

## Lawyers are the human expression of the individual will for order and civilization

Interview with Mr. Daniel Voicu, Managing Partner Voicu & Filipescu to [www.juridice.ro](http://www.juridice.ro) on July 14, 2020 (available in Romanian)

[Read the full interview here...](#)

## Legal Changes of July 2020

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:

- Corporate
- Data Protection
- Employment
- Litigation & Arbitration
- Public Procurement

## + VF News

VF has organised a dedicated task force to address coronavirus (COVID-19) concerns. Legal implications and strategies for companies. [Read more here.](#)

Voicu & Filipescu is pleased to announce that two of the transactions in which the Firm was involved were included among the most important deals on the Romanian M&A market in the research made by the specialists of the [Ziarul Financiar](#) newspaper for the 2019 edition of their [Top Deals Directory](#). [Click here](#) to read the details.

[Legal500 EMEA 2020 edition](#) recommends Voicu & Filipescu for our lawyers' activity in 6 practice areas: Corporate, Commercial and M & A, Employment, PPP and Procurement, Real Estate and Construction, Restructuring and Insolvency and TMT.

[IFLR 1000, 2020 edition](#) recommends Voicu & Filipescu for our lawyer's activity in three practice areas: M&A, Banking and Finance and Project Development. Also, Mr. Dumitru Rusu – Partner, head of the Banking and Finance practice, was selected as a *Highly Regarded Lawyer* for the practice areas of Capital Markets and Banking.

[Chambers and Partners Europe, 2019 edition](#) recommends Voicu & Filipescu for Corporate and M&A practice.

## corporate - legal changes published in July 2020

### 1 AMENDMENTS AND ADDITIONS TO COMPANIES LAW NO. 31/1990

Law no. 102/2020 for the amendment and completion of Companies Law no. 31/1990 was published in the Official Gazette, Part I, no. 583 of July 2, 2020.

The amendments and additions relate to the following main issues:

- repealing the provision regarding the possibility for several companies to operate at the same headquarters only if the building, through its structure and its usable area, allows the operation of several companies in different rooms or in distinctly shared spaces, the number of companies operating in a building cannot exceed the number of separate rooms or spaces obtained by subdividing;
- the elimination of the obligation to present the affidavit statement regarding the holding of the quality of sole shareholder in a single limited liability company;
- presentation at the trade registry office, in case of company registration and change of registered headquarters, of the document certifying the right of use over the registered office space registered with the fiscal body within the National Agency for Fiscal Administration with jurisdiction over the building with registered headquarters purpose;
- the approval regarding the change of the purpose of the collective buildings with residential regime, provided by Law no. 196/2018 on the establishment, organization and operation of owners' associations and the administration of condominiums, with subsequent amendments, when the building manager(s) declare(s) by affidavit that no activity is carried out at the registered office.

### 2 AMENDMENTS TO ANTI-MONEY LAUNDERING AND TERRORIST FINANCING LEGISLATION

GEO no. 111/2020 published in O.G. Part I no. 620 of 15.07.2020 brings a series of amendments and additions to the anti- money laundering and terrorist financing Law no. 129/2019.

An important change refers to the fact that the obligation to declare the beneficial owner is also fulfilled by including, at the registration, in the articles of association, the identification data of the beneficial owners and the ways in which the control over the legal person is exercised.

Also, the declaration on the beneficial owner will be submitted **only upon registration or when the beneficial owners change**, within 15 days from the date when the change occurred. Therefore, the declaration no longer has to be submitted annually as long as the actual beneficial owners do not change.

At the same time, the obligation to submit the declaration by companies already registered, which have only **natural person shareholders**, who are the only beneficial owners, has been eliminated. In this case, the NTRO will fill in ex officio the Registry of Beneficial Owners.

## data protection - legal changes published in July 2020

### I. ROMANIA

#### 1. ANSPDCP. THE NATIONAL COMPANY ROMANIAN POST WAS SANCTIONED WITH A FINE IN THE AMOUNT OF RON 9,686.60, THE EQUIVALENT OF EUR 2,000

On 15 July 2020, the National Supervisory Authority completed an investigation at the controller the National Company Romanian Post and found that it violated the provisions of art. 32 of the General Data Protection Regulation regarding the security of processing, sanctioning it with a fine of RON 9,686.60, the equivalent of EUR 2,000.

The fine was issued because the controller **did not implement adequate technical and organizational measures (e.g. pseudonymization)**, both upon establishing the means of processing and during the processing itself, so as to efficiently implement the principles of data protection and to include the safeguards necessary for the processing, so as to fulfill the requirements of the GDPR and to protect the rights of data subjects.

In particular, the controller has not taken the appropriate technical and organizational measures to prevent **unauthorized access to personal data** (e-mail addresses and telephone numbers) at the website <https://awb.posta-romana.ro> belonging to the National Post Company, which led to the compromise of the confidentiality of the personal data of **eighty one (81) data subjects**.

The National Supervisory Authority carried out the investigation as a result of receiving from the controller a notification of a data security breach, according to the provisions of art. 33 of the GDPR.

#### 2. ANSPDCP. THE CONTROLLER VIVA CREDIT IFN S.A WAS SANCTIONED WITH A FINE IN THE AMOUNT OF RON 9,680, THE EQUIVALENT OF EUR 2,000

The National Supervisory Authority completed an investigation at the controller Viva Credit IFN S.A., finding the violation of art. 12 par. (3) and (4) of the General Data Protection Regulation, by reference to art. 17 of the same Regulation, applying a fine in the amount of RON 9.680 lei, the equivalent of EUR 2,000.

The investigation took place as a result of a complaint claiming that the controller did not solve the petitioner's request by which they exercised their right to erasure, according to art. 17 of the General Data Protection Regulation.

Also, the controller did not provide the applicant with information on the actions taken following their request within one month (or a maximum of 3 months, stating the reasons for the delay) at their home address or contact address (e-mail) available in its records.

Thus, the controller Viva Credit IFN S.A. violated the provisions of art. 12 par. (3) and (4), by reference to art. 17 of the General Data Protection Regulation.

The controller has the obligation, according to art. 12 par. (3), to respond to the requests of the data subjects without undue delay and at the latest within one month from the receipt of the request, and according to par. (4) of the same article "If the controller does not take action on the request of the data subject, the controller shall inform the data

subject without delay and at the latest within one month of receipt of the request of the reasons for not taking action and on the possibility of lodging a complaint with a supervisory authority and seeking a judicial remedy".

At the same time, the controller S.C. Viva Credit IFN S.A. was ordered a corrective measure based on the provisions of art. 58 par. (2) let. d) of the GDPR, whereby it must send a reply to the petitioner to the submitted request, within 5 working days from the communication of the citation.

### **3. ANSPDCP. THE CONTROLLER CNTAR TAROM WAS SANCTIONED WITH AN ADMINISTRATIVE FINE IN THE AMOUNT OF RON 24,182.50, THE EQUIVALENT OF EUR 5,000**

The National Supervisory Authority completed on 06.07.2020 an investigation at the controller **SC CNTAR TAROM SA**, as a result of the transmission by the controller of a notification regarding a personal data security breach, finding the violation of the provisions of art. 32 par. (4), art. 32 par. (1) let. b) and par. (2) of the GDPR, which led to the application of a fine in the amount of **RON 24,182.50**, the equivalent of **EUR 5,000**.

The personal data security breach consisted in the fact that the controller **did not implement adequate technical and organizational measures** to ensure that any natural person acting under the authority of the controller and having access to personal data only processes said data at the request of the controller, **which led to the loss of the confidentiality of personal data through unauthorized access to data belonging to five (5) TAROM passengers, as well as to the unauthorized disclosure of their data.**

The controller was also ordered the corrective measure **to review and update the technical and organizational measures implemented** as a result of the risk assessment for the rights and freedoms of individuals, including working procedures on personal data protection, and the implementation of certain measures **on the regular training of persons acting under its authority (employees).**

### **4. ANSPDCP. THE CONTROLLER PROLEASING MOTORS ARL WAS SANCTIONED WITH A FINE IN THE AMOUNT OF RON 72,642, THE EQUIVALENT OF EUR 15,000**

The National Supervisory Authority completed on 23.06.2020 an investigation at the controller **Proleasing Motors SRL** and found the violation of the provisions of art. 32 par. (1) and (2) of the General Data Protection Regulation, sanctioning the controller with a fine in the amount of **RON 72,642**, the equivalent of **EUR 15,000**.

The investigation was initiated following the submission by the controller of a notification of personal data breach, by filling in the specific form established under the General Data Protection Regulation.

The security breach consisted in the fact that, on the Facebook page where the controller conducted an online contest to attract participating customers to the repair shop, **a document was posted with a screenshot of the website source code which included the access password to the forms filled in by the contest participants.**

This situation led to the unauthorized viewing and access to the personal data of 436 customers of the controller, on the website of Proleasing Motors SRL, and to the unauthorized disclosure of this data, contrary to the obligations provided by art. 32 of the General Data Protection Regulation.

As such, the sanction was applied to the controller due to the fact that it did not implement adequate technical and organizational measures in order to ensure an appropriate level of security of the processing regarding the rights and freedoms of individuals, in relation to the risk generated in this case accidentally or illegally, of destruction, loss, modification, unauthorized disclosure of personal data transmitted, stored or otherwise processed, or unauthorized access thereto.

**A corrective measure was also applied to the controller**, namely to review and update the technical and organizational measures implemented as a result of the risk assessment for the rights and freedoms of individuals, including electronic communications procedures, so as to avoid similar incidents of unauthorized disclosure of the personal data processed, in relation to art. 58 par. (2) let. d) of the General Data Protection Regulation.

## **II. EUROPEAN UNION**

### **1. GERMANY. A HEALTH INSURANCE COMPANY HAS BEEN FINED EUR 1,240,000 FOR GDPR VIOLATION**

According to a statement dated 29 July 2020, the German Personal Data Protection Supervisor imposed a fine on AOK Baden-Wuerttemberg.

Due to a breach of secure data processing obligations (Article 32 of the General Data Protection Regulation, GDPR), the State Commissioner for Data Protection and Freedom of Information imposed a fine of € 1,240,000 against AOK Baden-Wuerttemberg.

From 2015 to 2019, AOK Baden-Württemberg organized competitions on various occasions and collected personal data of the participants, including their contact details and health insurance affiliation. The AOK also wanted to use this data for advertising purposes, provided the participants had given their consent. With the help of technical and organizational measures, including internal guidelines and data protection training, the AOK wanted to ensure that only data of those contest participants who had previously given their effective consent would be used for advertising purposes. However, the measures defined by the AOK did not meet the legal requirements. As a result, the personal data of more than 500 lottery participants were used for advertising purposes without their consent. No insurance data was concerned.

### **2. ITALY. A PHONE COMPANY HAS BEEN FINED EUR 17 MILLION FOR GDPR VIOLATION**

On 27 July 2020, the Italian Authority for the Protection of Personal Data announced a fine of € 17 million to Wind Tre SpA for several cases of illegal data processing which were largely related to marketing.

The fine was imposed following complex investigations and inspections. Complaints have been received from users in connection with unsolicited marketing communications, made without their consent by sending automated messages, e-mails, faxes and telephone calls. In several cases, the data subjects were not able to exercise their right to withdraw their consent and object to processing for direct marketing purposes because the information contained in the Data Protection Policy was incomplete in relation to the contact details. In other cases, users' personal data were included in public telephone lists, despite objections (sometimes reiterated) made by these users.

The Authority fined Wind Tre EUR 16,729,600 and banned any further processing of the data it had acquired without consent.

### **3. POLAND. A NURSERY AND A KINDERGARTEN WERE FINED PLN 5,000 FOR GDPR VIOLATION**

The Polish data protection authority imposed a fine of PLN 5000 on an entrepreneur operating a nursery and a kindergarten.

The company did not allow the Authority access to personal data and other information necessary for the performance of its tasks - in this case, to assess whether the controller had notified a security breach.

The controller notified the Authority of a personal data breach, which consisted of losing access to personal data stored by the company.

In view of the lack of information necessary to carry out an assessment of the notification, the supervisory authority sent three requests to the company to provide relevant explanations.

### **4. POLAND. INSPECTOR GENERAL WAS FINED PLN 100,000 FOR GDPR VIOLATION**

The Polish Data Protection Authority, following an ex officio administrative procedure, imposed a fine of PLN 100,000 on the Inspector General of Poland.

The Authority established that the Inspector General of Poland had violated the provisions of the General Data Protection Regulation where the breach consisted in failing to provide the Authority, during the inspection, access to the data processing facilities and equipment and information necessary to perform its tasks. In addition, the Inspectorate did not cooperate with the President of the Authority during this inspection.

### **5. BELGIUM. GOOGLE BELGIUM HAS BEEN FINED EUR 600,000 FOR GDPR VIOLATION**

The Belgian data protection authority has fined Google Belgium 600,000 euros. for the rejection of an application by a data subject under the right to be forgotten, and lack of transparency in Google's form for dereferencing applications.

A Belgian citizen has requested the dereferencing of links containing negative information about him. The request was denied by Google.

The Authority found that some of these referenced links were necessary for the public interest and should not be removed: the citizen does indeed play a role in public life, and the links concerned an alleged relationship with a political party. The other links contained old, unfounded information and could seriously damage the citizen's reputation. The Belgian authority considered that these links should therefore have been dereferenced by Google.

### **6. POLAND. A RECRUITMENT COMPANY WAS FINED PLN 15,000 FOR GDPR VIOLATION**

The Data Protection Authority imposed a fine of PLN 15,000 to East Power from Jelenia Góra for failing to provide the Authority with access to personal data and other information necessary for the performance of its tasks.

The fined company provides employment services in Poland and Germany, and a German citizen filed a complaint against its actions because it processed his personal data for marketing purposes. The complaint was lodged with the competent German Data Protection Authority but was taken up for examination by the Polish Authority, which was the so-called main authority in this case, as the company is established in Poland.

In this proceeding, the President of the Authority sent three subpoenas to the company for an explanation. Two of them went unanswered. The company responded to one of the requests, but its explanations were incomplete and contradictory. In the opinion of the President of the Authority, these were clearly insufficient to establish the facts of the case. Due to such conduct of the company, the President of the Authority considered that the company had deliberately obstructed the course of the procedure or at least failed to comply with its obligations to cooperate with the supervisory authority.

### **III. NEW LEGISLATIVE AND REGULATORY DEVELOPMENTS**

#### **1. INVALIDATION OF EUROPEAN COMMISSION DECISION (EU) 2016/1250 ON THE EU-US PRIVACY SHIELD**

In its judgment from 16 July 2020 in Case C-113/18 Schrems II, the Court of Justice of the European Union invalidates Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 under Directive 95/46/EC of the European Parliament and Council on the adequacy of the protection afforded by the **EU-US Privacy Shield**.

Thus, the CJEU examined the validity of European Commission Decision (EU) 2016/1250 in the light of the requirements derived from Regulation (EU) 2016/679, taking into account the provisions of the Charter guaranteeing respect for private and family life, protection of personal data and the right to effective judicial protection.

In the opinion of the CJEU, the limits on the protection of personal data arising from US domestic law on access to and use by US public authorities of such data transferred from the European Union to the third country are not circumscribed in a way that satisfies requirements which are essentially equivalent to those imposed by European Union law, by the principle of proportionality, in so far as surveillance programs based on these provisions are not limited to what is strictly necessary.

At the same time, the CJEU emphasized that, although these provisions set out the requirements that the US authorities must comply with when implementing the surveillance programs in question, the provisions do not grant the data subjects rights of legal action against the US authorities.

With regard to the requirement of judicial protection, in the opinion of the CJEU, the Ombudsperson's mechanism for the Privacy Shield does not offer guarantees equivalent to those imposed by EU law, so as to ensure both the Ombudsperson's independence and the rules that allow it to make decisions that are binding on the US intelligence services. In this regard, the CJEU notes that although Recital (120) of European Commission Decision (EU) 2016/1250 mentions a commitment by the US government that the intelligence component should be obliged to remedy any breach of the applicable rules detected by the Privacy Shield Ombudsperson, that decision does not contain any indication that said Ombudsperson was empowered to take binding decisions in respect of those services, nor does it mention the legal guarantees which would accompany that undertaking and which could be invoked by the data subjects. Thus, the Ombudsperson mechanism provided in European Commission Decision (EU) 2016/1250 does not offer a legal remedy to a body that grants persons whose data are transferred to the United States guarantees essentially equivalent to those provided in Article 47 of the Charter of Fundamental Rights of the European Union.

For all these reasons, the Court of Justice of the European Union has invalidated Decision (EU) 2016/1250 of 12 July 2016 under Directive 95/46/EC of the European Parliament and Council on the adequacy of protection offered by the EU-US Privacy Shield. The CJEU decision is available at the following link:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=228677&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=10304093>

At the same time, during the Plenary Session of the European Data Protection Board, held online on 17 July 2020, **the Statement on the invalidation by the Court of Justice of the European Union of Decision (EU) 2016/1250 was adopted under Directive 95/46/EC of the European Parliament and Council on the adequacy of the protection afforded by the EU-US Privacy Shield.**

In such a situation, in the absence of an adequacy decision under art. 45 par. (3) of Regulation (EU) 2016/679, the transfer of personal data to the United States may be carried out in accordance with one of the following instruments provided by art. 46 of Regulation (EU) 2016/679:

- standard data protection clauses,
- binding corporate rules,
- codes of conduct and certification mechanisms.

Also, the transfer of personal data to the United States may be made under the derogations provided in art. 49 of Regulation (EU) 2016/679.

The English version of the **EDPB Statement** can be found at the following link:

[https://edpb.europa.eu/news/news/2020/statement-court-justice-european-union-judgment-case-c-31118-data-protection\\_en](https://edpb.europa.eu/news/news/2020/statement-court-justice-european-union-judgment-case-c-31118-data-protection_en)

Following the judgment of the CJEU in Case C-113/18, the European Data Protection Board adopted the document "Frequently Asked Questions" to provide initial clarifications and preliminary guidance to interested parties on the use of legal instruments for the transfer of personal data to third countries, including to the USA. It should be noted that this document will be supplemented by additional guidance, as the Board will continue to examine and evaluate the judgment of the CJEU.

The FAQ issued by the European Data Protection Board is available in **Romanian** and in **English**.

## employment - legal changes published in July 2020

**Order of the Minister of Labour and Social Protection no. 1106/2020 for the amendment of the Order of the Minister of Labour and Social Protection no. 740/2020 regarding the approval of the template of the documents provided in art. XV para. (1) of the Government Emergency Ordinance no. 30/2020 for amending and supplementing some normative acts, as well as for establishing measures in the field of social protection in the context of the epidemiological situation determined by the spread of SARS-CoV-2 coronavirus, with amendments and completions brought by the Government Emergency Ordinance no. 32/2020 for the amendment and completion of the Government Emergency Ordinance no. 30/2020 for amending and supplementing some normative acts, as well as for establishing measures in the field of social protection in the context of the epidemiological situation caused by the spread of SARS-CoV-2 coronavirus and for establishing additional social protection measures** was published in the Official Gazette of Romania, Part I, no. 576 of July 1, 2020, entering into force on the same date.

The Order amends the Annex to the Order of the Minister of Labour and Social Protection no. 740/2020 regarding the approval of the template of the documents provided in art. XV para. (1) of the Government Emergency Ordinance no. 30/2020 for amending and supplementing some normative acts, as well as for establishing measures in the field of social protection in the context of the epidemiological situation determined by the spread of the SARS-CoV-2 coronavirus. The Annex contains the template of the application and of the declaration on one's own responsibility for requesting the indemnity by other professionals and by the persons who have concluded individual labour agreements based on Law no. 1/2005 on the organization and functioning of the cooperation.

**Order of the Ministry of Labour and Social Protection no. 1107/2020 on amending the Order of the Minister of Labour and Social Protection no. 741/2020 for the approval of the template of the documents provided in art. XII para. (1) of the Government Emergency Ordinance no. 30/2020 for amending and supplementing some normative acts, as well as for establishing measures in the field of social protection in the context of the epidemiological situation determined by the spread of SARS-CoV-2 coronavirus, with amendments and completions brought by the Government Emergency Ordinance no. 32/2020 for the amendment and completion of the Government Emergency Ordinance no. 30/2020 for amending and supplementing some normative acts, as well as for establishing measures in the field of social protection in the context of the epidemiological situation caused by the spread of SARS-CoV-2 coronavirus and for establishing additional social protection measures** was published in the Official Gazette of Of Romania, Part I, no. 576 of July 1, 2020, entering into force on the same date.

The Order amends the Annex to the Order of the Minister of Labour and Social Protection no. 741/2020 for the approval of the template of the documents provided in art. XII para. (1) of the Government Emergency Ordinance no. 30/2020 for

amending and supplementing some normative acts, as well as for establishing measures in the field of social protection in the context of the epidemiological situation determined by the spread of the SARS-CoV-2 coronavirus. The Annex includes the template of the application, of the declaration on one's own responsibility and of the list of persons that the employers must submit in order to benefit from the payment of the indemnity for employees whose employment contracts have been suspended at the initiative of the employer, according to art. 52 para. (1) letter c) of the Labour Code.

**Order of the Minister of Health and of the President of the National Health Insurance House no. 1092/745/2020 for the approval of the single template of the medical leave certificate and of the instructions regarding the use and the way of completing the medical leave certificates on the basis of which the indemnities of the insured persons from the social health insurance system and from the accident insurance system are granted and occupational diseases** was published in the Official Gazette of Romania, Part I, no. 583 of July 2, 2020, entering into force on the same date.

The Order approved the unique template of the medical leave certificate, as printed with a special regime, which is a payment order and based on which the social health insurance benefits are granted, as well as the insurance benefits for work accidents and occupational diseases.

At the same time, the Order approved the Instructions on the use and how to fill in the medical leave certificates.

**Order of the Minister of Labour and Social Protection no. 1140/2020 for the approval of the Methodology for drawing up and transmitting the Electronic Register of daily laborers' records, as well as the registrations made in it** was published in the Official Gazette of Romania, Part I, no. 651 of July 23, 2020, entering into force on July 25, 2020.

According to the Order, the beneficiaries of the works, defined according to art. 1 para. (1) letter b) of the Law no. 52/2011 regarding the exercise of occasional activities carried out by day laborers have the obligation to draw up, fill in and transmit the electronic Register of the daily laborers.

For the establishment of the Register, the beneficiary obtains, based on a documentation, the username and password from the territorial labour inspectorate in whose territorial area it has its headquarters.

The Register shall be filled in by the beneficiary or by one or more authorized persons using the computer application for mobile devices "*Labour Inspection*", in accordance with the instructions for use obtained from the website of the Labour Inspectorate.

The Register is sent online by the beneficiary or by the persons empowered by him, through the computer application "*Labour Inspection*", after filling it in the same application.

**Law no. 151/2020 for the amendment and supplementation of the Law no. 53/2003 - The Labour Code** was published in the Official Gazette of Romania, Part I, no. 658 of July 24, 2020, entering into force on July 27, 2020.

Law no. 151/2020 amends the definition of regime of discrimination at the workplace provided by the Labour Code by introducing several discrimination criteria and new notions, such as “harassment at work”, “victimization” and “discrimination by association”:

- the list of discrimination criteria was supplemented, being explicitly included the chronic non-contagious disease, HIV infection and belonging to a disadvantaged category;
- the indirect discrimination is redefined, representing any provision, action, criterion or seemingly neutral practice that has the effect of disadvantaging a person to another person on the basis of one of the criteria of discrimination, unless that provision, action, criterion or the practice is objectively justified by a legitimate aim and whether the means to that end are proportionate, appropriate and necessary;
- the harassment is expressly defined in the Labour Code as any type of behavior based on one of the criteria provided in para. (2) of art. 5 which has as its purpose or effect the damage of a person's dignity and leads to the creation of an intimidating, hostile, degrading, humiliating or offensive environment;
- the discrimination by association was introduced and defined as any act or act of discrimination committed against a person who, although not part of a category of persons identified according to the criteria provided in para. (2) of art. 5, is associated or presumed to be associated with one or more persons belonging to such a category of persons;
- the victimization is defined as any adverse treatment, coming in response to a complaint or legal action regarding the violation of the principle of equal treatment and non-discrimination;
- is also considered discrimination the act of ordering, in writing or verbally, a person to use a form of discrimination against one or more persons;
- instead, it is not considered discrimination the exclusion, restriction or preference in respect of a particular job in case in which, due to the specific nature of the activity in question or the conditions under which the activity is performed, there are certain essential and decisive professional requirements, provided that the purpose is legitimate and the requirements proportionate;
- the non-compliance with the legal provisions mentioned above is sanctioned with a fine from Lei 1,000 to Lei 20,000.

**The Government Emergency Ordinance no. 120/2020 on the establishment of support measures for employees and employers in the context of the epidemiological situation caused by the spread of SARS-CoV-2 coronavirus** was published in the Official Gazette of Romania, Part I, no. 658 of July 24, 2020, entering into force on the same date.

The Ordinance establishes that, by derogation from the provisions of art. 24 of Law no. 55/2020 on some measures to prevent and combat the effects of the COVID-19 pandemic (as subsequently amended), the employees of the employers whose activity has been suspended due to the epidemiological investigation conducted by the county public health directorates, respectively the municipality of Bucharest, benefit from granting the indemnity (in the amount of 75% of the basic salary corresponding to the job occupied) provided in art. XI of the Government Emergency Ordinance no. 30/2020 for amending and supplementing some normative acts, as well as for establishing measures in the field of social

protection in the context of the epidemiological situation determined by the spread of SARS-CoV-2 coronavirus, approved with amendments and completions by Law no. 59/2020, with subsequent completions.

The indemnity mentioned above is calculated for the number of days in which the activity was suspended.

The above mentioned measure applies for the entire period in which the activity is suspended, but not later than December 31, 2020. This measure does not apply for the employees on sick leave and receiving the related social insurance indemnity.

## litigation and arbitration - legal changes published in July 2020

### **Decision of the High Court of Cassation and Justice no. 8/2020 regarding the examination of the notification formulated by the Board of Directors of the Braşov Court of Appeal regarding a legal issue was published in the Official Gazette, Part I no. 580 of July 2, 2020 is applicable from the same date.**

The High Court admitted the appeal in the interest of the law and established that, in the unitary interpretation and application of the provisions of art. 1 para. (1), art. 2 para. (1) a), r) and s) and art. 8 para. (1<sup>1</sup>) and (1<sup>2</sup>) of the Law of contentious administrative matters no. 554/2004, as subsequently amended and supplemented, in order to exercise judicial review of administrative acts at the request of associations, as interested social bodies, invoking legitimate public interest must be subsidiary to invoking a legitimate private interest, the latter arising from the direct link between the administrative act subject to judicial review and the direct purpose and the objectives of the association, according to their statute.

### **Decision of the Constitutional Court of Romania no. 421/2020 regarding the admission of the exception of unconstitutionality of the provisions of art. 146<sup>1</sup> of the Code of Criminal Procedure was published in the Official Gazette, Part I no. 661 of July 27, 2020 and is applicable from the same date.**

The Court admitted the exception of unconstitutionality raised by Horaţiu Dumbavă in File no. 2.871/1/2018 of the High Court of Cassation and Justice - Criminal Section and stated that the legislative solution contained in the provisions of art. 146<sup>1</sup> of the Code of Criminal Procedure, which does not allow challenging the legality of the measure regarding the obtaining of a person's financial transactions data by the person covered by it, who is not the defendant, is unconstitutional.

## public procurement - legal changes published in July 2020

**Decision of the Constitutional Court no. 221/2020 regarding the admission of the exception of unconstitutionality of the Government Emergency Ordinance no. 23/2020 for the amendment and completion of some normative acts with impact on the public procurement system** was published in the Official Gazette of Romania, Part I, no. 594 of July 7, 2020.

On February 26, 2020, the Ombudsman notified the Constitutional Court with the exception of the unconstitutionality of the provisions of art. IV point 26 of the Government Emergency Ordinance no. 23/2020 for the amendment and completion of some normative acts with impact on the public procurement system ("G.E.O. no. 23/2020"). In support of the exception, it was stated that, in addition to provisions likely to "improve and make the public procurement system more flexible", the G.E.O. no. 23/2020 includes both norms regarding the functioning of the courts - art. IV points 18-24, by establishing some terms, procedures and measures that may be ordered by the courts - as well as norms that establish a new disciplinary violation, aspects that obviously belong to the status and obligations of the judge. Therefore, in the procedure of adopting the G.E.O. no. 23/2020, which includes provisions regarding the disciplinary liability of judges, as well as regarding the judicial organization, it was necessary to request the opinion of the Superior Council of Magistracy; the lack of its request has as a consequence the disregard of the constitutional norms contained in art. 1 para. (5) and art. 134 para. (4).

The Constitutional Court found that not requesting the legal opinion of the Superior Council of Magistracy is a violation of art. 1 para. (5) and art. 133 para. (1) of the Constitution, which constitutes, implicitly, a violation of art. 1 para. (3) on the rule of law.

The Court also raised the issue of violation of art. 79 para. (1) of the Constitution, regarding the opinion of the Legislative Council that was to accompany the normative act, including the criticized text. From this point of view, it was noted that the obligation to request the opinion of the Legislative Council has a constitutional nature and its scope is not limited to normative acts covering a certain area of regulation (see the opinion of the Superior Council of Magistracy), but regarding the normative act as a whole, which means that the violation of art. 1 para. (3) and (5), as well as of art. 79 para. (1) of the Constitution refers to the emergency ordinance, as a whole.

For these reasons, the Constitutional Court admitted the objection of unconstitutionality raised by the Ombudsman and found that the G.E.O. no. 23/2020 for the amendment and completion of some normative acts with impact on the public procurement system is unconstitutional, as a whole.

It should be mentioned that there is a separate opinion formulated by 2 of the judges, according to which the exception of unconstitutionality could be admitted only with regard to the provisions of art. IV point 26 of the G.E.O. no. 23/2020, with which the Constitutional Court was explicitly invested, and the unconstitutionality could target only those provisions, punctual, contextual and circumstantial, and not the normative act as a whole.

**Government Emergency Ordinance no. 114/2020 on amending and supplementing some normative acts with impact in the field of public procurement** was published in the Official Gazette of Romania, Part I, no. 614 of July 13, 2020, entering into force on the same date.

The Emergency Ordinance no. 114/2020 (hereinafter referred to as “**G.E.O. 114/2020**” or the “**Emergency Ordinance**”) amended a series of primary normative acts in the field of public and sectoral procurement (as well as concessions), in order to implement urgent measures leading to to simplify, improve and make more flexible the public procurement system.

Through the G.E.O. no. 114/2020, the Government Emergency Ordinance no. 23/2020 for the amendment and completion of some normative acts with impact on the public procurement system, published in the Official Gazette of Romania, Part I, no. 106 of 12 February 2020, was repealed.

### Law no. 98/2016

The new Emergency Ordinance brings a series of amendments to the Law no. 98/2016 on public procurement, as follows::

- it is established that the contracting authority has the obligation not to disclose the information from the technical proposal, the elements of the financial proposal and/ or substantiation/ price/ cost justifications sent by the economic operators indicated and proved by them as confidential as they are: personal data , technical or trade secrets or are protected by an intellectual property right; the confidentiality applies only to data / information indicated and proven to be personal data, technical or trade secrets or are protected by an intellectual property right;
- it is expressly stated that the information indicated by the economic operators as confidential must be accompanied by the proof that gives them the character of confidentiality, proof that becomes annexed to the offer; otherwise, the obligation of the contracting authority not to disclose the information indicated by the economic operators as confidential shall cease to exist;
- a number of clarifications are provided regarding the award procedure applicable to social services and other specific services;
- the concept of “*IT mechanism for simplified procedures*” is introduced, designating the technical facility implemented in SEAP for carrying out the simplified procedures;
- it is clarified the alternative character of the two cases of exclusion provided by art. 165 of Law no. 98/2016 for breach of obligations regarding the payment of taxes, fees or contributions to the general consolidated budget;
- the obligation of the contracting authorities to offer the possibility to the candidates/ bidders who participated in the preparation of the award procedure to demonstrate that their involvement in its preparation cannot distort the competition, before being excluded from the award procedure;
- additions are made in connection with the measures adopted by the economic operators who are in one of the situations of exclusion provided by art. 164 and 167 of Law 98/2016 to prove their credibility; thus, these measures presented by economic operators to demonstrate credibility will be assessed by the contracting authority taking into account the seriousness and particular circumstances of the offense or offense in question; if the measures submitted are considered insufficient by the contracting authority, it shall provide the economic operator with a statement of the reasons which led to the decision to exclude him from the award procedure;
- it is established that, if the contracting authority cannot conclude the contract/ framework agreement with the bidder whose tender has been established as the winner, due to the fact that the bidder in question is in

a situation of force majeure or fortuitous impossibility to execute the contract/ framework agreement, the contracting authority has the obligation to declare the next ranked bid the winner, provided that it exists and is admissible;

- clear deadlines are stipulated in which the contracting authority has the obligation to prepare the report of the procedure (exceptions are strictly indicated), namely:
  - a) 60 working days from the deadline for submission of tenders/ initial tenders/ projects, for open tender procedures, restricted tender, innovation partnership, solution competition and award procedure applicable to social and other specific services;
  - b) 20 working days from the deadline for submission of tenders, for the negotiated procedure without prior publication and for the simplified procedure;
  - c) 100 working days is the deadline for submission of tenders for competitive negotiation and competitive dialogue procedures.
- it is stipulated that the contracting authorities must publish in the dedicated section of SEAP all the amendments of the public procurement contracts/ framework agreements, so that the final duration and price at their finalization or termination to result.

### **Law no. 99/2016**

The changes brought by G.E.O. 114/2020 to the **Law no. 99/2016** on sectoral procurement are, in principle, the same as those brought to the Law no. 98/2016 and indicated briefly above, clarifications being provided regarding the substantial amendment of a contract or framework agreement.

### **Law no. 101/2016**

**Law no. 101/2016** on remedies and means of appeals for the award of public procurement contracts, sectoral contracts and works and service concession contracts, as well as for the organization and functioning of the National Council for Solving Complaints has been amended and supplemented as follows:

- the concept of act of the contracting authority has been clarified, in the sense that it does not concern the direct procurement;
- the term in which the person injured by an act of the contracting authority may file a complaint to the National Council for Solving Complaints (NCSC) has been modified in case the estimated value of the public/ sectoral procurement or concession procedure is lower than the value thresholds in relation to which it is mandatory to send for publication to the Official Journal of the European Union the notices of participation: **7 days** from the day following the notification of the act of the contracting authority considered illegal (the previous term was 5 days);
- it is mentioned that, in case the complaint concerns the content of the award documentation, published in the Electronic Public Procurement System (SEAP), the date of acknowledgment is the date of publication of the award documentation;
- it provides the obligation of the contracting authority to publish the complaint in full in the SEAP in one day following its receipt, eliminating the restriction of not publishing the information that the economic operator specifies as being confidential, classified or protected by an intellectual property right;

- the obligation of the economic operators to communicate the request for voluntary intervention submitted in the case both to the NCSC and to the contracting authority and to the complainant/ complainants is introduced, no later than the expiration of the legal term for its submission; the previous regulation provided that the request for intervention submitted to the NCSC was to be communicated to the other parties to the case, within two days of receipt;
- it is established that the economic operators have a double obligation regarding the confidential documents in the bids, so that the access to them will be restricted by the NCSC to the other parties of the case: to declare and prove the confidentiality of the respective documents;
- the term in which NCSC solves the complaint has been extended: 20 days (the previous term was 15 days) from the date of receiving the file of the public procurement, of the sectorial procurement or of the concession; also, the deadline for resolving the complaint by way of exception was extended: 10 days (the previous deadline was 5 days);
- it is provided that the decisions of the NCSC regarding the settlement of the complaint may be challenged by the contracting authority and/ or by any person harmed by the measures ordered with a complaint to the competent court, both for reasons of illegality and lack of grounds, within 10 days from the communication for the parties of the case, respectively from the date of being informed by other injured persons (in the previous regulation the term was 10 working days);
- it is mentioned that the complaint formulated against the decision issued by NCSC is exempted from the payment of any judicial stamp duty;
- it is mentioned that, insofar as NCSC solved the complaint by resolving a procedural exception or analyzed only a part of the reasons invoked in the complaint, the settlement on the merits of the case as a result of admitting the complaint is made by the court at a separate time, which is established after the solution regarding the complaint; in other words, in the two situations mentioned above, the complaint will be solved "in two steps";
- novelty elements are brought regarding the complaint filed judicially, namely:
  - a) similar to the administrative-jurisdictional complaint, the obligation of the contracting authority to publish the complaint in SEAP is provided, within one day from its receipt; in the case of award procedures whose initiation is not carried out by publication in the SEAP, the contracting authority has the obligation to communicate the complaint to the other economic operators interested/ involved in the procedure, within one day from the date of its receipt;
  - b) it is introduced the provision according to which the complaints formulated in the stage up to the deadline for submitting the requests to participate/ offers/ projects are jointed; at the same time, the complaints formulated in the stage after the deadline for submitting the participation requests/ offers/ projects are also jointed;
  - c) the complaints filed judicially are charged 2% of the estimated value of the contract, but not more than Lei 100,000,000; if the award procedure is organized in lots, the stamp duties shall relate to the estimated value of each disputed lot;
  - d) the appeal filed against the decision to settle the complaint is charged with 50% of the fee provided above (the contracting authorities that file the appeal are exempted from the judicial stamp duty);
- a number of extremely important changes are introduced with regard to the settlement of disputes in court;

- a) it is established that the disputes and requests regarding the granting of compensations for the damages caused within the award procedure, as well as those regarding the annulment or nullity of the contracts are solved in the first instance, urgently and especially, by the administrative and fiscal contentious section of the tribunal in whose district the registered seat of the contracting authority is situated or in the district in which the claimant has its registered seat/ domicile, by means of panels specialized in public procurement;
  - b) instead, the disputes and requests arising from the execution of administrative contracts are solved in the first instance, urgently and especially, by the civil section of the tribunal in the district where the contracting authority has its registered seat or in the district where the claimant has its registered seat/ domicile;
  - c) the decision issued in the case of litigations regarding the granting of compensations for the damages caused within the award procedure, as well as those regarding the annulment or nullity of the contracts can be challenged by **second appeal** within 10 days from its communication, before the administrative and fiscal contentious section of the court of appeals;
  - d) the decision issued in the case of litigations and claims arising from the performance of the administrative contracts can be **appealed** within 10 days from its communication to the hierarchically superior court; the appeal is resolved urgently and with priority, within a term that will not exceed 30 days from the date of legal referral to the court;
  - e) the remedies provided above produce a stay of enforcement and are judged urgently and with priority, and in case of admitting the appeal/second appeal, the court shall, in all cases, re-judge the dispute on its merits; in order to comply with the principles of orality, adversarial proceedings and the right of defense, the court shall decide the merits of the case after admitting the complaint at a different hearing term, which shall be determined after the ruling on the complaint on the exception;
  - f) in connection with the modality of taxing the requests submitted to the court, they are taxed as follows:
    1. 2% of the value of the request, but not more than Lei 100,000,000;
    2. the requests not valued in money are charged with Lei 450;
    3. the second appeal/ appeal is charged with 50% of the fees provided above, and the appeals filed by the contracting authorities are exempted from the judicial stamp duty.
- the waiting period for the conclusion of the contract has been increased if the estimated value of the public procurement or concession procedure is lower than the value thresholds in relation to which it is mandatory to send for publication to the Official Journal of the European Union: 8 days (the previous term was 6 days) starting with the day following the moment of sending the contract award decision to the interested bidders/ candidates, by any means of communication provided by the public procurement legislation, the sectoral procurement legislation or the works concessions and concessions legislation of services;
  - with regard to the bond required for the submission of the complaint:
    - a) G.E.O. no. 114/2020 eliminates the bond for the complaint filed judicially;
    - b) related to the NCSC practice that allows the subsequent constitution of the bond, it is established that it can be constituted in maximum 5 days from the date of the NCSC notification in this respect;
    - c) as regards of the amount of the bond:

1. the concept of fixed value of the contract is replaced by the concept of estimated value of the contract;
  2. the bond is established as follows:
    - i. 2% of the estimated value of the contract, if it is lower than the value thresholds provided for the publication of the notice of participation in the JOUE, but not more than Lei 35,000 for the complaints submitted in the stage up to the deadline for submission of requests to participate/ offers/ projects, respectively not more than Lei 88,000 for the complaints submitted in the stage after the deadline for submitting the requests to participate/offers / projects;
    - ii. 2% of the estimated value of the contract, if it is equal to or higher than the value thresholds provided for the publication of the notice of participation in the JOUE, but not more than Lei 220,000 for the complaints filed in the stage up to the deadline submission of requests to participate/ offers/ projects, respectively not more than Lei 880,000 for the complaints submitted in the stage after the deadline for submission of requests to participate/ offers/ projects;
  3. in the case of a procedure for awarding the framework agreement, the provisions of para. (1) of art. 611 refers to twice the estimated value of the largest subsequent contract to be awarded under the respective framework agreement;
  4. in the case of an award procedure divided into lots, the provisions of para. (1) of art. 611 refers to the estimated value of each contested lot.
- d) in connection with the manner of restitution of the receipts for the establishment of the bonds, G.E.O. no. 114/2020 provides the following:
1. the bond shall be returned to the person who filed it, not earlier than 30 days from the date of the final decision of the NCSC;
  2. the bond shall not be returned to the person who filed it to the extent that the contracting authority proves that it has filed a claim for the payment of the due compensation until the expiry of the 30-day period from the date of the final decision of NCSC;
  3. the request for restitution is submitted to NCSC and to the contracting authority, after the expiration of the term of 30 days; the bond shall be returned immediately if the contracting authority expressly declares that it does not seek to oblige the complainant who provided the bond for damages caused as a result of filing of the complaint; within 2 days from the date of the request of the complainant or of NCSC, the contracting authority has the obligation to send the answer;
  4. NCSC, as the case may be, decides on the request for restitution of the bond within 5 days, through a decision subject to complaint to the competent court within 5 days from the communication (the complaint is suspensive of execution).

### **G.E.O. no. 98/2017**

G.E.O. no. 114/2020 also brings a series of amendments to the Government Emergency Ordinance no. 98/2017 on the ex ante control function of the process of awarding public procurement contracts/ framework agreements, sectoral contracts/ framework agreements and works concession and service concession contracts (“**G.E.O. 98/2017**”), and among the most important we mention:

- it is established that the ex ante control exercised by the National Agency for Public Procurement (NAPP) aims at verifying the conformity with the applicable legal provisions in the field of public/ sectoral procurement/ concessions, from the point of view of regularity and quality, based on checklists;
- it is mentioned that the contracting authority selected for the ex ante control will be notified before the start of the control activity, through SEAP, within 2 working days from the upload of the award documentation in SEAP/ transmission of the notification on the intention to amend the contract or to negotiate without prior publication;
- as a novelty, it is provided that the contracting authority may decide to publish the participation notice/ simplified participation notice/ concession notice/ competition notice, with or without remedying the deviations found by NAPP by the conditional notice issued as a result of the ex ante control, having the obligation to publish the notice as issued;
- it is outlined the possibility for the contracting authority to decide to continue the award procedure with or without remedying the deviations found by NAPP by the conditional notice, the contracting authority having the obligation to publish the final notice with the publication of the interim report/ procedure report, respectively on the day of transmission on the result of the selection/ result of the procedure;
- it is provided that, if the contracting authority has objections regarding the findings and/ or remedial measures ordered, identified by NAPP as a result of the ex ante control activity of the award process, the conciliation procedure may be initiated.

### **Transitional provisions**

The award procedures in progress on the date of entry into force of the G.E.O. 114/2020 remain subject to the legislation in force at the date of their initiation ("*award procedure in progress*" means any procedure for which a simplified notice of participation, an invitation to tender or, as the case may be, a concession notice, has been issued before the date of entry into force of G.E.O. 114/2020).

The complaints, trials and requests that are pending before the National Council for Solving Complaints or as the case may be, before the courts, on the date of entry into force of G.E.O. 114/2020 continue to be solutioned in accordance with the procedure provided for by the legislation in force on the date on which they were initiated.

The term for exercising the means of appeal is subject to the law in force at the time when the appeal was filed by administrative-jurisdictional or judicial means.

**Law no. 148/2020 for the amendment of Law no. 98/2016 on public procurement** was published in the Official Gazette of Romania, Part I, no. 658 of July 24, 2020, entering into force on July 27, 2020.

The Law includes the following amendments to the Law no. 98/2016:

- it is provided that the contracting authority has the right to request, and the economic operator has the obligation to communicate the identification data of the holders/ beneficiaries of the bearer shares, in case the form of organization of the bidder - economic operator tenderer/ candidate, third party supporter or subcontractor to the procedure is a joint stock company, with share capital represented by bearer shares;

- in addition, it is established that the legal representative of the economic operator submits a statement on its own responsibility regarding the holders/ real beneficiaries of the bearer shares, under the sanctions provided by art. 326 of the Criminal Code;
- non-compliance with the above mentioned obligations represents situations potentially generating conflict of interests, within the meaning of art. 59 of Law no. 98/2016;
- moreover, the contracting authority is obliged to exclude from the award procedure any economic operator, organized as a joint stock company, whose share capital is represented by bearer shares and which does not prove the identity of the holders/ beneficiaries of the bearer shares.

**Decision of the High Court of Cassation and Justice no. 40/2020 regarding the referral that forms the object of the File no. 696/1/2020 is legally constituted according to the provisions of art. 520 para. (8) of the Code of Civil Procedure and of art. 37 of the Regulation on the organization and administrative functioning of the High Court of Cassation and Justice** was published in the Official Gazette of Romania, Part I, no. 683 of July 31, 2020, being applicable from the same date.

The High Court of Cassation and Justice was seised by three panels of the Bucharest Court of Appeals, the Galati Court of Appeals and the Constanța Court of Appeals, which are responsible for resolving the second appeal and the appeal in litigations whose settlement procedure is the special one, provided by the provisions of Law no. 101/2016 on remedies and means of appeal for the award of public procurement contracts, sectoral contracts and works concession and service concession contracts ("**Law no. 101/2016**"), and one of the issues that needs to be resolved concerns the very nature of the appeal incidental in such disputes.

The High Court admitted the 3 related referrals and decided that, in the interpretation and application of art. 55 para. (3) and art. 53 para. (1<sup>1</sup>) of Law no. 101/2016 (in the form in force prior to the amendment by the Government Emergency Ordinance no. 23/2020 for amending and supplementing some normative acts with impact on the public procurement system): the decision pronounced in the first instance in the litigations and requests arising from the execution of administrative contracts can be appealed within 10 days from the communication to the hierarchically superior court - the section or panel specialized in litigation with professionals, according to the procedure provided by the Law no. 101/2016.

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

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