

Legal Brief

Lina & Guia SCA

Romanian Civil Code

The New Romanian Civil Code

Law no. 71/2011 for the enforcement of Law 287/2009 on the Civil Code (published in the Official Gazette no. 409 dated 10 June 2011)

Romanian Civil Code	1
Banking, Finance and Capital Markets	2
Energy	3
Real estate	5
Competition	7
Dispute resolution	8

The New Civil Code approved by Law 287/2009 entered into force on the 1 October 2011 and it correlates dispositions arising from the sustainable tradition of the 1864 Civil Code with provisions contained both in European and international instruments as well as with the current Romanian legislative framework, settling the solutions constantly offered by the jurisprudence and doctrine over the years.

The New Civil Code answers the necessity to adapt the legislation to the demands of the social and economic realities. The law for the enforcement of the New Civil Code is Law no. 71/2011 which contains important transitory dispositions.

The changes brought by the New Civil Code affected a broad range of existing provisions. The novelties brought by the New Civil Code refer among others to: provisions for persons, family and privacy protection, the matrimonial regime, the ownership regime and assets, fiducia (the Romanian equivalent of trust), the Land Book regime, the express regulation of the hardship theory, the financing agreement, the possibility of assignment of a debt, the possibility to conclude an agreement with respect to an asset that at the moment of the execution of the agreement is in the ownership of a third-party, the possibility of the parties to change the length of the prescription terms in the limits and according to the provisions of the law, the sanctioning of the initiation or termination of the negotiations with bad faith, modifications related to in rem rights - superficies, use rights, easements, administration rights, warranties etc.

The New Civil Code brings important provisions in the sector of bank financings and securities:

- According to the Code, if the creditor unilaterally terminates the contract, the banks have to grant borrowers a term of 15 days for reimbursing the loan.
- Another interesting concept introduced by the New Civil Code is that of "control over a bank account" which appears as an alternative to ensure enforceability of a security toward third parties without registering the security with the Electronic Archive. The mortgage of a creditor that has control over an account is preferred to the mortgage of a creditor that does not have control over the account.
- The Code introduces the concept of "perfection of mortgages" which means that the sole registration of the mortgage with the Electronic Archive is not sufficient to ensure effectiveness and enforceability toward third parties.
- With respect to the enforcement procedures, the Civil Code contains provisions according to which the challenging of the enforcement procedures suspends by law the sale process until the court definitively solves the matter.

As of the entering into force of the Civil Code a number of legislative acts were repealed, among these: the Commercial Code, the Family Code, Title VI from the Law 99/1999, Decree no.157/1958, Title X „Legal circulation of lands“of Law 247/2005 etc.

For a detailed analysis of the novelties brought by the New Civil Code as well as for their direct bussiness impact, please do not hesitate to contact us.

Banking, Finance and Capital Markets

New regulations on loans to individuals

The Romanian National Bank (“**NBR**”) issued Regulation no. 24/2011 regarding the loans to individuals (“**Regulation no. 24/2011**”) (published in the Official Gazette no. 767 dated 31 October 2011)

The regulation applies to various financial services providers, namely: (i) Romanian credit institutions and the branches of foreign credit institutions, (ii) Romanian non-banking financial institutions and the branches of foreign non-banking financial institutions, registered with the Special Register, (iii) certain payment institutions, (iv) certain Romanian electronic money institutions (“**Lenders**”), and sets out the minimal requirements for granting and delivering loans to individuals.

The requirements provided by Regulation no. 24/2011 are compulsory to virtually all types of credits granted to individuals, with a number of exceptions (e.g. study loans, loans related to death or medical situations).

For the purpose of complying with these, the Lenders shall establish through their respective internal regulations, which shall be previously approved by the NBR, such aspects as:

- the method of organizing their lending activity to individuals, as well as the conditions for setting up guarantees to secure such loans, including the maximum financing limit;
 - the categories of clients which are eligible for financing;
 - the target-client classification procedures applicable for each type of default risk, based on the general risk profile of the borrower;
 - the methodology for periodic review of the adjustment margins regarding revenues and the maximum indebtedness threshold; etc.
- For the purpose of ensuring a sustainable lending activity to individuals, the regulation provides inter alia that:
- The Lenders must organize their credit activity so as to have a clear delimitation between (i) the function of sale and promotion of credit products and (ii) that of credit risk analysis and monitoring;
 - The Lenders shall analyze the reimbursement capacity of the borrowers in consideration of an eligible income which cannot exceed by more than 20% the eligible income for the previous year;
 - Regarding consumer credits denominated in foreign currency or indexed depending on a foreign currency exchange rate, the applicant must provide guarantees valued to at least 133% the credit value;
 - Consumer credits can be granted, in principle, for a maximum 5-year period, except for certain real estate related credits;
 - The value of real estate investment credits cannot exceed: (i) 85% the value of the mortgaged asset, for loans denominated in lei, or (ii) 80% the value of the mortgaged asset, for loans denominated in foreign currency or indexed depending on a foreign currency exchange rate, if the borrower has eligible incomes denominated in foreign currency or indexed depending on a foreign currency exchange rate; etc.

Safe Investments under the New Civil Code

Order no. 11/2011 approving Regulation no. 15/10/2011 issued by NBR and the Romanian National Securities Commission ("**NSC**") on the investments provided by Article 831 of Law no. 287/2009 on the Civil Code ("**Regulation no. 15/10/2011**") (published in the Official Gazette no. 694 dated 30 September 2011)

Pursuant to the provisions of Article 831 of the New Civil Code, Regulation no. 15/10/2011 establishes the investments which are deemed as "safe":

- investments in state bonds issued by the Romanian state; and
- investments entrusted to credit institutions, which are guaranteed by an officially approved guarantee scheme, within the guarantee ceiling, applicable according to Government Ordinance no. 39/1996.

According to Article 835 (2) of the New Civil Code, the administrator who makes an investment which is not deemed as "safe", as per the above, and which was not authorized by its beneficiary shall be liable for the resulting damage, regardless of his fault.

It is to be noted that NBR and NSC may periodically change the meaning of the concept of "safe investments".

Energy The Romanian Green Certificate Market Unblocked

Government Emergency Ordinance no. 88/2011 ("**GEO no. 88/2011**") amending Law no. 220/2008 (published in the Official Gazette no. 736 dated 19 October 2011).

Following the approval of the European Commission of the Romanian scheme designed to support the production of energy from renewable energy sources ("**E-RES**"), the Romanian Government was in charge to implement the effects of this important decision mainly by enforcing Law 220/2008 (that remained until now completely inapplicable) and to adopt the necessary secondary legislation.

GEO no. 88/2011 amending Law 220/2008 was published in the Official Gazette no. 736 dated 19 October 2011. Among the main amendments brought to Law 220/2008 are:

- Producers of E-RES can benefit of the promotion system established by Law 220/2008 as long as they are authorised by the Romanian Energy Regulatory Authority ("**ANRE**"). They will have access to the number of green certificates stipulated by Law 220/2008 starting with the calendar month when the decision was issued;
- Producers of energy from renewable energy sources which hold groups/power plants that use renewable energy sources, functioning as of the date of the entry into force of GEO 88/2011 have the obligation to request ANRE's authorisation in term of 30 days and benefit from the number of green certificates stipulated by Law 220/2008 after the date of obtaining of the authorisation;
- The electricity produced in power plants that use both renewable and conventional energy sources is excluded from the application of the promotion system (in the same combustion plant) if the energy content of the conventional fuel exceeds 10% of the total energy content;

- The introduction of new terms, such as over-compensation (which appears for an internal rate of return by 10% higher than the value envisaged for the respective technology at the authorization of the support scheme and which will be published on ANRE's website), cost-benefit analysis and internal rate of return. The Romanian authorities must monitor the support scheme and reduce the number of granted green certificates in case of over-compensation;
- Reduction of terms for which the support scheme in Law is applicable to renewable energy producers which benefited from green certificates prior to the application of this system with the periods for which they have already benefited from green certificates;
- Irrespective of the renewable sources used, the electricity producers benefit from:
 - one green certificate for each 1 MW of power produced and delivered from power plants during trial period;
 - a number of green certificates established by ANRE by reducing the provided number of green certificates, diminishing the investment reference value per MW with the value of the received aid per MW and maintaining the value of the internal rates of return considered in the calculations provided to the European Commission in the process of authorization of the promotion system, if the power plants benefit supplementary from one or more state aids;
- Investors in renewable power plants with installed capacity of more than 125 MW who fulfill the conditions for applying the promotion system set forth by Law 220/2008, must prepare and submit the documentation necessary for the assessment of the support measure by the European Commission. The aforementioned producers shall be authorized by ANRE and shall benefit from the number of green certificates established by the law corresponding to the used renewable energy source for a period of 24 months following the authorization. The potential positive differences between the number of green certificates received and the green certificates to which they are entitled according to the individual authorization decision of the European Commission shall be recovered within maximum 24 months from the date of issuance of the decision;
- The reduction of the number of green certificates from 3 to 2 green certificates for each MW awarded for producers of energy from the following sources: biomass, geothermal, bio-liquids and biogas;
- The reduction of the number of green certificates from 3 to 1 for each MW produced and delivered by producers of energy from gas resulting from waste processing and mud fermentation gas from wastewater purge plants. Another green certificate for each MW produced and delivered shall be granted for electricity produced in co-generation which use the renewable energy sources mentioned above;
- The validity of green certificates is established to 16 months;
- The renewable energy produced within power plants that have an installed capacity of at most 1 MW per plant can be sold to suppliers in the license area of which the respective plants are established at regulated unique prices per technology. The energy sold at a regulated price does not benefit from green certificates. The suppliers at the request of the above mentioned producers have to buy the electricity thus produced, in the conditions established by ANRE. The regulated prices as well as the trading mechanism are established by ANRE and are notified to the European Commission;

As of the date of the entering into force of GEO 88/2011 Government Decision 443/2003 regarding the promotion of E-RES and the Government Decision no. 1479/2009 regarding the establishing of the promotion system of E-RES were repealed.

Secondary Legislation for the Support of Renewable Energy Production

[The Regulation for accreditation of producers of energy from renewable energy sources for the application of the promotion system set by Law 220/2208 \(published in the Official Gazette no. 770 dated 1 November 2011\)](#)

The Regulation provides the accreditation conditions for producers from E-RES, the accreditation stages as well as the required documentation, rights and obligations of accredited economic operators, the structure of the Register of accredited power plants, the modification, suspension and withdrawal of the accreditation.

[The Regulation for the organization and functioning of the green certificate market \(published in the Official Gazette no. 784 dated 4 November 2011\)](#)

The Regulation repeals the former regulation for the organization and functioning of the green certificate market and establishes the calculation method for the quantities of renewable energy which benefit from the support scheme, the procedure of issuing of green certificates as well as the involved parties and their rights and obligations. The National Company for Electric Transportation shall review the procedure of issuing of green certificates and ANRE shall approve the procedure within 15 days as of the entering into force of the Order 43/2011 approving the Regulation for the organization and functioning of the green certificate market.

[The methodology for establishing the annual mandatory acquisition quota of green certificates \(published in the Official Gazette no. 769 dated 1 November 2011\)](#)

The methodology repeals the Procedure for allocation of the amount of money resulting from the failure of the energy suppliers to purchase mandatory quota of green certificates. The methodology establishes a clear system for calculation of the: annual mandatory quota, the system of calculation of the number of green certificates subsequent to the non-fulfillment of the mandatory quota, the system of calculation, collection and transfer of the sums of money subsequent to the non-fulfillment of the mandatory quota, the system of determination of the annual mandatory quota of energy from E-RES in the gross final consumption of energy.

Real estate Valuation of assets

[Government Ordinance no. 24/2011 regarding the measures to be taken in relation to the valuation of assets \(published in the Official Gazette no. 628 dated 2 September 2011\)](#)

The Ordinance expressly sets the valuation activity, as well as the organization of the activities to be performed by authorized evaluators. Under the terms of the Ordinance no. 24/2011, valuation refers to such activities designated to estimate the value of assets, activities to be integrated within the so-called valuation report.

Under the provisions of the same Ordinance, the National Association of the Romanian Authorised Evaluators was set-up (the "**Association**"), the scope of such Association being to organize, coordinate and authorise the activity of the evaluators.

The authorised evaluators, in their capacity of members of the Association, shall mainly perform the following activities:

- valuation of the immovable assets;
- valuation of the companies;
- valuation of the movable assets;
- valuation of shares and other financial instruments;
- valuation of intangible assets.

Control over the construction products

[Order no. 2389/2011 approving the procedure regarding the exercise of the unified state control over the construction products, issued by Ministry of Regional Development and Tourism \(published in the Official Gazette no. 666 dated 19 September 2011\)](#)

The procedure stipulates the general rules for exercising a unified state control over the construction products. The unified state control shall be exercised by the Construction State Inspectorate (rom: Inspectoratul de Stat in Constructii).

By way of example we refer to some of the main activities to be performed by the supervisory authority, as follows:

- performance of thematic controls;
- inspections following the receipt of relevant information or claims;
- requesting information or specific documentation from the economic agents;
- product sampling, examination and testing, where appropriate;
- analysing the results of the test conducted in order to establish the compliance/non-compliance of the construction products.
- periodic inspections of the commercial and industrial objectives, on the site or in the warehouse;
- performance of unannounced inspections;

Provisions on land improvements

[The Government Emergency Ordinance no. 82/2011 regarding some measures related to the organisation of the activity of land improvements \(published in the Official Gazette no. 694 dated 30 September 2011\)](#)

According to the provisions of the Government Emergency Ordinance no. 82/2011, the National Administration of Land Improvements is reorganized as National Agency of Land Improvements (hereby referred as the "**Agency**").

We mention, *inter alia*, the following prerogatives of the new created Agency:

- the exploitation, maintenance, preservation and repair of public utility land improvements;
- the creation of new investments in order to rehabilitate the existing land improvements;
- providing natural and legal persons with services of land improvements;
- the exploitation, maintenance, preserva-

- drawing up and implementing the annual plans of exploitation, maintenance and repair of public utility land improvements;
- establishing the fees for the land improvements services;
- giving technical advices for the installations and constructions executed in the area of land improvements;
- reviewing the technical documentation, contracting with suppliers, financing the investments works and verifying the reception of the above mentioned works.

For achieving its aims and prerogatives, the Agency concludes contracts with third parties for elaborating studies, providing with projection services, executing construction works, maintenance and repair, purchasing

and leasing the necessary equipment for its activity, including the works of current maintenance in the areas of public utility land improvements, with the observance of the public procurement legislation.

Subject to the Agency' recommendation, the list of public utility land improvements taken in administration by the Agency is established according to the conditions required by the Government Emergency Ordinance no. 82/2011 and is approved by the Government.

The owners of lands found in the areas or outside the areas of land improvements, which, directly or indirectly, beneficiate of the land improvements, are obliged to pay a fee to the Agency, in the amount to be annually fixed through Government Decision.

Competition New secondary legislation adopted by the Competition Council

[Order no. 668/2011 enforcing the Regulation regarding the establishment of contraventions and applying of sanctions by the Competition Council, issued by the President of the Competition Council \(published in the Official Gazette no. 631 dated 5 September 2011\)](#)

The new regulation replaces the existing one, less than a year after issuance of the latter, mainly adding certain provisions required by the extension of the Competition Council's authority to sanction unfair competition based on Law no. 11/1991 (for details please see our Legal Brief no. 4/2011).

The regulation establishes the competence of Competition Council's inspectors regarding establishing and sanctioning anticompetitive behaviour. Accordingly, contraventions can be established and sanctions can be applied either by competition inspectors (for breaches of lesser gravity), or by the Competition Council's commissions or plenary (for more severe violations).

The minute or decision establishing the contravention and applying the sanction, if not

challenged in the legal term, constitutes a writ of execution which can be enforced against the sanctioned undertaking without any other formalities. Following communication of the minute/decision, the fine shall be paid within 15 days for fines applied through a minute, or within 30 days when the fine was applied through a decision.

The decisions of the Competition Council's Plenary or commissions can be contested in 30 days from communication, before the Bucharest Court of Appeal. The minutes issued by the competition inspectors can be contested within 15 days from communication, before the competent local court.

Order no. 710/2011 enforcing the Regulation modifying and completing the Regulation regarding the analysis and solving of the claims of violation of articles 5, 6 and 9 from the Competition Law no. 21/1996 and articles 101 and 102 of the Treaty on the Functioning of the European Union, issued by the President of the Competition Council (published in the Official Gazette no. 673 dated 21 September 2011)

Minor amendments have been made to the rules governing the analysis and solving of anticompetitive behaviour claims.

The regulation was modified to adapt new approach of the Competition Law regarding hearings (for details please see our Legal Brief no. 4/2011). The principle is now submission of written observations to the investigation report, while the hearings can be required by the parties of an investigation, in the 30-days period for submitting their written observations. Hearings can also be held *ex officio*, if the chairman of the Competition Council finds it appropriate.

In respect of anticompetitive behaviours, existence of a fine applied by the Competition

Council and confirmed by the court (or not challenged) is no longer an absolute presumption of existence of guilt in a civil claim for damages, but a simple presumption (which can be proved against). Also, it is expressly provided that reparations can be sought by authorized customers' protection agencies, on behalf of the consumers, and by professional associations or employers' unions, on behalf of their members.

While is confirmed that the claimant must at all times have an interest in filing a claim to the Competition Council, it is now clarified such can be either a direct or indirect interest. Also, all claims must be documented.

Dispute resolution

Opening of the Ilfov Tribunal

Order no. 2021/C/06.10.2011 of the Minister of Justice enacted following application of Law no. 304/2004 regarding the judicial organization of the courts of justice.

On the 1 November 2011 the Ilfov Tribunal was opened, according to the Order of the Minister of Justice no. 2021/C/06.10.2011.

Two courts of justice shall operate under the Ilfov Tribunal (Buftea and Cornetu) and shall have full jurisdiction powers (first instance, appeal and second appeal).

The Tribunal will work temporarily in the building where is located the Buftea Court, respec-

tively in Buftea City, 24 Stirbei Voda Street, Ilfov County being allotted spaces at levels 2 and 3.

Important: File cases recorded until 31 October 2011 on the role of the Bucharest Tribunal, cases that would fall within the competence of Ilfov Court will remain under the jurisdiction of the Bucharest Tribunal.

Contact Information

Lina & Guia SCA

Victoria Center, 9th floor
145, Calea Victoriei,
Bucharest, Romania

T: +40 21 311 2561
F: +40 21 311 2562
E: office@lina-guia.ro
W: 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.*

The Legal Brief (the "Legal brief") is a free, periodical electronic publication edited by the law firm Lina & Guia (the "Law Firm"), and published for Lina & Guia's clients and business associates. The Legal brief is strictly limited to personal use by its addressees and is intended to provide nonexhaustive, general legal/business information. The Legal brief is not intended to be and should not be construed as providing legal advice. The addressee is solely liable for any use of the information contained herein and the Law Firm shall not be held responsible for any damages, direct, indirect or otherwise, arising from the use of the information by the addressee.