provide for the supply of goods or execution of works, implementation or operation of a joint project with the signatory States, and only if the agreement has mentioned a specific procedure for awarding the contract;
- an international agreement on the stationing of troops and only if the agreement has provided a specific procedure for awarding the contract;
- implementation of a procedure specific to an international organization.

Pursuant to the new law, the conclusion of the agreement comprises several stages, as it follows:

- initiating the project by publishing the intention announcement by the public partner;
- analysis and preliminary selection of private investors, previously to signing the project agreement;
- negotiating by consulting with the selected private investors on the contractual provisions, including the total value of the investment and the term of the agreement;
- signing of the agreement with the selected private investor.

In contradiction with the provisions of EO no. 34/2006, **the new law does not institute the public tender procedure as a way of assigning the contract of the public-private partnership**. It seems that the selection and negotiation of a contract is the new modality preferred by the legislator as a method of awarding the contract.

The law also regulates in detail:

- stages of assigning the contract
- minimum terms of development of the defining stages of the project and private investors' selection;
- conditions of initiating and completing the project;
- aspects concerning the content of the contract;
- general rules and principles for assigning the contract;
- provisions concerning the incorporation of a project company with a share capital owned by the public and private investor; the public investor participating with a contribution in kind.

Centralized coordination and monitoring of the performance of the public-private partnership project is performed by the Central Unit for Coordination of the Public-Private Partnership, which is being reorganized by way of a Government decision at the level of general department subordinated to the General Secretary of Government.

The Law shall enter into force on November 4, 2010 while the methodological norm for its application shall be approved by the Government within 30 days as of the entry into force of the Law.

Changes to the Company Law

Government Emergency Ordinance no. 90/29.09.2010 for amending and supplementing Law no. 31/1990 regarding companies ("**GEO 90/2010**") published in the Official Gazette of Romania Part I no. 674 of October 4, 2010.

The main amendments brought by GEO 90/2010 to Law 31/1990 refer to (*i*) the submission of financial statements and (*ii*) the objection to merger / spin-off.

The Romanian legislator imposed an obligation for the executive bodies (administration council, board of directors etc.) of the companies to submit *annual financial statements,* together with the attached documents with the Ministry of Public Finance. Such documents shall be transmitted either in paper or electronically along with the economic and financial indicators, with a digital signature attached. This obligation shall take effect starting with January 1st, 2011.

For publicity purposes, the Ministry of Finance is required to send to the National Trade Registry, in electronic format, copies of the mentioned documents.

As regards the objection to merger /spin-off, the following aspects are established and/or clarified according to the new amendments brought to Companies Law:

- A creditor that hasn't recovered his debt from a company going through a spin-off process has the right to held liable for his debt all the companies that resulted out of the spinning-off process;
- In order for a creditor to file an opposition against the merger/spin-off process, he shall hold a definite and liquid receivable arising before the publication of the merger or spin-off process, not due before publication date and the creditor should aim to avoid a prejudice to be caused by the merger/spin-off process;
- The submission of an objection no longer suspends the execution of the merger or spin-off process, nor prevents their achievement;
- The creditor can oppose the process within 30 days starting from the day the announcement about the merger or spin -off has been published in the Romanian Official Gazette Part IV;
- The court will reject an objection if: (i) the debtor company or its successors has proof of payment of debts, (ii) after analysing the financial situation of the new company, new securities in favour of the creditor shall not be necessary, (iii) the parties have reached an agreement on payment of debts, (iv) the creditor refused the settlement of the securities within the term established by the court, (v) there are already adequate securities or privileges for payment of receivable;
- Should the court admit the objection, it will oblige the debtor or its successor to pay the debt immediately or within a term established by the court depending on the value of the receivable and the liabilities of the debtor company or its successor in rights and obligations;
- The decision for admitting the opposition is enforceable;
- The term for passing the decision of the participating companies' Shareholders General Meetings regarding the merger or spin-off process shall be of 3 months and shall be calculated starting with the publishing day of the merger or spin-off project in the Official Gazette of Romania.

The new regulations regarding the companies' merger of spin-off process shall apply to the operations for which the project is published pursuant to coming into force of the GEO 90/2010.

Real Estate

Methodological Norms for application of Law no. 10/2001 were modified in order to reflect adoption of Law no. 1/2009 granting additional protection of ownership right acquired based on Law no. 112/1995

The Government Decision no. 923/2010 for amending and supplementing the Methodological Norms for the application of the Law no. 10/2001 on regime of properties abusively seized between March 6th 1945 and December 22nd 1989 (published in Official Gazette, Part I, no. 640 of 13 September 2010).

The new regulation ("**GD no. 23/2010**") modifies the methodological norms of Law no. 10/2001 on regime of properties abusively seized between March 6th 1945 and December 22nd 1989 ("**Law no. 10/2001**") in order to reflect adoption of Law no. 1/2009, which brought supplementary protection to the ownership right acquired by the former tenants of the Romanian State based on Law no. 112/1995. We remind that the main modifications of Law no. 10/2001 by Law no. 1/2009, as some of them are detailed in the methodological norms, are the following:

- In case of the properties alienated in compliance with the provisions of the Law no. 112/1995, the restitution in kind is no longer possible, the former owners being compensated only with equivalent remedy measures. This measure applies both to the buildings and the lands associated to the respective buildings. The "associated land" represents the land on which the building is located, together with the land adjacent to the building and necessary for its proper utilization. The size of "associated land" is to be determined and substantiated by the entity solving the notification;
- The sale-purchase agreement concluded in accordance with Law no. 112/1995 is declared as authentic deed and ownership title;
- If the sale-purchase agreement based on which a property was alienated in compliance with the provisions of the Law no. 112/1995 is annulled or made ineffective by irrevocable decision of a court, the ex-owner (i.e. the former tenant of the Romanian State) is entitled to be reimbursed with the market value of the respective property. Any court claim for such reimbursement is exempted of stamp duties;
- In the same hypothesis as in point mentioned above, the former tenants will have priority to receive a lodging from the local councils and/or Ministry of Regional Development and Lodging and will be entitled to buy such lodging. Until the mentioned lodgings are constructed, the former tenants can benefit of a lodging with special rent allocated by the Regie Autonome of the State Protocol (RAAPPS);
- Law no. 1/2009 and GD no. 923/2010 provides that in all cases of restitution in kind of a property alienated based on Law no. 112/1995, reimbursement of the former tenants with expenses associated with the necessary and helpful improvements (in Romanian "*imbunatatiri necesare si utile*") are supported by the entitled person (former lawful owner or its heirs). Before this modification, reimbursement was charged upon the state or public authority possessing the property, provided that the property was seized without a legal title (which was the majority of the cases);
- Law no. 1/2009 repeals the interdiction of alienating for a period of 10 years the properties acquired based on Law no. 112/1995 to any person other than the former owner;
- It is expressly stated that the former owners compulsorily have to use special procedure of Law no. 10/2001 instead of general law (e.g. restitution claim based on the Civil Code), and that provisions of Law no. 10/2001 prevails.

Energy & Projects

Amendments to the system promoting energy production from renewable energy sources

Government Ordinance no. 29/2010 amending and supplementing Law no. 220/2008 for the establishment of the system promoting energy production from renewable energy sources published in Official Gazette of Romania no. 616 of 11 August 2010

The scope of this normative deed is to improve the legal frame of the Law no.220/2008 in order to expand use of renewable energy. In this context, Romania may cooperate, by joint agreements with third countries, in the implementation of projects relating to the production of electricity from renewable energy sources. Under the new changes, the cooperation may also involve private operators.

The Ministry of Economy, Trade and Business Environment shall prepare once every 2 years, starting from October 2010, a report establishing the level of achievement of national targets and the measures taken with a view to facilitating the access to the grid of electricity generated from renewable sources. This Government Ordinance introduces some amendments to the content of the report requesting to add more details specifically mentioned.

Also, as a novelty, regulatory and/or building codes will require the use of minimum levels of energy from renewable energy sources for new and existing buildings subject to major renovations until 31 December 2014.

Procedure for authorizing new projects or refurbishment of cogeneration plants

Order no. 26/2010 issued by National Regulatory Authority for Energy (ANRE) approving the procedure for authorizing new projects or retrofitting of cogeneration plants published in Official Gazette no. 679 of 7 October 2010

The procedure establishes the responsibilities, conditions, processes and documentation required for the analysis of the new projects or retrofitting of cogeneration plants, in order to issue approval for the accreditation of the units subject to those projects.

Documentation required by this procedure is also used to record new or refurbished cogeneration units and for estimating the amount of electricity produced by these units which will benefit from the support scheme to promote high efficiency cogeneration based on useful heat demand.

This procedure applies to operators who propose projects for new plants/ cogeneration production configurations or replacement/refurbishment of the cogeneration plant composition/existing configuration.

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New Regulation establishing a legal framework for certification of energy auditors for buildings

Regulation of 30 September 2010 issued by the Ministry of Regional Development and Tourism on the certification of energy auditors for buildings published in Official Gazette no. 683 of 8 October 2010

This new Regulation establishes a legal framework for certification auditors regarding the accreditation procedure, the competent body, the professional degrees and the requirements and necessary skills. It also statues that a building energy auditor operates as an independent expert, authorized person or an employee of a company.

Competition

Secondary legislation on sanctions under the Competition Law

Instructions on the individualization of sanctions for offenses under Articles 50, 50^1 and 51 of the Competition Law no. 21/1996 were implemented by Orders no. 419/2010 and 420/2010 of the Competition Council (published in the Official Gazette, Part I, no. 638 of 10 September 2010)

The Competition Council establishes certain criteria for individualization of the sanctions imposed by Articles 50, 50^1 and 51 of the Competition Law for illegal deeds (e.g. anti-competitive practices, abuse of dominant position on a market, lack of notification of economic concentrations, supply of inaccurate, incomplete or misleading information, refusal to obey to the inspection of the Competition Council). In order to achieve a deterrent effect of the sanction, the fine calculated according to the scheme below cannot be less than the amount of the gains resulted from the illegal deeds.

The individualization is centred on a basic level of the fine, which is to be determined using two criteria: *(i) the severity* and *(ii) the duration* of the illegal deed. The basic level of the fine can then be increased or decreased with a certain percent for each aggravating or mitigating circumstance, such percent being 5% to 10% for the sanctions provided by Articles 50 and 50^1, respectively 5% to 25% for the sanctions provided by Article 51.

Taking into account all the above-mentioned, the final amount of the fine shall not be less than 0.1% or greater than 1% (in case of sanctions under Articles 50 and 50^1), respectively not less than 0.5% or greater than 10% (in case of sanctions under Article 51), applied to the turnover made by the offender in the year previous to application of the fine. In case the turnover of the previous year cannot be determined, the turnover of the immediate previous year shall be considered instead.

For the newly created entities which have not achieved a turnover in the previous year, the fine applied shall be between 20.000 Lei and 2.000.000 Lei in case of Articles 50 and 50^1 and between 30.000 Lei and 5.000.000 Lei in case of Article 51.

The instructions also refer to the sanctions applied to an association of enterprises, expressly regulating joint liability. If the association itself is not solvent, the members involved in committing the illegal deed will be requested to bear the fine. If such request does not result in collection of the entire amount of the fine, all the members that were active in the relevant market where the illegal deed was committed will be held liable in order to cover the fine.

Specific values of fines are provided for the deeds of the authorities and institutions of the state or local public administration.

Procedure for solving complaints regarding breaches of Articles 5, 6 and 9 of the Competition Law

Order no. 499/2010 of the Competition Council for implementation of the Regulation on analysis and solving of complaints regarding the violation of Articles 5, 6 and 9 of the Competition Law no. 21/1996 and of Articles 101 and 102 of the Treaty on European Union (published in the Official Gazette, Part I, no. 687 of 5 October 2010)

Aiming to encourage citizens, enterprises and consumer protection associations to inform about possible violations of the Law no. 21/1996, the Competition Council established the procedures regarding complaints made under Articles 5, 6 and 9 of the above-mentioned law.

The regulation stipulates two possibilities to inform the Council about potential violations: *(i) submitting a complaint* and *(ii) providing a referral for possible anticompetitive behaviour.* The first option offers the complainant the opportunity to directly address the Council, together with the rights to be heard and to access the file, while the second might be the base for an *ex officio* investigation of the Competition Council.

Filing a complaint is conditioned by a legitimate interest of the complainant. The order provides that a decision of the Competition Council by which a fine was applied represents an absolute proof of an illegal deed causing damages, provided that such decision is irrevocable. Such proof can be used in court by any person claiming damages as a result of the illegal deed.

State Aids

EXIMBANK guarantees loans taken by SME's and large enterprises

Government Decision no. 112/2010 for establishing a norm of state aid schemes to facilitate access to financing in this period of economic and financial crisis, consisting of guarantees granted to SMEs and large enterprises(GAR-NI-09-II/0), was published in the Romanian Official Gazette no. 650 of 20 September 2010

The present regulation aims to establish an aid scheme which permits to SMEs and large enterprises to access bank loans, guaranteed by EXIMBANK to the extent of 90% of the loan value. The guarantee is given only to complete the real/personal guarantees established by the economic operator.

The legal persons above can benefit from the state aid if they operate in Romania and were not in financial difficulty on July 1, 2008, but they are facing this situation when the aid is required, as an outcome of the global financial and economic crisis.

Employment

Procedure for establishing the methodology and conditions required for authorizing protected units

Order no. 1372/2010 of the Ministry of Labor, Family and Social Protection, approving the Procedure for authorizing protected units, published in the Official Gazette no. 676 of 5 October 2010

Order no. 1372/2010 approves the Procedure for establishing the methodology and conditions required for authorizing protected units (the "**Procedure**"). As defined in Law no. 448/2006 regarding the protection and promotion of the rights of disabled persons ("**Law no. 448/2006**"), authorized protected units are those public or private economic entities, having their own management, with at least 30% of the total number of personnel employed under individual labour agreements being disabled persons. Authorized protected units benefit from a series of facilities (e.g. exemption from profit tax, subject to an obligation to reinvest at least 75% of the exempted amount into acquiring technological equipment/ machinery and/or the refurbishment of jobs for individuals with disabilities). The Procedure conditions the functioning of this type of entities on acquiring an authorization issued under the provisions of Law no. 448/2006.

The authorization is to be issued by order of the Minister of labour, family and social protection (the "**Minister of Labour**"), upon the fulfilment of the conditions underlined in the Procedure.

The conditions to be met by entities applying for such an authorization are:

- to have their own management;
- at least 30% of their employees to be disabled persons;
- the goods and services produced by the entity are the direct result of the activity of the disabled employees organization.

The application for authorization as a protected unit is analyzed by the National Authority for People with Disability ("**NAPD**") and, within 20 days from the registration date, NAPD will issue, if it deems appropriate, a note to the Minister of Labour proposing the authorization. The authorization is valid as long as the authorized protected unit meets the conditions mentioned above.

Order no. 1372/2010 provides that authorizations issued prior to its coming into force remain valid, as long as the previously authorized protected units complete, if necessary, their documents according to the Procedure and submit the complete documentation within 45 days from its coming into force.

Order no. 1372/2010 repeals Order no 60/2007 of the president of the NAPD approving the Procedure of authorizing protected units.

Modification of the methodological norms applying the provisions of Law no. 319/2006 regarding labor health and safety

Government Decision no. 955/2010 modifying and completing the Methodological norms applying the provisions of Law no. 319/2006 regarding labour health and safety

Government Decision no. 955/2010, published in the Official Gazette no. 661/27.09.2010, regulates several key aspects of employment security and labour accidents prevention ("**GD 955/2010**").

These provisions establish an obligation for all employers to either (a) organize one or more internal departments/services; or (b) outsource such services to external consultants for advice in respect to employment health and safety services. This obligation takes on different forms depending on the number of employees in each company.

Small companies, with a maximum of 9 employees, are allowed to carry out employment health and security activities themselves, internally, provided that they have been authorized, after undergoing a forty-hours training. Furthermore, the company's activity should not involve a high risk of occupational diseases or labour accidents.

Companies with 10 to 49 employees, are entitled to directly carry out this type of activity provided they meet the requirements mentioned above, but also some specific ones.

If the employer has over 50 employees, it must appoint a person responsible for carrying out these activities, or set up one or several internal services for prevention and protection, and it is also under the obligation to acquire an authorization in the conditions established for small and medium-sized companies.

Furthermore, GD 955/2010 sets out conditions that need to be met when organizing in-house employment security services or contacting third-parties in this respect. Starting June 1st, 2011, internal service for employment protection and security will be provided only by full-time employees, working under an individual labour agreement. On the other hand, third-party service providers have to be empowered by a Commission functioning under the territorial employment inspectorates.

With respect to the minimum number of workers' representatives for health and safety matters, this shall be

(a) one representative for employers hiring between 10 and 49 employees;

(b) two representatives for employers hiring between 50 and 100 employees;

(c) three representatives for employers hiring between 101 and 500 employees;

(d) four representatives for employers hiring between 501 and 1,000 employees;

(e) five representatives for employers hiring between 1,001 and 2,000 employees;

(f) six representatives for employers hiring between 2,001 and 3,000 employees;

(g) seven representatives for employers hiring 3,001 and 4,000 employees;

(h) eight representatives for employers hiring over 4,000 employees.

Last but not least, the employer's obligation in respect to training on the matter covers, but it is not limited to: (a) information regarding work accidents risks and occupational disease; (b) in-house instructions regarding a specific function or occupation; (c) first aid, fire emergency procedure and rules regarding evacuation of workers.

Dispute resolution

The Law no. 202/2010 on measures to accelerate the settlement process

Law no. 202/2010 on measures to accelerate the settlement process was published in the Official Gazette of Romania no. 714 of 26 October 2010 ("**Law no. 202/2010**")

The provisions of the new and highly controversial normative act, which will be applied starting with November 25th, 2010, are supposed to have a great impact on dispute resolution, totally reforming the in court procedure. Some of the most important provisions of Law no. 202/2010 refer to:

- the decisions rendered by the local courts in lawsuits for amounts of less than Lei 2,000.00 (approximately Euro 470), will not be subject to any appeal whatsoever;
- the party that has been subpoenaed once for a court hearing is presumed to know about the lawsuit and will no longer be subpoenaed for the following court hearings, no matter when they will be scheduled;
- the court hearings can and must be scheduled very soon after the plaintiff's request is filed, and after each hearing (even the next day), considering that the parties can also be subpoenaed by fax, e-mail, or even by phone;
- the courts must rule on the approval of the enforcements within 7 days (after the request is filed).
- the divorce settlements are now legal, even if there are children and no matter when the parties got married. If there are no children, the parties can even settle the divorce out of court.

According to the Romanian Ministry Of Justice, Law no. 202/2010 is a first step towards implementation of the new fundamental codes of Romania and it establishes new procedural rules with immediate effect in order to facilitate efficient resolution of legal proceedings while it simplifies and increases the celerity of solving the lawsuits, with direct impact on the enforcement of judgments as well.

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