

## Cover article: "Major Changes in the Public-Private Partnership Regime, a pursuit for Legislative Harmonization with the European Union Legal Norms"

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The public-private regime has recently been harmonized with the European norms, by means of the Government Emergency Ordinance no. 39/2011. Changes of the utmost impact, analyzed in this month's cover article, mainly refer to the selection of the participants in the procedure for awarding public-private contracts, the rapports between the public partner and the private one, the publication in the Official Journal of the European Union and the methods for contesting the award procedure.

### Legislative Retrospective

Voicu & Filipescu is a full service law firm, covering all legal areas relevant to your company's activity. This issue of our monthly newsletter provides you with a brief description of some of the recent legal amendments in the following areas:

- Banking and Finance
- Dispute Resolution



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- Voicu & Filipescu recommended in all practice areas covered for Romania by the international legal directory Legal500 EMEA 2011. Our lawyers received strong recognition for their activity in Banking, Finance and Capital Markets, Corporate and M&A, Dispute Resolution, Energy, IT, Telecoms and Media, PPP and Public Procurement, Real Estate.
- Voicu & Filipescu was awarded Law Firm of the Year 2010 in Competition Law title at Avocatnet Awards Ceremony. An independent jury recognized the firm's valuable involvement in a series of high profile competition projects on the market, as well as its general activity in competition law.

## **MAJOR CHANGES IN THE PUBLIC-PRIVATE PARTNERSHIP REGIME, A PURSUIT FOR LEGISLATIVE HARMONIZATION WITH THE EUROPEAN UNION LEGAL NORMS**

The public-private regime has recently been harmonized with the European norms, by means of the Government Emergency Ordinance no. 39/2011 published in the Official Gazette of Romania no. 284 of April 24, 2011. The need of amending the existent regulations was generated by the notices submitted by the European Union to the Romanian authorities regarding the inconsistencies between Law no. 178/2010 on public-private partnerships (published in the Official Gazette of Romania no. 676 of October 5, 2010) and the European legislation in this respect.

Changes of the utmost impact mainly refer to the following aspects: (i) the selection of the participants in the procedure for awarding public-private contracts; (ii) the rapports between the public partner and the private one; (iii) publication in the Official Journal of the European Union; (iv) contesting the award procedure.

### **SELECTION OF PARTICIPANTS. PARTICIPATION RESTRICTIONS AND SELECTION METHODS**

By the recent amendments the modalities have been set forth for selecting private partners, while the categories of entities have also been listed, the participation of which in the selection procedure is forbidden, hence resulting in restricted access to such procedures.

Also, the obligation has been introduced for the public partner to request private investors to set up a bid guarantee in amount of 1%, VAT free, of the estimated contractual value. By said provision, the possibility has been eliminated for the authority to ask for the participation to be guaranteed either by (i) excessive amounts that would abusively limit the access of economic agents to the selection procedure, or (ii) by undersized amounts, that would not represent a credible guarantee.

#### **Restrictions to Participate**

Legal entities meeting one of the below criteria cannot take part in the selection procedures stipulated by the law:

- (i) they are indebted towards the state budget;
- (ii) they are bankrupt or similar procedures have been initiated against them under the national legislation of other countries;
- (iii) they have been convicted in the past 5 (five) years under the Criminal Code;
- (iv) they submit an offer of an "unusually low price" and indications exist that the investor will not be able to substantiate such offer;
- (v) they provide incorrect information or fail to deliver the information requested by public partner for the purpose of giving evidence of the fulfillment of qualification and selection criteria.

#### **Selection Methods**

The private investor can only be selected by means of one of the two proceedings expressly stipulated by law, namely either by (i) open tender – covering a single phase in which any private investor can submit their offer, or by (ii) competitive dialogue – this procedure covers two phases, the assessment

and the negotiations phase, during which the public partner conducts a dialogue in accordance with the legal provisions.

The public partner needs to issue a justificatory note, giving reason for its decision of using competitive dialogue as selection procedure.

In case all discussions fail with the investors who submit offers for public-private partnership, the public authority is entitled to reinitiate the entire procedure, from the very preparation of the prefeasibility study.

### **RAPPORTS BETWEEN THE PUBLIC AND THE PRIVATE PARTNER**

Following these recent legal changes, public-private partnership can be achieved by means of two types of contracts: (a) goods and services contracts or (b) works contracts.

The main legal changes in this area include the following:

- (1) The selected private investor is under the obligation to include in the offer a list of its affiliated companies, as well as to permanently update such list throughout the duration of the public-private partnership contract.
- (2) Obligations regarding the design, as of the technical project phase, the construction, development, rehabilitation, operation, maintenance or financing are transferred by means of the public-private partnership contracts to the project company.
- (3) The project company can be assigned, upon its consent, all or only a part of the contracts/services which the public partner delivers for the purpose of fulfilling its duties in the designated public area, in relation to the public-private partnership contract, until the moment when the asset is taken over.
- (4) The partnership contract can stipulate the possibility for the public partner to empower the project company to cash the payments made by end users for the delivered services, throughout the duration of the public-private partnership.
- (5) Public-private partnership contracts can only be concluded after the expiry of a waiting period of at least ten days as of the date when the notice is communicated regarding the outcome of the procedure, whereas any contracts concluded before the end of such term are null and void. The ten days term is set up for the purpose of allowing the private investor to file requests for clarifications and in consideration of the terms in which the public partner is under obligation to provide answers.

### **PUBLICATION IN THE OFFICIAL JOURNAL OF THE EUROPEAN UNION**

It is mandatory for the announcement to be published in the Official Journal of the European Union in all situations when the estimated value of the public-private partnership contract to be implemented is equal to or greater than the lei equivalent of the following thresholds:

- The amount of EUR 125,000, VAT free, in the case of goods or services;
- The amount of EUR 4,845,000 VAT free, in the case of works.

## **CONTESTING**

The contesting modality is subject to wide debates, as 35 new articles have been introduced in this respect.

A highly important change, by which the access to justice has been alleviated, is that the condition has been removed of submitting the bid guarantee in amount of 2% of the estimated contractual value upon contesting the decisions ruled by the public partner.

Persons who feel any of their rights or lawful interests has been damaged by a deed of the public partner, in breach of the legal provisions in the area of public-private partnership, are entitled to file an administrative-jurisdictional complaint for the purpose of obtaining the annulment of said deed, the compelling of the public partner to issue a deed, the admission of the claimed right or lawful interest.

Said complaint shall be filed with the National Council for Solving Complaints (the "Council") within ten days as of the date following the day when one becomes aware of a deed of the public partner which one considers unlawful.

In case the Council rejects such complaint, the public partner shall detain from the plaintiff's bid guarantee fixed amounts and percentages of the contractual value, proportional to the estimated value of the contract.

The Council's decisions for solving the complaint and compelling the plaintiff to pay the fine can be objected to, by objection filed with the contentious-administrative and fiscal section of the court of appeal in the precinct of which the public partner is headquartered.

## **CONCLUSIONS**

The legal amendments analyzed in this article set forth new conditions for one to participate in the tender procedures aimed at the award of public-private partnership contracts, introduce changes in the partners' obligations and in regard to the publication in the Official Journal of the European Union and widely regulate the contesting procedure, all of which are measures taken in pursuit of harmonizing the Romanian legislation with the relevant European legislative framework.

It was in the context of these legislative changes that Prime Minister Emil Boc announced on April 27 the list of the main projects to be developed in the form of public-private partnership in the fields of transportation, energy, regional development, environment, health and justice, which list is now publicly available on the Government's website.

## banking & finance - legislative retrospective

Circular Letter no. 13/04.04.2011 issued by the National Bank of Romania on the **amendment of the mandatory minimal reserve for money values in foreign currency** was published in the Official Gazette of Romania, part 1, no. 250 of April 8, 2011.

According to said circular letter, as of the application period of April 24-May 25, 2011, the mandatory minimal reserve quota is of 20% in the case of money values in foreign currency the due term of which is less than two years from the end of the monitoring period and in the case of money values in foreign currency the residual due term of which is larger than two years from the end of the monitoring period, which set forth contractual clauses regarding reimbursement, withdrawal, early transfers.

**Procedure for spacing out the payment of tax duties.** Order no. 1853 of the Ministry of Public Finance on the approval of the procedure for the application of the provisions of Government Emergency Ordinance no. 29/2011 on regulating the payment spacing out was published in the Official Gazette of Romania, part 1, no. 249 of April 8, 2011.

Said Order lays down the actual procedure and basic documentation based on which payment spacing out is granted, which procedure applies to both legal entities and individuals.

Please find in the following a description of the procedure applicable to legal entities, the initial step of which is to file an application with the tax authority:

- It is mandatory for the **application to include** the following items:
  - (a) Identification data of the tax payer;
  - (b) Period for which the spacing out is requested;
  - (c) The amount for which the spacing out is requested;
  - (d) Justification of the special situation having generated the lack of liquidities and failure to pay the budget duties;
  - (e) The specification that the request is legally grounded on the Government Emergency Ordinance no. 29/2011 on the spacing out of budget duties;
  - (f) Signature and stamp of the tax payer.
  
- **The following documentation needs to be attached to the application:**
  - (a) Tax payer's statement that they are not under the insolvency procedure;
  - (b) Relevant documentation supporting the application;

## banking & finance - legislative retrospective

- (c) Copy of the most recent financial statement;
- (d) Copy of the most recent account balance;
- (e) Records of the past six months' earnings;
- (f) A financial recovery plan, including forecasted breakdown of budget payments;
- (g) Estimative financial indicators of the organization.

The application shall be settled within 60 days.

In case the tax authority issues its basic consent, the tax payer needs to set up securities within a 30 days term.

### **Information that need to be delivered by credit institutions to deposit holders.**

Regulations no. 1/2011 issued by the Bank Deposit Guarantee Fund on the information that need to be delivered by credit institutions to deposit holders were published in the Official Gazette of Romania, part 1, no. 273 of April 19, 2011.

According to said regulations, participant credit institutions are under the obligation of providing current and prospective deposit holders with information on deposit guarantees, at least in regard to the guarantees ceiling, on the types of guaranteed deposits and on the types of deposits that are not covered by compensation (non-guaranteed deposits).

The information will be provided to deposit holders as it follows:

- a) By displaying such in visible, easily accessible spaces at the participant credit institutions' units; and
- b) By the staff involved in customer operations, marketing and corporate communication activities.

Furthermore, participant credit institutions are under the obligation to expressly inform current and prospective deposit holders on whether their deposits are guaranteed or not. To such end, participant credit institutions need to make all efforts in order to obtain the relevant information in order to properly categorize deposits.

## dispute resolution - legislative retrospective

By **Decision of the Court of Justice of the European Union** of April 12, 2011, the Court ruled in Case no. 235/09 that, if a national court of justice which has been called as jurisdictional court on community trademarks aspects rules a judgment forbidding a counterfeiting action, then said judgment will basically become applicable on the European Union's level. Thus, a coercive measure such as the payment of periodic penalties, aimed at guaranteeing said prohibition, basically generates effects throughout the European Union territory. The regulations on the community trademark lays down a communitarian trademarks system, allowing for companies to register community trademarks which benefit of uniform protection and which generate effects throughout the EU.

If the laws of a member state do not stipulate coercive measures similar to those ruled by the jurisdictional community trademark court of the state member having ruled the prohibition, then the court called to rule on such matter needs to set forth the sanctions in line with the relevant provisions of its respective internal legislation, so that to guarantee equivalent compliance with the initially ruled prohibition.

For more information about the above, please contact:

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