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News in Laws – Legal Monthly Newsletter
March 2020

The coronavirus and force majeure

by Alice Ene - Managing Associate and Laura Anghel – Associate Voicu & Filipescu

As the World Health Organization declared the Covid-19 outbreak as a Public Health Emergency of International Concern, more and more countries are taking measures to restrict the movement of people and to cancel major events with an impact on national economies and not only (see the sudden cancellation of the 90th edition of the Geneva Motor Show), we ask ourselves whether a virus can change the world economic picture.

Legal Changes of February 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:

- Banking & Finance
- Corporate
- Data Protection
- Litigation & Arbitration
- PPP & Concessions
- Public Procurement

VF News

The chapter focusing on Romania, signed by Marta Popa, Senior Partner at Voicu & Filipescu, was included into the prestigious comparative guide Getting the Deal Through - Public Private Partnership 2020 edition. The edition can be consulted here.

Article "Clarifications concerning the application of the anti-money laundering legislation - which are the reporting entities and what are the novelties brought on by the rules developed by ONPCSB" by Voicu & Filipescu Partner Raluca Mihai, published on Juridice.ro. Click here to read the article.

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.

Chambers and Partners Europe, 2019 edition recommends Voicu & Filipescu for Corporate and M&A practice.

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.

Legal500 EMEA 2019 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. Daniel Voicu, Mugur Filipescu, Marta Popa, Roxana Negutu, Raluca Mihai, and Mariana Popa are also recommended by the prestigious guide for their activity.

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As the World Health Organization declared the Covid-19 outbreak as a Public Health Emergency of International Concern, more and more countries are taking measures to restrict the movement of people and to cancel major events with an impact on national economies and not only (see the sudden cancellation of the 90th edition of the **Geneva Motor Show**), we ask ourselves whether a virus can change the world economic picture.

Not only are entire industries and businesses in China affected, but as this virus spreads globally, other states impose prevention measures, local quarantine and travel restrictions, which can have direct or indirect effects on how legal reports in progress are performed, under contracts concluded before the outbreak/announcement of the epidemic.

Who can be blamed for not fulfilling such contracts or for their improper performance? Can these contracts be suspended during the period of the epidemic if it has been officially declared or during the quarantine period, in particular cases?

Most contracts contain clauses that refer to situations of force majeure in which the negative consequences of non-performance of the contracts in whole or in part are neutralized by suspending the contractual obligations assumed or even by the termination of the contract, when the force majeure operates for a longer period of time.

According to art. 1351 para. (2) of the Romanian Civil Code, "*force majeure is any external, unpredictable, absolutely invincible and inevitable event*". These situations usually include calamities, armed conflicts, revolutions, coups, embargoes, strikes, etc. At the case law level, epidemics have also been considered, in some situations, to be exonerating causes of liability, being classified as events of force majeure.

From the very definition of force majeure in domestic law, it follows that in order to establish an exemption from contractual liability due to the spread of coronavirus, it must be proven that it has an external origin or etiology, that it was unpredictable, absolutely invincible and inevitable.

And yet, the absolutely invincible and inevitable unpredictable events do not automatically constitute cases of force majeure, but they must be analyzed on a case-by-case basis to determine whether there is a causal link between the event that is considered force majeure and the fact that the legal contract/relationship generating obligations is not fulfilled.

Thus, in the end, the courts are required to assess according to the specific circumstances of the case whether, for a certain legal relationship, a certain event may be described as force majeure, depending on the objective reality known to the contracting parties, that is depending on the reality they should have been aware of at the time of assuming the obligations. Only after the unpredictability is proven, the court proceeds to the next stage, namely the analysis of the seriousness of the non-performance and the determination of any actual harm.

Therefore, there is no valid general rule according to which an event (determined by the declaration of a national epidemic in general, or even in the case of an illness in particular) is automatically considered to be a case of force majeure, but it is necessary to analyze concretely the way in which this event affected the fulfillment of some essential obligations assumed by the contract.

In similar cases, such as avian (H5N1) or swine (H1N1) flu, the courts have considered that there is unpredictability especially at the time of occurrence of these events, but as the risks of the epidemics became known, they lost of the unpredictable nature and no longer represented events of force majeure. This is why, from a legal point of view, the official communications of government institutions have a special role in shaping the awareness of the subjects of these legal relationships.

So as long as there are only a few confirmed cases in Romania, Covid-19 is not currently considered an epidemic = force majeure event (just as there is no global pandemic), we ask ourselves whether the effects of the influenza virus (including quarantine), home isolation, suspension of employment contracts, etc.) could be seen by the Romanian courts as events of force majeure, taking into account the world-wide context and the measures ordered by the authorities.

For example, suppose that, in order to fulfill the obligations established by a contract concluded prior to the knowledge of the occurrence and development of the Coronavirus epidemic, it is necessary to travel to cities or countries where numerous cases of Covid-19 infection have been detected, and the authorities have banned travel in and out of the territories of the countries/cities in question, meaning that, independently of the will of the party, it does not have the objective possibility to fulfill its obligations. Or, suppose that for the fulfilment of certain obligations, a certain deadline has been stipulated, but the debtor of the obligation to must spend 14 days in quarantine/home isolation, as a result of his coming back from areas severely affected by the epidemic, and the deadline for fulfilling the obligations is within these 14 days. Thus, although the contracting party that has to fulfill this obligation is prevented for objective reasons, outside his will, does it automatically mean that we are dealing with a situation of force majeure?

For ongoing contracts and those concluded before the parties knew of the risk of this epidemic, the courts could emphasize the invincible and inevitable nature of the eventual force majeure, where the causal link between the event and the non-performance of the obligations must be very strongly supported and proven.

In the case of contracts to be concluded during this period or which are already under negotiation, in this global context where the negative consequences for the national and world economy are not yet evaluated, greater attention is needed in reconsidering the force majeure clauses in which to expressly and explicitly stipulate how it operates; but why not, separately from events of force majeure, the parties might provide potential risk mitigation mechanisms, including possibilities to modify/adapt the schedule for fulfilling contractual obligations, the right of suspension or termination of the contract before the deadline, ways of regulating the price of the contract related to the market change, the demand/supply ratio, etc.

According to the provisions of art. 28 paragraph (2) (i) of Law no. 335/2007, the Chamber of Commerce and Industry of Romania notifies, upon request, for Romanian companies, based on supporting documentation, the existence of force majeure events and their effects on the performance of international commercial obligations. However the opinion and the certificate of attestation of the force majeure event issued by the Chamber of Commerce and Industry

of Romania/any other chamber of commerce in the country are not always sufficient to prove the existence of a case of force majeure, the courts being vested to verify the fulfillment of all the legal conditions for a force majeure situation.

Given that have already been requests registered before the courts for exercising certain obligations in the context generated by Covid-19, the general issues presented above shall become more specific, but hopefully in a restricted practice.

However, we would like to reiterate that, in certain specific areas, national and European law allow for the termination of rapports in exceptional cases, such as, for example, the passenger's right to terminate the contract regarding the package of travel services before starting its performance, without paying any termination fee, in the event of unavoidable and extraordinary circumstances occurring at the place of destination or in its immediate vicinity and which significantly affect the fulfilment of the package or which significantly affect the transport of passengers to the destination, as regulated by Directive (EU) no. 2015/2302 of the European Parliament and of the Council on travel packages and associated travel services, transposed into national law by Government Ordinance no. 2/08.02.2018.

By proper planning, uncertainties and unforeseeable situations can be better managed, and the companies should already, together with specialists, assess the applicability of force majeure within basic contracts, including from the perspective of the law applicable to said contracts, or to initiate the renegotiation of the existing contractual terms and conditions, knowing the domino effect which could be generated by the collapse of only a small number of companies, but with an impact in their field/industry.

banking & finance - legal changes published in February 2020

Decision no. 23/2019 regarding the examination of the appeal in the interest of the law submitted by the Bucharest Appeal Court on an issue of law, published in the Official Gazette no. 142 of February 21, 2020.

The subject of the appeal in the interest of the law concerns the nature of enforceable title of the distance financial services agreements concluded under the terms of the Government Ordinance no. 85/2004 when the debtor has not signed the agreement, but the proof of the agreement's conclusion is made with an agreement signed by the creditor, with an account statement or other similar evidence that shows that the amount was transferred to the debtor's account or, as the case may be, such amount was drawn by the debtor and with a confirmation, by email or SMS, from the debtor regarding the acceptance of the loan offer and from the creditor regarding the acceptance of the debtor's order.

The High Court of Cassation and Justice admitted the appeal in the interest of the law and established that the interpretation and application of the provisions of art. 3 lit. a), b), e) and f) and art. 8 of the Government Ordinance no. 85/2004 related to art. 120 of the Government Emergency Ordinance no. 99/2006 or, as the case may be, art. 52 paragraph (1) of Law no. 93/2009, art. 632 paragraph (2) and art. 272 of the Civil Procedure Code or, as the case may be, art. 5 of Law no. 455/2001, the distance financial services agreement concluded in accordance with the provisions of art. 8 of the Government Ordinance no. 85/2004 constitutes an enforceable title in the absence of the handwritten signature or the extended electronic signature, unless the parties impose the signature as a condition for the validity of the agreement.

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News in Laws – Legal Monthly Newsletter
March 2020

corporate – legal changes published in February 2020

The National Trade Registry Office (ONRC) has put into operation the Beneficial Owners Registry

On February 20, 2020, the National Trade Registry Office informed that it put into operation the Beneficial Owners Registry, Romanian companies having the obligation to submit a declaration regarding the beneficial owners of the legal entity in order to be entered in the new registry provided by Anti-Money Laundering and Terrorism Financing Law 129/2019.

ONRC's notice:

In accordance with the provisions of art. 19 paragraph (1), (2) and (5) of Anti-Money Laundering and Terrorism Financing Law no. 129/2019, as well as for amending and supplementing certain acts, the National Trade Registry Office has put into operation the Beneficial Owners Registry for companies.

(I) According to art. 56 paragraph (1) of the aforementioned act, **the legal persons subject to the obligation to register in the trade registry**, except for autonomous government entities, national companies and companies wholly or mainly owned by the state, **must submit a declaration regarding the beneficial owner of the legal person for registration in the Beneficial Owners Registry**, as follows:

(1) **upon incorporation**

Among the other documents required by law, upon registration, one shall also submit the declaration regarding beneficial owners, given by the legal representative, in the form provided by Law no. 129/2019.

(2) **annually**

The annual declaration is submitted to the trade registry office where the legal person is registered within 15 days from the approval of the annual financial statements.

(3) **any time a change occurs**

Within 15 days from the date when a change regarding the identification data of the beneficial owner takes place.

Failure by the legal representative to declare the identification data of the beneficial owner, annually or whenever a change occurs, constitutes an administrative offence and is sanctioned with a fine from RON 5,000 lei to RON 10,000.

The finding of the offence and the application of the sanction is carried out by the bodies with control powers within the Ministry of Public Finance - the National Agency for Fiscal Administration and its territorial units and by the National Anti-Money Laundering Office, through its own agents.

The citation is communicated to the trade registry office, and it mentions that the non-submission of the declaration attracts the dissolution of the company, under the conditions of art. 237 of the Companies Law no. 31/1990, republished, with subsequent amendments and additions.

If, within 30 days from the date of application of the sanction, the representative of the legal person referred to in art. 56 paragraph (1) does not submit the declaration regarding the identification data of the beneficial owner, at the request of the National Trade Registry Office, the court or, as the case may be, the specialized court will be able to rule the dissolution of the company (the dissolution cause can be removed before submitting arguments on the merits).

(II) **In the case of companies registered until 21.07.2019** (the date of entry into force of the law), except for national companies and companies wholly or mainly owned by the state, **the deadline for submission** (according to art. 62 paragraph (1) of Law no. 129/2019) **is 12 months from the entry into force of the law, namely by 21.07.2020.**

The declaration regarding the identification data of the beneficial owners is submitted, through the care of the legal representative, to the trade registry office where the company is registered for registration in the Beneficial Owners Registry, kept by the National Trade Registry Office.

Non-compliance by the administrator representing the company with the obligation stipulated in art. 62 paragraph (1), at the expiration of the aforementioned term, constitutes an administrative offence and is sanctioned with a fine from 5,000 lei to 10,000 lei.

The finding of offences and the application of sanctions are carried out by the control bodies of the Ministry of Public Finance - the National Agency for Fiscal Administration and its territorial units and by the National Anti-money Laundering Office, through its own agents.

The citation is communicated to the trade registry office, and it mentions that the non-submission of the declaration attracts the dissolution of the company, under the conditions of art. 237 of the Companies Law no. 31/1990, republished, with subsequent amendments and additions.

If, within 30 days from the date of application of the sanction, the representative of the legal person referred to in art. 56 paragraph (1) does not submit the declaration regarding the identification data of the beneficial owner, at the request of the National Trade Registry Office, the court or, as the case may be, the specialized court will be able to rule the dissolution of the company (the dissolution cause can be removed before submitting arguments on the merits).

In all the above cases, the declaration can be given in front of the representative of the trade registry office or it can be submitted in authenticated form.

In 2020, the legal persons established until the date of entry into force of the law, subject to the obligation to submit the beneficial owner **declaration submit a single declaration, after the approval of the annual financial statement**, which will cover both the obligation regulated by the provisions of art. 62 paragraph (1) of the law, as well as the one regulated by the provisions of art. 56 paragraph (4).

Registration requests aimed at submitting the above statements can be submitted at the **counter, online or by mail, with acknowledgment of receipt**. The application transmitted in electronic form will have the extended electronic signature incorporated, attached or logically associated.

In the case of applications submitted online or by mail, the declarations regarding the beneficial owners will be annexed, in authenticated form.

For more information, go to the institution's website www.onrc.ro, *Section - Entries for legal entities, Subsection - Registration of data from the declaration on the beneficial owner.*

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News in Laws – Legal Monthly Newsletter
March 2020

data protection - legal changes published in February 2020

1 SUMMARY OF ANSPDCP'S ACTIVITY FOR 2019

According to the communiqué published on February 5, 2020, the National Supervisory Authority for the Processing of Personal Data (the "Authority" or ANSPDCP) released the summary of its activity for the year 2019. Thus, in 2019, the Authority received a total number of ***6193 complaints, intimations and notifications concerning the personal data breaches***, based on which ***912 investigations were opened***. As a result of the investigations, ***28 fines*** were imposed in a total amount of ***RON 2,339,291.75***. Also, ***134 warnings*** were applied and ***128 corrective measures*** were ordered.

Regarding the ***activity of handling the complaints***, the Authority received a total of ***5808 complaints***, on the basis of which ***527 investigations*** were initiated.

The complaints received by the Authority in 2019 mainly focused on the following areas:

- the disclosure of personal data without the consent of the data subjects;
- violation of the rights and principles provided by the GDPR;
- reporting of data to the Credit Bureau;
- installation of video surveillance systems within various entities;
- receiving unsolicited marketing messages;
- breach of the security and confidentiality of the processing of personal data by failure of the controllers to adopt appropriate technical and organizational measures regarding the security of the processing;
- non-compliance with the conditions regarding online consent.

In 2019, regarding the ***personal data breaches***, the controllers submitted, both under the GDPR and the Law no. 506/2004, ***233 notifications***, and the complaints regarding possible non-conformities with the provisions of the GDPR ***amounted to 152***.

As a result of the complaints received and the security breaches notified by the data controllers, during the year 2019, ***385 ex-officio investigations*** were opened.

At the same time, during the year 2019, a number of ***1106 requests for the point of views*** on various aspects regarding the interpretation and application of Regulation (EU) 679/2016, from controllers and processors acting in the public and private sector, from other entities, as well as from individuals. In addition, the controllers, the public and the data

subjects were also informed through ***more than 80 responses provided to citizens and the media***, both from Romania and abroad, according to Law no. 544/2001.

Concerning the ***activity of representation in court***, the Authority has managed a number of ***207 files*** that are pending in the courts in different procedural stages.

For more details regarding ANSPDCP activity for 2019, you can access the following link:

https://www.dataprotection.ro/?page=Sinteza_activitatii_ANSPDCP_2019%20&lang=ro

2 EUROPEAN DATA PROTECTION BOARD - THE 18TH PLENARY SESSION

During the plenary, which took place on 18 and 19 of February, 2020, the following main documents were adopted:

- **Contribution of the EDPB to the evaluation of the GDPR under Article 97;**

The EDPB is of the opinion that the application of the GDPR in the first 20 months has been successful. The EDPB is examining possible solutions to improve existing cooperation procedures and considers that, in the end, legislators may also have a role to play in ensuring further harmonization of data protection legislation. In its assessment, the EDPB also addresses issues such as international transfer tools, the impact on SMEs and the development of new technologies. The Board concludes that it is premature to revise the Regulation at this point in time.

- **Guidelines on Art. 46.2 (a) and 46.3 (b) of the GDPR for transfers of personal data between public authorities and bodies**

The articles adress transfers of personal data from EEA public authorities or bodies to public bodies in third countries or to international organizations, where such transfers are not covered by an adequacy decision. The guidelines recommend which safeguards to implement in legally binding instruments in order to ensure the level of protection of natural persons under the GDPR.

For more details, you can access the following link:

https://edpb.europa.eu/news/news/2020/eighteenth-plenary-session-adopted-documents_en

3 GDPR ENFORCEMENT – NATIONAL AND EUROPEAN DEVELOPMENTS

3.1 Italy. EUR 27.8 million fine imposed on mobile telecom company TIM for violation of GDPR provisions

On ***February 1, 2020***, the National Authority of Italy informed that it has completed an investigation with data controller TIM. Following the investigation, the Authority concluded that the controller violated the GDPR provisions by unlawful processing personal data for marketing purposes.

Between January 2017 and 2019, the Authority received hundreds of complaints, in particular, ***unsolicited marketing calls*** that had been performed ***without any consent*** or ***in spite of the called parties***.

In one case, one person was contacted 155 times in one month. In about two hundred thousand cases, ***"off-list" numbers were called - numbers that are not included in the TIM's list of marketing numbers***.

In the investigation, the Authority found that there ***were no adequate implementation and management systems*** in place regarding the personal data processing.

Thus, the Italian Authority imposed ***twenty corrective measures*** on TIM, including both prohibitions and injunctions. In particular, the Authority has banned the controller from using, for marketing purposes, the data of the users that had denied their consent to marketing calls when contacted by call centers, of the users included in blacklists and of the 'non-customers' that had not given their consent. The controller is not permitted to use any longer the customer data that were collected via the "MyTim", "TimPersonal" and "TimSmartKid" applications for purposes other than the provision of relevant services without the users' free, specific consent. The controller will have to implement technical and organizational measures in respect of data subject rights requests and enhance the measures to ensure quality, accuracy and timely updates of the personal data that are processed in their individual systems.

As a result of the findings, the controller received ***a fine of 27.8 million euros*** for unlawful processing user data for marketing purposes and the measures and implementing arrangements will have to be in place and notified to the Authority according to a specific timeline.

3.2 ANSPDCP: The consent of the authors of doctoral theses is not necessary for publishing them

On Wednesday, February 19, 2020, the National Supervisory Authority for the Processing of Personal Data issued a notice following the analysis of the provisions of art. 168 paragraph (9) of Law no. 1/2022 of national education from the perspective of Regulation (EU) 679/2016.

Thus, considering art. 6 paragraph (1) c), "processing (including disclosure) is necessary for compliance with a legal obligation to which the controller (Ministry of Education and Research) is subject. At the same time, the National Supervisory Authority specified that, according to art. 12-14 of the GDPR, any data controller has the obligation to ensure the right to information of the data subject (the one whose data is disclosed), in a concise, transparent, intelligible and easily accessible form, using clear and simple language. As such, compared to the above, the ***National Supervisory Authority made no reference to the need for the consent of the authors of the doctoral theses for the purpose of publishing them."***

Therefore, according to the Authority, the publication of doctoral theses can be made by the Ministry of Education and Research based on the legal obligation established by art. 168 paragraph (9) of Law no. 1/2011 of the national education, with the subsequent amendments and additions.

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News in Laws – Legal Monthly Newsletter
March 2020

litigation and arbitration - legal changes published in February 2020

Decision of the High Court of Cassation and Justice no. 31/2019 regarding the examination of the appeal in the interest of the law formulated by the Governing Board of the Brasov Court of Appeal, which is the subject of the case no. 1.142/1/2019 and which was published in the Official Gazette of Romania, Part I, no. 133 of February 19, 2020 and is applicable from the same date.

The court granted the appeal in the interest of law and established that, when interpreting the provisions of art. 131 of the Code of Civil Procedure, if the first court invokes the objection of material/functional lack of jurisdiction after the moment expressly established in art. 131 of the Code of Civil Procedure (art. 131 stipulates the compulsory verification of jurisdiction by the court on the first court hearing), the court subsequently invested may decline its jurisdiction in favor of the first court, reasoning that this court has become competent to judge the case, as a result of issuing an interlocutory conclusion in which it held that it has material/functional jurisdiction.

Decision of the High Court of Cassation and Justice no. 3/2020 regarding the settlement of the complaint made by the Iași Court of Appeal - Criminal and for cases regarding minors Section, in the case no. 5.916/99/2016, by which the High Court of Cassation and Justice is requested to settle a question of law, which was published in the Official Gazette of Romania, Part I, no. 138 of February 21, 2020 and is applicable from the same date.

The Court admitted the complaint stating that the use or presentation in bad faith of forged private signature documents, which resulted in unfairly obtaining funds from the European Union budget or from the budgets administered by it or on its behalf, committed by the same person who, as author or secondary participant, contributed to the forgery, fulfills the content of the offense of using or presenting in bad faith false documents or inaccurate or incomplete statements, provided by art. 181 par. (1) of Law no. 78/2000 for the prevention, finding and sanctioning of corruption deeds and forgery in documents under private signature, provided by art. 322, paragraph (1) of the Criminal Code, in multiple offences.

Decision of the High Court of Cassation and Justice no. 2/2020 regarding the settlement of the complaint made by the Constanta Court of Appeal, Criminal and for cases regarding minors and family Section, in Criminal Case no. 11.252/256/2017, by which the High Court of Cassation and Justice is requested to settle a question of law was published in the Official Gazette of Romania, Part I, no. 135 of February 20, 2020 and is applicable from the same date.

The court admitted the complaint and established that, in the case of the family abandonment offense established in art. 378 par. (1) c) of the Criminal Code, the deadline for introducing the preliminary complaint provided in the content of art. 296 par. (1) and (2) of the Code of Criminal Procedure, - of 3 months from the day the injured party or their legal representative learned about the offense - it starts from the date when the injured party or their legal representative

became aware of the offense. The 3 months period provided in art. 296 par. (1) and (2) of the Code of Criminal Procedure may run from three different moments, as follows: a) from the moment the offence is committed, if this moment is identical with that of the knowledge of the crime; b) from the moment of becoming aware of the offence, which can be between the moment of committing it until the moment of its exhaustion, and c) from the moment of the exhaustion of the crime or after it, once it becomes known, in which case the limitation period for the criminal liability should have not been fulfilled.

Decision of the High Court of Cassation and Justice no. 32/2019 regarding the examination of the appeal in the interest of the law formulated by the Governing Board of the High Court of Cassation and Justice, which is the subject of Case no. 2.060/1/2019, and which was published in the Official Gazette of Romania, Part I, no. 148 of February 25, 2020 and is applicable from the same date.

The court granted the appeal in the interest of the law, stating that, in interpreting and applying the provisions of art. 64, paragraph (3) of the Code of Criminal Procedure, the judge who participated in the trial of a case may not participate in the trial of the same case in an extraordinary way of appeal, in the admissibility in principle stage (appeal for annulment, review and appeal in cassation).

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News in Laws – Legal Monthly Newsletter
March 2020

PPP & concessions - legal changes published in February 2020

Government Emergency Ordinance no. 7/2020 for amending and supplementing the Government Emergency Ordinance no. 39/2018 regarding the public-private partnership and for establishing measures regarding public investments was published in the Official Gazette of Romania, Part I, no. 93 of February 7, 2020, coming into force on the same date.

Emergency Ordinance no. 7/2020 introduced a series of changes in the Government Emergency Ordinance no. 39/2018 regarding the public-private partnerships, taking into account the need to ensure a unitary approach in the field of public investments, as well as the need to carry out infrastructure projects at national level. Amendments to the Government Emergency Ordinance no. 39/2018 regarding the public-private partnerships refer to the following aspects:

- in the case of requests for financing from private investment funds or companies, as well as from the sovereign development and investment funds, it is established that only the public partner will include their contribution in financing the private partner, not and/or the National Strategy and Forecast Commission (as established by previous regulations);

- it is provided that the financing requests made by the private investment funds or companies will be sent to the public partner until the Substantiation Study is approved, in order to communicate to the private investors the necessary financing from own resources (the previous regulation established that these requests were sent to the National Strategy and Forecast Commission);

- in order to establish and use public funds necessary to make payments to the project company or the private partner during the operation and maintenance of the project realized under public-private partnership, it is established that budgetary funds are provided for the financing of public-private partnership contracts within the budgets of the main authorizing officers of public authorities with the role of public partner or who have under their authority or coordination public partners in the public-private partnership contract; the aforementioned public authorities are to be established by decision of the Government approving the List of strategic investment projects to be prepared and assigned under public-private partnerships;

- it introduces the provision according to which the projects financed under a public-private partnership contract are highlighted in a separate annex within the budgets of the main authorizing officers of the public authorities with the role of public partner who have under their authority or coordination public partners in the public-private partnership contract;

- it is specified that, at the proposal of public authorities with the role of public partner, the Government may decide that certain projects that it considers strategic be prepared and assigned by them for the field of activity in which investments in public-private partnership will be implemented;

- it is mentioned that only the public partner bears the costs generated by carrying out the substantiation study and the award procedure, not the National Strategy and Forecast Commission (as previously provided).

Emergency Ordinance no. 7/2020 also regulates the taking over of certain projects expressly indicated by the National Strategy and Forecast Commission by the relevant ministries, indicating that the modalities of carrying out these strategic investment projects and the identification of the financing sources are under their exclusive jurisdiction.

Government Emergency Ordinance no. 23/2020 for the modification and completion of some normative acts with an impact on the public procurement system

was published in the Official Gazette of Romania, Part I, no. 106 of February 12, 2020, coming into force on the same date.

Emergency Ordinance no. 23/2020 (hereinafter referred to as "**EGO 23/2020**" or "**Emergency Ordinance**") has modified a number of primary normative acts in the field of public procurement, sectoral procurement and concessions.

Regarding the Law no. 100/2016 on the concessions of works and the concession of services, the amendments brought by O.U.G. 23/2020 concern aspects such as the notion of "*contracting authority/entity*", the reasons for exclusion, as well as the award criteria.

Thus, EGO 23/2020 makes **clarifications regarding the notions of contracting authority/entity**, in order to correctly transpose Directive 2014/23/EU of the European Parliament and Council of 26 February 2014 on awarding of concession contracts. To this end, a series of articles of Law no. 100/2016 have been modified in the sense of replacing the phrase "*contracting entities*" with the phrase "*contracting authorities/entities*".

Also, the new amendments provide **the obligation of the contracting authorities referred to in art. 9 and of the contracting entities from art. 10 paragraph (1) a) of Law no. 100/2016 to exclude the economic operators at any time of the award procedure when they become aware that they are in one of the situations of exclusion (either before or during the procedure, considering the facts committed or omitted by the operators**), namely:

- they were convicted by a final decision of a court for committing one of the offenses expressly provided by law at art. 79 of Law no. 100/2016;

- they have violated their obligations regarding the payment of taxes or contributions to the general consolidated budget, and this was established by a final and binding court decision or an administrative decision according to the law of the country where the respective economic operator is set up or if the breach of the obligations regarding the payment of taxes or contributions to the general consolidated budget can be proven by any appropriate means.

Last but not least, **regarding the award criteria**, EGO 23/2020 states that they do not give the contracting authority/ entity unlimited freedom of choice, instead they must have a direct connection with the purpose of the works concession or the service concession [such as: the degree of risk taking by the concessionaire, the level of the updated payments made by the contracting authority, the level of the operating fees, the way of execution of the works/the provision of the services based on performance indicators (qualitative, technical, functional, financial, etc .); the way of ensuring the environmental protection, the way of solving of some social problems; the level of the royalty, the duration of the concession, the innovation].

In addition, essential clarifications have been introduced regarding the change of the order of award criteria in the event that the contracting authority/entity receives an offer proposing an innovative solution with an exceptional level of functional performance, which could not have been foreseen by a diligent contracting authority/entity. In this situation, if the award criteria were published at the time of publication of the concession notice, the contracting authority/entity has the obligation to publish a new concession notice, in compliance with the minimum legal deadlines. It is also specified that changing the order of the award criteria in the aforementioned hypothesis does not lead to discrimination.

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public procurement - legal changes published in February 2020

Government Emergency Ordinance no. 23/2020 for amending and supplementing certain normative acts with an impact on the public procurement system was published in the Official Gazette of Romania, Part I, no. 106 of February 12, 2020, coming into force on the same date.

Emergency Ordinance no. 23/2020 (hereinafter referred to as "**GEO 23/2020**" or "**Emergency Ordinance**") has modified a number of primary normative acts in the field of public and sectoral procurement (as well as concessions), in order to implement urgent measures to lead to the simplification, improvement and flexibility of the public procurement system, as well as the increase of the absorption of European funds and the unblocking of the public procurement procedures.

Law no. 98/2016

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

- as a novelty, it is expressly provided that the information indicated by the economic operators as confidential must be accompanied by the evidence conferring this nature; otherwise the obligation of the contracting authority not to disclose the information indicated by the economic operators as confidential is no longer applicable;

- it clarifies the alternative nature of the two cases of exclusion provided by art. 165 of Law no. 98/2016 for breach of the obligations regarding the payment of fees, taxes or contributions to the general consolidated budget; in addition, the first exclusion case is supplemented in the sense that an economic operator is excluded from the award procedure also when the court decision or administrative decision establishing the violation of the obligations regarding the payment of fees, taxes or contributions to the general consolidated budget has definitive and compulsory nature and in accordance with the law of the Member State of the contracting authority, not only with that of the state in which the respective economic operator is established;

- The Emergency Ordinance introduces the obligation of the contracting authorities to offer the possibility of bidders/applicants who participated in the preparation of the award procedure to show that their involvement in its preparation cannot distort competition, before excluding them from the award procedure;

- additions are made in relation to the measures adopted by the economic operators who are in one of the exclusion situations provided by art. 164 and 167 of Law 98/2016 to prove their credibility; thus, these measures presented by the economic operators for proving their credibility will be evaluated by the contracting authority taking into account the particular gravity and circumstances of the offence or irregularity considered; in the event that the measures presented are considered insufficient by the contracting authority, it has the obligation to send the economic operator an explanation of the reasons that led to the decision to exclude it from the award procedure.

- clear deadlines are set in which the contracting authority has the obligation to prepare the report of the procedure (the exceptions are strictly indicated), namely:

  (a) 60 working days, for open tender, restricted tender, partnership for innovation, competition for solutions and award procedure applicable to social services and other specific services;

  (b) 20 working days for the negotiation procedure without prior publication and for the simplified procedure;

  (c) 100 working days for competitive negotiation and competitive dialogue procedures.

- it defines the notion of a substantial change of a public procurement contract/framework agreement within the meaning of art. 221 par. (1) let. e) of Law 98/2016, as the amendment by which the contract/framework agreement presents characteristics that differ substantially from those contained in the initially signed document; the four conditions regulated from the beginning by Law 98/2016 for the verification of the substantial nature of a change remain applicable.

Law no. 99/2016

The changes made by EGO 23/2020 to **Law no. 99/2016** regarding sectoral procurement are in principle the same as those brought to Law no. 98/2016 and indicated briefly above, and in addition it provides the introduction of a new category of sectoral contracts of legal services for the award of which Law 99/2016 does not apply, namely those that have as their scope the services of certification and authentication of documents. which are provided by public notaries, in accordance with the legal provisions.

In relation to the obligation of the contracting entity to justify in the report of the procedure the measures taken to ensure that the participation of a bidder/applicant in the award procedure is not likely to distort the competition, this is necessary in case said bidder/applicant has submitted opinions, suggestions or recommendations to the contracting entity in connection with the preparation of the award procedure, within the consultations provided in art. 148 of Law 99/2016 or in any other way, including as part of consulting services, or otherwise participated in the preparation of the award procedure.

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 services concession contracts, as well as for the organization and operation of the National Council for Solving Complaints, is amended and supplemented as follows:

- the concept of act of the contracting authority is clarified, in the sense that it does not concern the direct procurement;

- it reintroduces the specification of the clear date from which the period for filing complaints against the award documentation starts, i.e. the date of publication of the award documentation in the SEAP;

- it corrects the errors in the legal texts applicable to the procedures whose initiation is not carried out by publication in the SEAP, which continued to refer to the abrogated articles regarding the prior notice; thus, both the remedial measures adopted by the contracting authority as a result of an appeal, as well as the complaint are communicated to the complainant and to the other economic operators interested/ involved in the procedure, within no more than one working day from the date of their adoption/receipt, by any means of communication provided by the legislation in the field;

- it provides the obligation of the contracting authority to publish the complaint in full in the SEAP, 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 economic operators to notify the parties of the case regarding the formulation of a request for voluntary intervention is introduced; in the previous regulation it was stipulated that the request for intervention submitted to the NCSC would be communicated to the other parties 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 deadlines for solving the complaints by the NCSC are no longer set in calendar days, but in working days, and the deadline for resolving the complaint by way of objection has been extended: NCSC will solve the complaint on the merits within 15 working days from the date of receipt of the public/sectoral procurement/ concession file, and within 10 working days in the case of the incidence of an objection that prevents the analysis on the merits of the complaint;

- novelty elements are brought regarding the complaint filed judicially, as follows:

  (a) similar to the administrative-jurisdictional complaint, the contracting authority is required to publish the complaint in the SEAP, within one working day of its receipt; in the case of award procedures whose initiation is not made by publishing in SEAP, the contracting authority has the obligation to communicate the complaint to the other economic operators interested/involved in the procedure, within one working day from the date of its receipt;

  (b) the formulation of a request for voluntary intervention is subject to the same conditions as those provided in the case of the administrative-jurisdictional complaint (the other parties must be notified);

  (c) the access to the case file submitted to the court, following the formulation of a complaint, will be made under the same conditions as the access to the file submitted to the NCSC;

  (d) the deadline for filing the appeal against the court decision by which the judicial complaint is solved was correlated with the deadline for filing the complaint against the NCSC decision; therefore, the

appeal can also be filed within 10 working days from the communication of the decision, instead of 10 calendar days (as provided in the previous regulation);

(e) unlike the administrative-jurisdictional complaints, the judicial ones are taxed according to the rules provided for court litigations, and the appeal is charged with 50% of this tax (the contracting authorities that file the appeal are exempted of stamp duty); the security for the judicial complaints is eliminated.

- a series of extremely important changes regarding the settlement of disputes in court are introduced:

(a) the decision issued in the case of litigation regarding the award of compensation for the damages caused during the award procedure, as well as those regarding the cancellation or nullity of the contracts can be challenged by **second appeal** within 10 working days from communication, before the administrative and fiscal litigation department of the court of appeals;

(b) instead, the decision issued in the case of trials and claims arising from the performance of the administrative contracts can be **appealed** within 10 days from communication, to the hierarchically superior court; the appeal is resolved urgently and with priority, within a term that will not exceed 30 working days from the date of legal referral to the court;

(c) 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;

(d) in relation to the method of taxation of the claims submitted to the court, they shall be charged as follows:

- 2% of the estimated contract value, but no more than Lei (RON) 100.000.000;
- if the award procedure is organized in lots, the stamp fees refer to the estimated value of each disputed lot;
- in the case of a procedure for awarding a framework agreement, the amount of the court fee refers to double the estimated value of the largest subsequent contract that is intended to be awarded on the basis of the framework agreement;
- the appeal/second appeal is charged with 50% of the fees provided above, and the second appeals submitted by the contracting authorities are exempted from the judicial stamp duty.

- Regarding the security for submitting the complaint:

(a) EGO 23/2020 eliminates the security for judicial complaints, in conjunction with the imposition of a stamp duty for these complaints;

(b) in relation to the practice of the NCSC which allows the subsequent establishment of the security, it is established that it may be constituted within a maximum of 3 working days from the date of the complaint submitted with the NCSC;

(c) regarding the amount of the security:

- the concept of established value of the contract is replaced by that of the value of the bid declared successful;
- the ratio of the 2% percentage from the estimated value of the contract and the maximum limits related to it are maintained, however, the following ways of establishing the amount of the security also become applicable:
  - (i) 2% of the value of the bid declared successful in the report of the procedure, if it is lower than the value thresholds provided for the publication of the contract notice in JOUE, but not more than Lei (RON) 88.000;
  - (ii) 2% of the value of the bid declared successful in the report of the procedure, if it is equal to or higher than the value thresholds provided for the publication of the contract notice in JOUE, but not more than Lei (RON) 880.000.
- in the case of an award procedure divided in lots, the provisions of par. (1) of art. 61^1 refer to the estimated value of each disputed lot;
- if the procedure for awarding the framework agreement is organized in lots, the provisions of par. (1) of art. 61^1 refers to double the estimated value of the largest subsequent contract that is intended to be awarded based on the respective framework agreement for each disputed lot.

(d) on the method of returning the securities receipt notices, EGO 23/2020 provides the following:

- the security is returned to the person who submitted it, no earlier than 30 days from the date when the NCSC decision becomes final;
- the security is not returned to the one who submitted it to the extent that the contracting authority proves that it has filed a court claim against it for the payment of the compensation due within the 30-day deadline from the date when the NCSC decision becomes final.

EGO no. 98/2017

EGO 23/2020 brings a series of changes to the Government Emergency Ordinance no. 98/2017 regarding the ex ante control function of the process of awarding the public procurement contracts/framework agreements, the sectoral contracts/framework agreements and the works and service concession contracts ("**GEO 98/2017**"), and among the most important we mention:

- it is no longer provided that the ex ante control exerted by NAPP is performed at the request of the contracting authority, but that it aims to verify compliance 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 modifies aspects entailed by the ex ante quality and regularity control, such as checking compliance with the legal provisions in the field of public/sectoral procurement, concessions of services or works or of the award documentation, together with the contracting strategy and other documents accompany it, of the errata type notice, as well as of the contracting authority's response proposals to the requests for clarifications made by the economic operators and any additional information published by it in relation to the respective award documentation, except for the substantiation study provided in art . 229 of Law no. 98/2016;

- it is established that any of the award procedures regulated by Law no. 98/2016, by Law no. 99/2016 and by Law no. 100/2016 are subject to ex ant control, with certain exceptions expressly indicated;

- it is expressly established that, in carrying out the ex ante control activity within the stage provided in art. 6 paragraph (2) a) from EGO 98/2017, NAPP carries out quality and regularity only once; also, from the scope of the documents that can be subject to quality and regularity control, the following were eliminated: the tender book, the descriptive documentation, the contractual clauses, the contract notice, the simplified contract notice, the competition notice;

- it eliminates references to unconditional compliance notice;

- as a novelty, it is stipulated that the contracting authority may decide to publish the contract notice/the simplified contract notice/the concession notice/the competition notice, with or without remedying the irregularities found by NAPP by the conditional compliance notice issued as a result of the ex ante control, having the obligation to publish the issued compliance notice;

- it outlines the possibility of the contracting authority to decide on the continuation of the award procedure with or without remedying the irregularities found by NAPP by the conditional compliance notice, having the obligation to publish the final compliance notice once the report of the procedure is published, namely on the day of transmitting communications regarding the outcome of the procedure.

Transitional provisions

The award procedures in progress on the date of entry into force of EGO 23/2020 shall remain subject to the legislation in force at the time of their initiation ("*award procedure in progress*" meaning any procedure for which a contract notice or, as the case may be, a simplified contract notice has been issued before the entry into force of GEO 23/2020).

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 EGO 23/2020 continues to be judged under the conditions and according to the procedure provided by the law in force on the date when they were started.

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