

Cover article: “A new reformation of the public procurement system”

by Raluca Mihai –Partner Voicu & Filipescu

After the end of 2017 brought us a number of important changes in the field of public procurement, intended, according to the legislator's motivation, to perfect and streamline the public procurement system, and to reform the ex ante control function of the award of public procurement contracts/framework agreements, sectorial contracts/framework agreements and works concession and service concession contracts, in May 2018, the Romanian legislature amends and supplements the normative acts that have an impact on the public procurement system, starting from the same premise of perfecting and making it more flexible, with the aim of increasing the spending of the allocated funds, including European ones.

Legal Changes of May 2018

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- Data Protection
- Employment
- Litigation & Arbitration
- PPP & Concessions

+ VF News

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cover article

A new reformation of the public procurement system

by Raluca Mihai – Partner Voicu & Filipescu

After the end of 2017 brought us a number of important changes in the field of public procurement, intended, according to the legislator's motivation, to perfect and streamline the public procurement system, and to reform the ex ante control function of the award of public procurement contracts/framework agreements, sectorial contracts/framework agreements and works concession and service concession contracts, in May 2018, the Romanian legislature amends and supplements the normative acts that have an impact on the public procurement system, starting from the same premise of perfecting and making it more flexible, with the aim of increasing the spending of the allocated funds, including European ones.

Thereby, the Romanian Government passed **Emergency Ordinance no. 45 of 24 May 2018 for amending and supplementing certain normative acts with impact on the public procurement system**, which was published in the Official Gazette of Romania, Part I, no. 459 of 4 June 2018, with effect from that date.

Amending the general value thresholds

Starting from the European Commission Communication no. 1219/2017 for transposing the provisions of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, repealing Directive 2004/18/EC, the new value thresholds in Art. 7 par. (1) of the Law no. 98/2016, the central element in the law for establishing the obligation to apply certain award procedures, but also the application of certain publication formalities and certain deadlines, is amended as follows:

- a) Lei (RON) 24,977,096, for public procurement contracts/framework agreements for works;
- b) Lei (RON) 648,288, for public procurement contracts/framework agreements for products and services;
- c) Lei (RON) 994,942, for public procurement contracts/framework agreements for products and services awarded by the county council, local council, the General Council of the City of Bucharest, and public institutions in their control;
- d) Lei (RON) 3,376,500, for public procurement contracts/framework agreements for services having as object social services and other specific services, provided in Annex no. 2 of Law no. 98/2016.

It can be observed in art. 7 par. (1) let. c) the mention of a specific threshold for public procurement contracts/framework agreements for products and services awarded by the county council, the local council, the General Council of the City of Bucharest, as well as the public institutions under their control.

Regarding **sectorial procurement**, the value thresholds from art. 12 Law 99/2016 shall provide:

- a) Lei (RON) 1,994,386, for sector contracts of products and services, and for solution contests;
- b) Lei (RON) 24,977,096, for sector contracts of works;
- c) Lei (RON) 4,502,000, for sector contracts of services having as object social services and other specific services, provided in Annex no. 2 of Law no. 98/2016.

In case of **works and services concessions**, the award procedures provided by Law 100/2016 apply to works and services concessions whose value, VAT excluded, is equal or greater than the threshold of Lei (RON) 24,977,096.

New value thresholds for direct purchases and simplified procedures

Both in the case of public procurement regulated by general Law no. 98/2016, as well as those regulated by Law no. 99/2016, contracting authorities will have the right to directly purchase (i) products or services if the estimated value of the acquisition, excluding VAT, is less than Lei (RON) 135,060, and (ii) works, if the estimated value of the purchase, excluding VAT, is less than Lei (RON) 450,200.

In the case of the simplified procedures, the maximum value thresholds were increased to Lei (RON) 360,160, in the case of the purchase of products or services, and Lei (RON) 4,502,000, in the case of the purchase of works.

Limiting the application of the lowest price criterion

The contracting authority may use the criterion of the lowest price only if it purchases products, services or works whose estimated contract value does not exceed the thresholds set out in art. 7 par. (1) of the Law no. 98/2016, and those stipulated in art. 12 paragraph (1) of the Law no. 99/2016, mentioned above.

Excluding economic operators with outstanding debts to the general consolidated budget

An economic operator shall not be excluded from the award procedure if the amount of outstanding taxes and contributions due to the general consolidated budget is less than Lei (RON) 10,000, as opposed to the old regulation which stipulated a maximum threshold of Lei (RON) 4,000.

Elimination of the obligation for contracting authorities to communicate partial results to bidders/applicants

EGO nr. 45/2018 completely repeals the provisions of art. 214 par. (2) of the Law no. 98/2016, according to which, during the evaluation process, the contracting authority had the obligation to send to the bidders/applicants partial results, related to each intermediate stage of the process, namely the result of the verification of the DUAE applications and the outcome of the evaluation of the bids.

Access of bidders to the information of the other bids submitted in the award procedure

The amendment brought by EGO no. 45/2018 emphasizes the obligation of the contracting authority to allow, upon request, within a time limit that may not exceed one working day from the date of receipt of the application, the unrestricted access of any bidder/applicant to the report of the award procedure and the information in the qualification documents, as well as information on technical and/or financial proposals that have not been declared by the bidders as confidential, classified or protected by an intellectual property right.

Regarding the previous regulation, the legislator emphasizes the obligation of the contracting authority to make available to the other bidders/applicants, in addition to the report of the award procedure, the qualification documents, and we can interpret this as meaning that they can no longer be declared confidential by bidders/applicants. Only information in the technical and financial proposals can be declared confidential, classified or protected by an intellectual property right. This eliminates the abuse of certain bidders/applicants who declared their entire offer as confidential, including qualification documents, in order to restrict the access of other bidders/applicants to them.

Amending public procurement contracts / framework agreements

EGO no. 45/2018 modifies the conditions under which such an amendment would be permitted without the organization of a new award procedure, providing one such situation where additional works, services or products are required from the original contractor, up to a maximum of 50% from the value of the original contract, that became necessary and were not included in the initial procurement procedure and changing the contractor (i) is impossible for economic or technical reasons such as interchangeability or interoperability with existing equipment, services or installations purchased under the initial procedure; and (ii) would cause the contracting authority a significant increase in costs.

In addition, in another permitted situation where the contractor with whom the contracting authority originally concluded the public procurement contract is replaced by a new contractor, it is also permitted that the rights and obligations of the original contractor resulting from the public procurement contract are taken over in the context of a reorganization process, including acquisition or insolvency (the previously legislation mentioned only merger or spin-off), by another economic operator fulfilling the initial qualification and selection criteria, provided that this change does not imply other substantial changes to the public procurement contract and is not carried out in order to circumvent the application of the award procedures provided by this law.

Eliminating the prior notification procedure

Among the main changes we mention the fact that persons who consider themselves harmed by an act of the contracting authority, the latter being defined as any deed, any operation that produces or is likely to produce legal effects, failure to comply with a legal obligation, omission or refusal to issue an act or to perform a particular transaction in connection with or in the course of an award procedure, will be addressed directly to the National Council for Solving Complaints (CNSC) or the competent court, without having to go through the prior notification procedure.

However, in the administrative-judicial proceedings before the CNSC, after the receipt of the complaint, the contracting authority may take the remedial measures it deems necessary following the complaint, within three days after its receipt. The adopted measures will have to be communicated to the complainant, to the other economic operators involved in the award procedure and to the CNSC within one working day after their adoption.

Clearer provisions on the limits of availability between CNSC and the courts of law

In compliance with the principle of availability, CNSC or the court examines the lawfulness and merits of the contested act and can:

- a) issue a decision to repeal it in whole or in part;
- b) order the contracting authority to issue an act / to take the necessary measures to restore legality, with a clear and precise indication of the operations to be performed by the contracting authority; or
- c) cancel the award procedure, in case the remedy of the challenged act cannot be achieved.

Also, as a new provision, CNSC or the court can not decide to award the contract to a particular economic operator unless it has been designated by the contracting authority or its status as successful bidder results from the information contained in the solutioning file.

Introducing the obligation to deposit a bond upon lodging the complaint / court action. Elimination of stamp duty for court action and for complaint against CNSC decision.

One of the important changes already known among the specialists for some time is the obligation to deposit a **bond** in advance of the complaint / court action, determined as follows:

- a) **2% of the estimated contract value**, if it is lower than the thresholds stipulated in art. 7 par. (1) of the Law no. 98/2016, as amended and supplemented, art. 12 paragraph (1) of the Law no. 99/2016, as amended and supplemented, art. 11 par. (1) of the Law no. 100/2016, with the subsequent modifications and completions, **but not more than Lei (RON) 35,000**;
- b) **2% of the established contract value**, if it is lower than the thresholds stipulated in art. 7 par. (1) of the Law no. 98/2016, as amended and supplemented, art. 12 paragraph (1) of the Law no. 99/2016, as amended and supplemented, art. 11 par. (1) of the Law no. 100/2016, with the subsequent amendments and completions, **but not more than Lei (RON) 88,000**;
- c) **2% of the estimated contract value**, if it is equal to or higher than the thresholds stipulated in art. 7 par. (1) of the Law no. 98/2016, as amended and supplemented, art. 12 paragraph (1) of the Law no. 99/2016, as amended and supplemented, art. 11 par. (1) of the Law no. 100/2016, with the subsequent modifications and completions, **but not more than Lei (RON) 220,000**;
- d) **2% of the established contract value**, if it is equal to or higher than the thresholds stipulated in art. 7 par. (1) of the Law no. 98/2016, as amended and supplemented, art. 12 paragraph (1) of the Law no. 99/2016, as amended

and supplemented, art. 11 par. (1) of the Law no. 100/2016, with the subsequent modifications and completions, but not more than Lei (RON) 880,000.

The bond shall be returned to the person who deposited it at their request, not earlier than 30 days from the date of the final judgment or, as the case may be, from the date of cessation of the effects of the suspension of the award procedure and / or the performance of the contract.

Instead, the stamp duty for court action (first court and appeal) and for the complaint against CNSC decision was eliminated, but also the bond which had to be deposited for the request to suspend the award procedure and / or the performance of the contract until the final settlement of the case.

Special time limits for exercising claims for damages and claims on the performance of public procurement contracts

GEO no. 45/2018 introduces special deadlines for such claims as follows: the time limit for bringing an action is 1 year from the birth of the right to compensation for damages caused in the award procedure, and 3 years from the birth of the right to claims on the performance, annulment, nullity, termination, or unilateral termination of contracts, if special laws do not provide for other general statute of limitation periods of the material right to claim in relation to the legal or contractual obligations infringed.

Regarding the stamp duty for their settlement, it will also be determined according to the estimated value of the public procurement contract, according to the following formula: a) up to and including Lei (RON) 100,000,000 - 2% of the estimated contract value; and b) over Lei (RON) 100,000,000 - 1% of the estimated contract value.

Transitory provisions

Award procedures in progress at the date of entry into force of EGO no. 45/2018 remain subject to the legislation in force on the date of their initiation. An ongoing award procedure means any procedure for which a contract notice or, as the case may be, a simplified participation notice has been submitted, until the date of entry into force of GEO no. 45/2018 (June 4, 2018).

Complaints, litigations and claims pending before CNSC or, as the case may be, the courts at the date of entry into force of EGO no. 45/2018 continue to be judged under the conditions and procedure provided by the law in force at the date of their commencement.

data protection - legal changes published in May 2018

On the 23rd of May 2018, Decision no. 99/2018 regarding the cessation of applicability of certain acts of an administrative nature issued in application of Law no. 677/2001 on the protection of individuals regarding the processing of personal data and the free movement of such data was published.

Since Regulation (EU) 2016/679 on the protection of individuals regarding the processing of personal data is applicable starting with the 25th of May 2018, from this date, a series of acts cease to be applicable, such as:

- (a) ANSPDCP Decision no. 167/2006 on the approval of standard contractual clauses in the case of transfers of personal data to a processor established in a state whose legislation does not provide a level of protection at least equal to that provided by the Romanian law published in the Official Gazette of Romania, Part I, no. 6 of the 4th of January 2007;
- (b) ANSPDCP Chairman's Decision no. 105/2007 regarding the processing of personal data carried out in credit office - type logging systems, published in the Official Gazette of Romania, Part I, no. 891 of the 27th of December 2007;
- (c) ANSPDCP Chairman's Decision no. 95/2008 regarding the establishment of the standard form of the notices provided by the Law no. 677/2001 for the protection of individuals regarding the processing of personal data and the free movement of such data, published in the Official Gazette of Romania, Part I, no. 876 of the 24th of December 2008, as amended;
- (d) ANSPDCP Chairman's Decision no. 101/2008 on the procedure for issuing the authorization for the processing of personal data regarding health, under the conditions of art. 9 par. (3) and (4) of Law no. 677/2001 for the protection of individuals regarding the processing of personal data and the free movement of such data, published in the Official Gazette of Romania, Part I, no. 34 of the 19th of January 2009;
- (e) ANSPDCP Chairman's Decision no. 10/2009 regarding the establishment of an authorization model for the transfer of personal data abroad under art. 29 para. (4) of the Law no. 677/2001 for the protection of individuals regarding the processing of personal data and the free movement of such data, published in the Official Gazette of Romania, Part I, no. 149 of the 10th of March 2009;
- (f) ANSPDCP Chairman's Decision no. 132/2011 regarding the conditions of processing the personal numerical code and other personal data having a generally applicable identification function, published in the Official Gazette of Romania, Part I, no. 929 of the 28th of December 2011;
- (g) ANSPDCP Chairman's Decision no. 52/2012 regarding the processing of personal data by using video surveillance means, published in the Official Gazette of Romania, Part I, no. 389 of the 11th of June 2012;

- (h) ANSPDCP Chairman's Decision no. 41/2014 regarding the establishment of an authorization model for the transfer of personal data abroad, under Binding Corporate Rules (BCR), published in the Official Gazette of Romania, Part I, no. 218 of the 27th of March 2014;
- (i) ANSPDCP Chairman's Decision no. 200/2015 regarding the establishment of personal data processing cases for which no notice is necessary, as well as for amending and repealing certain decisions, published in the Official Gazette of Romania, Part I, no. 969 of the 28th of December 2015;
- (j) Ombudsman's Order no. 52/2002 regarding the approval of the minimum security requirements of personal data processing, published in the Official Gazette of Romania, Part I, no. 383 of the 5th of June 2002;
- (k) Ombudsman's Order no. 75/2002 on the establishment of specific measures and procedures to ensure a satisfactory level of protection of the rights of individuals whose personal data is being processed.

The Order was published in the Official Gazette of Romania, Part I, no. 432 of the 22nd of May 2018 and enters into force on the 25th of May, 2018.

The National Supervisory Authority for Personal Data Processing published on the 17th of May 2018, a notice on repealing the obligation of controllers to notify the data processing operations carried out starting with the 25th of May 2018.

On the 17th of May 2018, the National Supervisory Authority for Personal Data Processing issued a note whereby, in accordance with the provisions of EU Regulation 2016/679 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, repealing Directive 95/46/EC, starting the 25th of May 2018 (date of application of this European Regulation), controllers will no longer have the obligation to notify data processing activities, according to an ANSPDCP notice.

In this context, as of this date, the notice form existing on the Authority's website will no longer be available for filling in by the controllers in order to enter the processing operations carried out by them in the registry of personal data processing.

At the same time, the notice forms sent by controllers prior to this date and not processed by the Supervisory Authority will no longer be entered into the personal data processing registry after that date.

However, the removal of the obligation to notify the Supervisory Authority does not exonerate controllers from fulfilling their obligations under the provisions of EU Regulation 2016/679 on the protection of individuals regarding the processing of personal data and on the free movement of such data, repealing Directive 95/46/EC.

A Corrigendum was published to the Regulation (EU) 2016/679 of the European Parliament and of the Council of the 27th of April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, repealing Directive 95/46/EC (General Data Protection Regulation).

The Official Journal of the European Union L 119 of the 23rd of May 2018 published a Corrigendum to Regulation (EU) 2016/679 of the European Parliament and of the Council of the 27th of April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, repealing Directive 95/46/EC (General Data Protection Regulation).

[https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:32016R0679R\(02\)](https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:32016R0679R(02))

The National Supervisory Authority for Personal Data Processing has published on its website the template of the statement - form regarding the data protection officer (DPO).

On the 24th of May 2018, in the context of the entry into force of GDPR Regulation no. 679/2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, applicable from the 25th of May 2018, ANSPDCP has published on its website the template of the statement-form on the Data Protection Officer (DPO).

The document must be filled in with the data of the controller/processor, the information on the Data Protection Officer, their signature, and then it must be sent to the e-mail address: anspdcp@dataprotection.ro.

employment - legal changes published in May 2018

Decision of the Chamber of Deputies no. 24/2018 concerning the adoption of the opinion on the Proposal for a Directive of the European Parliament and of the Council on the transparency and predictability of working conditions in the European Union COM (2017) 797 was published in the Official Gazette of Romania, Part I, no. 404 of 11 May 2018, entering into force on the same date.

Taking into account Opinion no. 4c-19/187, adopted by the Committee on European Affairs, in the meeting of 24 April 2018, the Chamber of Deputies:

- believes that more flexible working arrangements correspond to the current state of the digital society and that the rights applicable to them have the advantage of being more quickly and easily modified if it becomes necessary due to technical progress, which is likely to counterbalance the risk of uncertainty raised by the normative framework of labor relations, and recommends exploring the social security opportunities created by this situation;
- recommends that the right of information be exercised upon employment be provided in an extended form during the probation period, so that improving workers' access to information on working conditions include issues that derive eloquently, preponderantly, from performing the work, but are difficult to describe in a statement;
- recommends that the right to information to be regulated in a form appropriate to the context of freedom of movement for workers in the European Union, in particular with regard to ensuring its effectiveness in the case of employees originating from Member States other than the one in which they work;
- mentions that, from a legal standpoint, conflict of interest is an imprecise category, so that clarification is needed to avoid abuse of this possibility by the employer in order to prevent the employee from engaging in another activity;
- recommends that the rules set out in this proposal to be integrated as soon as possible into a single act together with the regulations on the social security of self-employed persons and those related to working and contracting arrangements in the new economy.

Order of the Ministry of Labour and Social Justice no. 1618/2018 for establishing the indexed nominal value of a meal ticket for the first semester of 2018 was published in the Official Gazette of Romania, Part I, no. 412 of 15 May 2018, entering into force on the same date.

The Order stipulates that for the first semester of 2018, starting with May, the nominal value of a meal ticket may not exceed the amount of Lei 15,18.

Order of the Ministry of Labour and Social Justice no. 1619/2018 regarding the establishment of the value of the monthly indexed amount which is granted as nursery tickets for the first semester of 2018 was published in the Official Gazette of Romania, Part I, no. 412 of 15 May 2018, entering into force on the same date.

The Order stipulates that for the first semester of 2018, starting with May, the amount of the monthly amount to be given as nursery tickets is Lei 450.

Order of the Ministry of Labour and Social Justice no. 1485/2018 amending Annex no. 1 to the Order of the Minister of Labour and Social Justice nr. 489/2018 for the approval of the template of the social insurance contract and its addendum, used in the public pension system was published in the Official Gazette of Romania, Part I, no. 419 of 16 May 2018, entering into force on the same date.

The Order amends and supplements the social insurance conditions, stipulating that the obligations of the Pension Fund are to notify the insured person, whenever the monthly insured income is lower than the minimum stipulated by the law, as a result of the modification, by law, of the guaranteed minimum gross wage.

The Order also mentions as an insurance condition that the monthly insured income can not be lower than the amount of the guaranteed gross national minimum wage.

dispute resolution - legal changes published in May 2018

Decision of the High Court of Cassation and Justice no. 4 of March 5, 2018 regarding the examination of the complaint made by the Board of the Cluj Court of Appeals regarding "the interpretation and the unitary application of the provisions of art. 8 par. (1), related to those of art. 1 par. (1) let. b) of the Government Ordinance no. 15/2002 on the application of the usage fee and the passage fee on the national road network in Romania, approved with amendments and supplements by Law no. 424/2002, with subsequent amendments and supplements, in order to establish the active subject of the misdemeanor consisting in the act of driving without a valid vignette, if it is proved with a document registered with certified date at a public institution that the vehicle was sold prior to the date of finding the misdemeanor" was published in the Official Gazette of Romania, Part I, no. 388 of May 7, 2018 and is applicable from the same date. The HCCJ admitted the appeal in the interest of the law formulated by the Board of the Cluj Court of Appeals and consequently found that, in the interpretation and unitary application of the provisions of art. 8 par. (1), related to art. 7 and art. 1 par. (1) let. b) of the Government Ordinance no. 15/2002 on the application of the usage fee and the passage fee on the national road network in Romania, approved with amendments and supplements by Law no. 424/2002, with subsequent amendments and supplements, in the case of the transfer of ownership of the vehicle, the former owner loses the quality of user and the active subject of the misdemeanor consisting in the act of driving without a valid vignette, and that the proof of the transfer of the right of ownership is made according to common law.

Decision of the High Court of Cassation and Justice no. 12 of February 22, 2018 regarding the examination of the appeal filed by the Iasi Court of Appeals - Administrative and Tax Litigation Section in File no. 2.711/99/2016, in order to issue a prior decision for the resolution of a matter of law, was published in the Official Gazette of Romania, Part I, no. 418 of May 16, 2018 and is applicable from the same date. The HCCJ has admitted the referral on issuing a preliminary ruling filed by the Iasi Court of Appeals - Administrative and Tax Litigation Section in File no. 2.711/99/2016 and, consequently, found that in the interpretation of the provisions of art. 24 par. (4) of the Administrative Litigation Law no. 554/2004, as subsequently amended and supplemented: (i) the period within which the creditor may request the payment of the sum owed to them by the debtor as penalty is the limitation period of the mandatory enforcement, 3 years, regulated by art. 706 of the Civil Procedure Code, which runs from the date of performance of the obligation or, in case of non-performance, from the expiry of the three-month period, within which the debtor was able to fulfill the obligation in kind; (ii) the penalties set in percentage per day of delay shall be calculated from the time indicated in the resolution issued during the procedure regulated by art. 24 par. (3) of the Law no. 554/2004, as subsequently amended and supplemented, until the fulfillment of the obligation, but no later than the expiration of the three-month period within which the debtor was able to fulfill the obligation in kind, in case of non-performance; (iii) under the procedure regulated by art. 24 par. (4) of the Law no. 554/2004, as subsequently amended and supplemented, the Court may determine the value of the object of the obligation to

which late payment penalties, set in percentage per day of delay, shall apply, on the assumption that the Court mentioned in art. 24 par. (3) of the same law has not established this.

Decision of the High Court of Cassation and Justice no. 3 of February 19, 2018 on the examination of the complaint made by the Board of the Bacau Court of Appeals regarding the interpretation of the provisions of art. 3.1.1 let. c) of the Legal Metrology Norm NML 021-05 "Vehicle Speed Measuring Devices (Velocimeters)", approved by the Order of the General Manager of the Romanian Bureau of Legal Metrology no. 301/2005, as subsequently amended and supplemented, was published in the Official Gazette of Romania, Part I, no. 423 of May 17, 2018 and is applicable from the same date.

The HCCJ has examined the appeal filed by the Board of the Bacau Court of Appeals regarding the interpretation of the provisions of art. 3.1.1 let. c) of the Legal Metrology Norm NML 021-05 "*Vehicle Speed Measuring Devices (Velocimeters)*", approved by the Order of the General Manager of the Romanian Bureau of Legal Metrology no. 301/2005, in the sense that they apply at the moment of finding the misdemeanor, as a result of speed measurement by the radar operator/Court of Law, in the course of solving the misdemeanor complaint, or apply only at the time of verification and approval of the radar device by the legal metrology service. The High Court noted that, in view of the provisions of art. 49 from EGO no. 195/2002 on the circulation on public roads, which regulate the legal speed limits, as well as the provisions of art. 108 of the same act regulating the speeding misdemeanors, the limit upon which the sanction is applied, is the one established, according to the law, with technically approved and metrologically verified technical means, on the presumption that they express the real speed of the vehicle caught speeding. Since the misdemeanor was found by technically approved and metrologically verified technical means, according to art. 6 point 20 of EGO no. 195/2002, the margin of error can not be applied, the purpose of the norm subjected to interpretation is the observance of the metrological and technical requirements for putting into operation and using the Velocimeters. Consequently, the High Court has admitted the appeal in the interest of the law by establishing that in the interpretation and application of the provisions of art. 3.1.1 of the Legal Metrology Norm NML 021-05 "*Vehicle Speed Measuring Devices (Velocimeters)*", approved by the Order of the General Manager of the Romanian Bureau of Legal Metrology no. 301/2005, the maximum tolerable errors for speed measurement are metrological requirements applicable only in the procedure for certification of a Velocimeter by the entities referred to in art. 4 of the aforementioned order, i.e. only at the time of checking and approving the device.

Decision of the High Court of Cassation and Justice no. 11 of April 16, 2018 on the examination of the appeal in the interest of the law submitted by the Board of the Brasov Court of Appeals regarding the unitary interpretation and application of art. 784 par. (1), second thesis of the Civil Procedure Code was published in the Official Gazette of Romania, Part I, no. 430 of May 21, 2018 and is applicable from the same date.

The HCCJ has been consulted for a decision to ensure the unitary interpretation and application of art. 784 par. (1), second thesis of the Civil Procedure Code regarding the extent of the effects of the stay on enforcement by garnishment of bank accounts, or in case of seizing of all future amounts that feed the debtor's account opened with the third party garnishee, whether or not they existed at the date of the stay, or they do not fall under the measure of seizing of future income,

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subsequent to the stay, which did not exist in the garnished debtor's account on the date of the establishment of the garnishment. The HCCJ has established that, in the interpretation and unitary application of the provisions of art. 784 par. (1), second thesis of the Civil Procedure Code, the stay on enforcement by bank account garnishment removes the obligation of the third party to also seize the proceeds going into the debtor's account after the stay.

PPP & concessions - legal changes published in May 2018

Government Emergency Ordinance no. 39/2018 regarding public-private partnerships was published in the Official Gazette, Part I no. 427 of 18 May 2018, entering into force on the same date.

Government Emergency Ordinance no. 39/2018 (hereinafter referred to as "GEO 39/2018" or "*Emergency Ordinance*") repeals and totally replaces Law no. 233/2016 on public-private partnerships, the framework law in force in this field until 18 May 2018.

EGO 39/2018 regulates the conclusion, performing and termination of public-private partnerships, establishing that the public-private partnership has as its object the realization or, as the case may be, the rehabilitation and/or extension of a good or assets belonging to the public partner's patrimony and/or operation of a public service. The provisions of the Ordinance shall be applied by the public partner for the implementation of a project, if the project's substantiation study proves, in addition to the main elements provided in Art. 19 that more than half of the revenue to be obtained by the project company from the use of the good or goods or the public service operation that is the subject of the project comes from payments made by the public partner or other public entities to the benefit of the public partner.

According to the Emergency Ordinance, the mechanism of public-private partnerships is characterized by the following main elements: (i) cooperation between the public partner and the private partner in order to implement a public project; (ii) the relatively long duration of contractual relationships, over 5 years, to allow the private partner to recover the investment and achieve a reasonable profit; (iii) financing of the project, mainly from private funds and, where appropriate, by sharing private funds with public funds; (iv) achievement of the public partner's and private partner's goal; (v) risk-sharing between the public partner and the private partner, depending on each contracting party's ability to assess, manage and control a particular risk.

EGO 39/2018 maintains the distinction regulated by the old Law no. 233/2016 regarding the forms of public-private partnerships, these being the contractual public-private partnership (concluded under a contract between the public partner, the private partner and a new company whose share capital is wholly owned by the private partner acting as project company), and the institutional public-private partnership (achieved on the basis of a contract between the public partner and the private partner, whereby a new company is set up by the public partner and the private partner to act as a project company and, after being registered in the Companies Register, becomes a party to the public-private partnership contract in question).

The Emergency Ordinance provides that public-private partnership contracts (expressly classified as administrative contracts, according to Article 30 of the Ordinance) may also be concluded for the purpose of carrying out a relevant activity in the public utility sectors provided in Law no. 99/2016 on sectorial procurement, as well as for the performance by a private operator of the community services of public utilities stipulated in the Public Utilities Community Services Law no. 51/2006.

In relation to the parties of a public-private partnership contract, EGO 39/2018 mentions the following:

- a public partner can be any of the entities that are contracting authorities or contracting entities within the meaning of Art. 4 of Law no. 98/2016 on public procurement, art. 4 of Law no. 99/2016 on sectorial procurement, as well as art. 9 and 10 of Law no. 100/2016 on works concessions and concessions of services;
- on the other hand, any legal person or association of legal persons may participate in the public-private partnership contract award procedure, provided that it does not belong to the categories of public partners as mentioned above. In this way, the private investor designated as the winner of the award procedure which concludes a public-private partnership contract acquires the status of private partner;
- the direct beneficiary of the use of the public goods or public service representing the object of the partnership can be, under the terms of the public-private partnership agreement, either the public partner or another public entity, or the public in general.

The steps to be taken to conclude and start fulfilling the obligations of a public-private partnership contract are: (i) the public partner's performance of a substantiation study; (ii) endorsement of the substantiation study by the Government for central public administration projects or, where appropriate, by decision-making authorities for local government projects; (iii) conducting the award procedure of the public-private partnership contract; (iv) approval of the public-private partnership contract resulting from the finalization of the negotiations and initiated by the parties - by the Government for central public administration projects or, as the case may be, by the decision-making authorities for local public administration projects; (v) the signing of the public-private partnership contract; (vi) meeting all the conditions precedent set out in the public-private partnership contract, including financial closure.

Public-private partnership contracts are concluded in accordance with Romanian law, irrespective of the private partner's nationality and are awarded according to the provisions of Law no. 98/2016, of Law no. 99/2016 or Law no. 100/2016, as the case may be, according to the substantiation study elaborated according to the object of the contract and the way in which the transfer of a significant part of the economic risk of operation is realized. If, during the selection procedure, the public-private partnership contract can not be signed under the law, with any of the private investors who have submitted bids, the public partner has the right to launch a new procedure. At the same time, the provisions of Law no. 101/2016 on remedies in respect of the award of public procurement contracts, sectorial contracts, works concession contracts and services concession contracts, apply accordingly.

Also, EGO 39/2018 regulates (i) the minimum aspects that must be included in the public-private partnership contract, (ii) the elements according to which the duration of the contract is determined, (iii) the possibility of unilateral amendment/termination given by law to the public partner for exceptional reasons related to the public interest, (iv) issues related to the termination of the public-private partnership contract.

For additional details on this material, please do not hesitate to contact us.

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