



The problems in practice generated by the PLF in Romania

by Laura Pricop, Senior Associate Voicu & Filipescu

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Legal Changes of January 2022

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:

- Data Protection
- Dispute resolution
- Employment
- Public Procurement

The dedicated VF task force addressing [Coronavirus \(COVID-19\) concerns](#) continues to be active in providing legal solutions and strategies for the benefit of companies impacted by the health crisis. [Read more here.](#)

[Chambers and Partners Europe, 2021 edition](#) recommends Voicu & Filipescu for our lawyer's activity in the field of dispute resolution.

[Legal500 EMEA 2021 edition](#) recommends Voicu & Filipescu for our lawyers' activity in 6 practice areas: Corporate and Commercial, Employment, PPP and Procurement, Real Estate and Construction, Restructuring and Insolvency and TMT.

[IFLR 1000, 2021 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.





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General considerations

At the end of 2021, Romania complied with the European Union recommendations that allow the transmission of information from the existing national systems of location forms of Member States passengers to other competent authorities, in an interoperable and automatic way (Passenger Locator Form / PLF), publishing thus in the Official Gazette, Part I no. 1190 of December 15, 2021 the Emergency Ordinance no. 129/2021 regarding the implementation of the digital entry form in Romania / FDIR (hereinafter "**GEO 129/2021**").

GEO 129/2021 entered into force on December 15, 2021, except for article 4 para. (1) of the same normative act - non-compliance by the person entering the territory of Romania with the obligation to complete FDIR within 24 hours from entering the country constitutes a contravention and is sanctioned with a fine from 2,000 lei to 3,000 lei - which entered into force on the first day of Christmas.

What is interesting is that GEO 129/2021 has already been amended and supplemented, in the Official Gazette, Part I no. 117 of February 4, 2022, being published the Emergency Ordinance no. 5/2022 ("**GEO 5/2022**"), which entered into force on February 9, 2022, seeking to cover some of the gaps and problems generated by GEO 129/2021, which we believe that the case law (nonexistent so far) will highlight.

Issues related to the validity of the applied fines

The initial form of GEO 129/2021 stated that the Government Ordinance no. 2/2001 on the legal regime of contraventions, with subsequent amendments and completions ("**GO 2/2001**") is fully applicable to the misdemeanor provided by article 4 par. (1) of GEO 129/2001.

The entry into force of GEO 129/2021 led to a series of controversies in media and in politics, especially when the persons who entered Romania after December 25, 2021 began to receive by mail countless fines, most of them aimed at the maximum provided by law without any justification in this regard.

Either these individuals have not been sufficiently informed of their obligation to fill in the FDIR within 24 hours of entering the country, or some of them have filled in the form incorrectly and have not been verified or even have filled in and obtained the FDIR from the system, but such system provided by the authorities generated errors, whether there should be exempt categories, etc., the courts were assaulted by misdemeanor complaints filed against the minutes issued by public health institutions in Romania.

Petitioners raised issues of illegality of the legal basis indicated in the misdemeanor minutes, for which reason they requested the annulment of the abusive fines, indicating, inter alia, the following: (i) that they did not have the opportunity to raise any objections to the misdemeanor allegedly committed, as provided by article 16, para. (7) of GO 2/2001, (ii) "the ascertaining agent" did not have a witness at the time of completing the minutes in the absence of the offender, as provided for in article 19, 2nd part of GO 2/2001, (iii) the lack of a proportionality between the fine aimed at the maximum provided by law and the degree of social danger of the committed misdemeanor, as well as (iv) the violation of the principles of personality and accountability of the contravention liability.



Therefore, if a person considers that he/she has been unjustly fined as per article 4 para. (1) of GEO 129/2021 (its initial form or completed by GEO 5/2022), it may challenge the received fine within 15 days from the communication of the misdemeanor minutes.

What is new due to GEO 5/2022? Are these changes sufficient to overcome the problems in practice?

Some of the aforementioned "impediments" and "inaccuracies" are recognized by the Romanian authorities and their representatives, according to the statements released to the press, this being, in reality, also the reason for the amendments and completions brought by GEO 5/2022. However, it remains to be seen whether these changes and additions are sufficient in order to remove the major problems that will be generated in practice, we strongly believe, nevertheless, that there will be problems even after the entry into force of GEO 5/2022.

According to the provisions in force on February 9, 2022, the minimum fine was reduced to 500 lei, as a response to the opinions that the fine between 2,000 and 3,000 lei was clearly disproportionate to the degree of social danger of the deed. GEO 5/2022 stipulates that the misdemeanor minutes must bear the signature of the person who drafted it, without indicating, however, what is the legal sanction if such signature is not provided on the contested act - we can just assume that such misdemeanor minutes would be null and void. Moreover, by expressly mentioning the fact that to the article 4 para. (1) of GEO 129/2001 does not apply the provisions of article 16 par. (1) of GO 2/2001, regarding the mention in the misdemeanor minutes of the place where the deed was committed, it is understood that there are no other derogations from GO 2/2001, which is, *per a contrario*, fully applicable.

Procedural issues regarding the misdemeanor complaints against the fines issued based upon GEO 129/2021

According to GEO 5/2022, the disputes pending before the courts on February 9, 2022 are subject to the legal provisions in force at the time of the misdemeanor. Hence, we hope that as few situations as possible will be encountered in the event of a potential erroneous application of the law over time.

Another possible practical problem could be given by the fact that based upon the initial form of GEO 129/2001, the complaints were submitted to the court in whose district the contravention was committed, and GEO 5/2022 introduces a new paragraph to art. 4 of GEO 129/2021, according to which the complaint against the misdemeanor minutes is submitted to the court in whose district the county public health directorate or of the Bucharest municipality issuing the report is based.



data protection - legislative changes published in January 2022

I. ROMANIA

1 SANCTIONS APPLIED BY THE NATIONAL SUPERVISORY AUTHORITY

1.1 KAUFLAND ROMANIA SCS was sanctioned for violating the provisions of Article 15 para. (3) of the GDPR with a fine in the amount of LEI 14.846,40 (the equivalent of EUR 3,000)

As a result of the investigation, the Data Protection Authority found that, by the refusal to provide a full copy of the video recordings for the time period during which the data subject was in the commercial premises, the controller violated the data subject's right of access.

The transmission of the images could be carried out without being affect the rights and freedoms of third parties, by using the process of blocking ("blurring") the images concerning the data and personal information of other data subjects.

The controller was required to implement technical and organizational measures, in order to enable the full exercise of the data subject's right of access, while respecting the rights of other persons.

2 REGULATIONS

2.1 The National Supervisory Authority has launched on 28.01.2022 the "Guide on the processing of personal data by owners' association".

The guide is intended to support owners' associations in fulfilling their obligations as personal data controllers, as follows:

- in relation with the installation of a video surveillance system, it is established that this measure may be taken based on the legitimate interest of the owners' association, *e.g.*, to ensure the security and protection of persons, goods and valuables of the buildings and public utility installations, as well as their enclosures, but also in the area of access to the building or elevators. Monitored premises shall be pointed out by an appropriate pictogram located in a visible place, so that it can be seen by any person, as an expression of the obligation to inform the data subject. It is recommended that the information storage not to last longer than 30 days, except in duly justified cases where events have occurred that require only the relevant images to be stored for a longer period which is necessary to fulfill those purposes (*e.g.*, until the final settlement of a criminal case by the judicial authorities).
- disclosure of personal data such as the first and last names of owners/tenants on the notice board shall only be made on the basis of an express legal provision or unequivocal consent expressed by the data subject. Lack of response or action from the data subject shall not be equivalent to a valid consent.
- the recording of personal data in the property register shall be made without the data subject's consent only to the extent that there is a legal obligation to do so. The registration is made based on the identity



card and, for children under 14, based on their birth certificate. The owners' association is not allowed to request photocopies of these documents, which will only be checked visually for compliance.

- the processing of personal data by owners' associations does not fall under the situations provided for in Article 37 of the GDPR, therefore, there is no obligation to appoint a data protection officer.

II. EUROPEAN UNION

1 REGULATIONS

1.1. EDPB adopts the first version of the Guide 01/2022 on data subjects' rights - right of access, in public consultation.

The Guide provides several guidelines and recommendations, as follows:

- limitation of the procedures for identifying the person submitting the request. To this end, requesting a copy of the identity card in the identification process shall be considered inappropriate, except where strictly necessary in relation to the personal data concerned and the provisions of applicable national law, where applicable;
- the controller shall not be entitled to refuse access to personal data on the grounds that the information concern third parties. To this end, the controller should take measures to avoid disclosure information which shall affect the rights and freedoms of third parties;
- the data subject is not required to motivate the request for access to information and the controller is not entitled to analyze whether the data provided can effectively help the data subject;
- if the details in the access request do not allow the controller to identify the personal data relating to the data subject, the controller may refuse to provide the information.

2 SANCTIONS GRANTED IN THE EU

2.1 The Italian Data Protection Authority („Garante per la protezione dei dati personali”) imposed to Enel Energia S.p.A a fine of EUR 26,5 million for breaches of the GDPR provisions

Following an extensive investigation, Garante per la protezione dei dati personali found that the controller failed to respond in legal time or act upon hundreds of requests under consumers' right of access and right to object. In particular, the data subjects have still received promotional phone calls, even pre-recorded ones, on behalf of or on behalf of the controller, in the absence of their consent for marketing purposes.

In addition to the fine, the controller was required to implement several technical and organizational corrective measures for the free and unrestricted exercise of the rights of data subjects, in particular as regards the right to object on receiving promotional messages.



2.2 The Austrian Data Protection Authority („DSB“) imposed to REWE International AG a fine of EUR 8 million for breaches of the GDPR provisions

Following the investigation, DSB sanctioned REWE International AG for non-compliance with the GDPR by one of its subsidiaries, Unser Ö-Bonus Club GmbH - which operates a client loyalty and reward programme - for the processing by the latter of the client's personal data for marketing purposes, without obtaining their prior consent.

The DSB decision against food retailer REWE International highlights that parent companies are ultimately responsible for how their subsidiaries handle data subjects' data, even if the entity operates separately as its own company and is economically independent.

2.3 The Hellenic Data Protection Authority („HDPA“) imposed to Cosmote Mobile Telecommunications S.A. a fine of EUR 6 million for breaches of the GDPR provisions

Following notification by the controller of a security breach concerning a leakage of data on subscribers' telephone calls, the HDPA also examined the lawfulness of the personal data processing operations carried out at the controller's level, and identified its non-compliance with several provisions of the GDPR and violation of the principles of transparency and lawfulness in the processing of personal data.

It was found that the unlawful practices lasted for 6 years, affecting more than 10 million data subjects, and that, for a long period of time, pseudonymisation was not implemented either.



dispute resolution - legal changes published in January 2022

Decision of the High Court of Cassation and Justice no. 66/2021 regarding the request that forms the object of Case File no. 1.059/98/2018 on the examination of the referral submitted by the Bucharest Court of Appeals – Criminal Section II, in order to issue a preliminary ruling was published in the Official Gazette Part I no. 87 dated January 28, 2022 and it is applicable from the same date.

The High Court of Cassation and Justice has been referred to issue a preliminary ruling in relation to article 10 paragraph (1¹) of Law no. 241/2005 for the prevention and combating against tax evasion which establishes that, in the event the damage caused by a willful misconduct of (i) a withholding and not payment, collection of income and not payment, in maximum 60 days since the maturity date, as provided by the law, of the taxes and/or contributions, (ii) a bad faith settlement by the taxpayer of the taxes and contributions, having as a result a no right achievement of money amounts as a refund or reimburse from the general consolidated budget or compensations due to the general consolidated budget, as well as (iii) a willful misconduct of the actions provided by article 9 of Law no. 241/2005 shall not exceed the amount of Euro 100,000, in the equivalent of national currency and during the criminal prosecution proceedings or during the trial proceedings, until the delivery of the final decision, the damage, as increased by 20% of the calculation basis, to which are added the interest and the penalties, have been paid in full, the misconduct shall not be punished.

The matter of law subject to referral is the following: *"If the interest and the overdue interest shall be applicable to the damages caused by the willful misconduct, increased by 20% of the calculation basis or the interest and the overdue interest shall be calculated only to the damage caused by the willful misconduct"*. More specifically, Bucharest Court of Appeals requested to the Supreme Court to clarify the calculation method of the fiscal accessories of which payment, accrued to the criminal damage payment and increased by 20% of the criminal damage, shall be subject to the application of the non-punishment clause.

The High Court granted the referral submitted by the Bucharest Court of Appeals – Criminal Section II, in order to issue a preliminary ruling and consequently, determined that, *the interest and the overdue interest related to the provisions of article 10 paragraph (1¹) of Law no. 241/2005 for the prevention and combating of tax evasion shall be applicable only to the damage caused by the willful misconduct, without taking into consideration the 20% increase of the calculation basis.*



employment - legal changes published in January 2022

Law no. 22/2022 for amending and supplementing the Government Emergency Ordinance no. 194/2002 on the regime of foreigners in Romania was published in the Official Gazette of Romania, Part I, no. 45 of January 14, 2022, in force starting with January 17, 2022.

The law regulates amendments and supplementations to the Government Emergency Ordinance no. 194/2002 on the regime of foreigners in Romania regarding (i) the introduction of a new term, that of *“digital nomad”*, (ii) the conditions for granting a long-stay visa to digital nomads, (iii) the conditions for extending the right of temporary residence for digital nomads and (iv) new particulars referred to in the residence permit.

The digital nomad represents *a foreigner who is employed under an employment agreement by a company established outside Romania and who provides services by using information and communication technology or who owns a company established outside Romania, for which he/she provides the work remotely, through the use of information and communication technology.*

Therefore, the legal regulation concerns both the hired foreigners under an employment agreement abroad, and the foreigners who own companies abroad, as long as they perform the activity by using information and communication technology in Romania.

The law offers to the digital nomads the possibility to request and, with the fulfilment of the conditions provided by the law, to obtain a long-stay visa, when they choose to stay in Romania while obtaining income from activities conducted remotely if they fulfill cumulatively the conditions to: 1) have an income from the performed activity, in amount of at least three times the average gross monthly salary in Romania for each of the last six months before submitting the visa request, as well as for the whole period written in the visa and 2) to perform activities from which they obtain income, remotely, by using information and communications technology.

In order to extend the right of residence, the digital nomads shall provide an income certificate issued by the competent tax authorities.

The extension of the right of temporary residence for the digital nomads shall be made if they prove that they are working remotely for the foreign company or if they prove that they own a company for at least three years prior to applying for a visa. Therefore, from now on, the digital nomads will be entitled to a long-stay visa, under the essential condition to produce monthly gross income for at least three times higher than the average gross monthly salary, for the period for which an extension of the right of residence is requested.

The temporary residence permit received by the digital nomad shall have the indication *“digital nomad”*.

Government Decision no. 132/2022 on establishing the quota of newly admitted foreign workers on the labour market in 2022, was published in the Official Gazette of Romania, Part I, no. 90 of January 28, 2022, in force from the same date.

In 2022, the quota of newly admitted foreign workers on the labour market was set at 100,000.



Order of the Minister of labour no. 94/2022 for the approval of the template of the documents provided in article 2 para. (1) of Government Emergency Ordinance no. 2/2022 on the establishment of social protection measures for employees and other professional categories in the context of prohibition, suspension or limitation of economic activities, determined by the epidemiological situation generated by the spread of Covid-19, as well as for amending and supplementing normative acts, was published in the Official Gazette, Part I no. 99 of January 31, 2022, in force from the same date.

The Order approved the template of the application, the sworn declaration and the list of persons to be paid the allowance for the period of temporary suspension of the individual labour contract on the employer's initiative, as provided in article 1 para. (1) of Government Emergency Ordinance no. 2/2022 on the establishment of social protection measures for employees and other professional categories in the context of prohibition, suspension or limitation of economic activities, determined by the epidemiological situation generated by the spread of Covid-19, as well as for amending and supplementing normative acts.



public procurement - legal changes published in January 2022

The National Agency for Public Procurement ("**NAPP**") published on January 25, 2022, within the Guides and useful documents section of its website, the **Guidance on the "third-party upholder" institution**, as regulated in article 182 of Law no. 98/2016 on public procurement and article 196 of Law no. 99/2016 on sectoral procurement - [Indrumare-tert-sustinator-25.01.2022.pdf \(gov.ro\)](#).

The third-party upholder is defined by Law no. 98/2016 on public procurement and Law no. 99/2016 on sectoral procurement, as the third party with the assistance of which the economic operator manages to fulfil the criteria relating to the economic and financial standing and/or the criteria relating to technical and professional capacity, regardless of the nature of the legal relationship existing between the economic operator and the third party concerned, when a public/sectoral procurement contract is intended to be concluded.

The Guide recommends contracting authorities/entities to consider the following aspects:

- The third-party upholder is neither a bidder, nor a subcontractor, but the contracting authority/entity shall be able to effectively benefit from its support to ensure that the public/sectoral procurement contract is successfully completed.
- The rights of the contracting authority/entity in relation with the third-party upholder shall be clearly and explicitly stated and reflected in the legal relation between the third-party upholder and the economic operator it upholds.
- Drafting a contract in which to expressly stipulate the obligations of the third-party towards the economic operator, the rights of the latter and the fact that the third party takes responsibility in relation with the contracting authority/entity (depending on the type of support granted). This legal act shall also be submitted to the contracting authority/entity. It is recommended to use the contractual clauses in Annex 2 of the Guidelines.

In relation with the qualification criteria that can be fulfilled with the assistance of the third party, support for third parties can be relied upon for the fulfilment of the criteria relating to:

- A. The economic and financial situation, for the fulfilment of criteria relating to a certain level of turnover or a certain level of other relevant economic and financial indicators, such as annual liquidity level, overall solvency, capital solvency, profitability, **except** for the criteria concerning the professional risk insurance for the economic operator, as concerns the specific characteristics of the economic operator for which the insurance is issued.

The third-party upholder is **jointly and severally liable** with the economic operator for the performance of the public/sector procurement contract. In so far as there are several third-party upholders, each of them may be jointly and severally liable for the entire outstanding obligation.

- B. Technical and professional capacity, for the fulfilment of all the criteria provided in article 179 of Law no. 98/2016 and article 192 of Law no. 99/2016, **except for**:



- a. Cases where the subject-matter of the contract is the supply of complex or exceptional products or services intended for a particular purpose, in which case the production or technical capacity must be fulfilled in the person of the economic operator.
- b. Criteria on "the indication of the environmental management measures that the economic operator will be able to apply during the performance of the contract", as the criteria concern procedures for the identification, planning, implementation, verification and continuous improvement of the environmental measures specified on the organized sites, implemented at economic operator's level.
- c. Criteria relating to authorizations/certificates, as the authorization/certificate may be used in its own name, **except** in cases where:
 - i. the public/sector procurement contract covers several activities, and the authorization/certificate is required only for the performance of one or more secondary activities of the contract;
 - ii. the contracting authority/entity has not required, through the award documentation, that certain essential tasks to be performed directly by the bidder.

In relation with the cumulation rule between the bidder and the third-party upholder for the fulfilment of the qualification/selection criteria, the conditions shall be met in any of the following ways: (i) cumulation between the candidate/bidder and a third-party upholder; (ii) cumulation between the candidate/ bidder and several third-party upholders; (iii) cumulation between the members of the association and a third-party upholder; (iv) cumulation between the members of the association and several third-party upholders; or (v) fully by third party upholder/(s).

Exceptions to the cumulation rule are:

- Cases where the contracting authority/entity imposes qualification criteria on the economic operator/consortium of economic operators which must be proved in their own person, when certain essential tasks shall be performed directly by them.
- The formulation of the criteria relating to the number of contracts by which the level applied for/quantity applied for can be reached by the wording "*at the level of one contract*", as provided for in Article 6 para. (1), points a) and d) of ANAP Instruction no. 2/2017 - the criteria shall either be fully demonstrated by the bidder/candidate or fully demonstrated by the third-party upholder.
- Cases in which a given capacity shall be fully met by an economic operator due to the subject- matter of the contract which presents certain particularities.

The **exception** to the possibility of fulfilling a qualification/selection criterion entirely through the third party/third-party upholders is the case of indivisible contracts, since they must be performed by a single operator. Where the contracting authority/entity considers that a specific contract is indivisible, it shall specify in the procurement documents that, for the fulfilment of the purpose of that contract, the cumulation of the



capacities (knowledge and/or experience) of two entities which, taken separately, do not have the capacities required for the performance of the contract, is not allowed.

An economic operator may cumulate the following qualities at the same time:

- (1) Bidder/candidate in an award procedure and third-party upholder in another bid/candidature or
- (2) Third-party upholder for one or more candidates/bidders in the same award procedure.

The contracting authority/entity is also responsible for verifying if the third-party upholder fulfils the relevant capacity criteria and does not fall within the grounds for exclusion provided for by law. If the third party does not fulfill these conditions, the contracting authority/entity shall request the economic operator, **only once**, to replace it. **Failure to reply shall be considered equivalent to an unacceptable bid and the contracting authority/entity shall no longer be entitled to request the replacement of the third-party upholder.**

Annex 1 to the Guidelines provides models of a Firm Commitment to uphold the bidder in fulfilling the criteria relating to economic and financial standing or technical and professional capacity. The Guide also contains tables detailing how the third-party upholder/(s) fulfil the above criteria. We also recall that the recommended contractual clauses are contained in Annex 2 to the Guidelines.

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

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