

# Legal Bulletin

March 2009

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## Legal Bulletin

### Banking Law

Name of the enactment	Government Emergency Ordinance No. 25/2009 for the amendment and supplementation of Government Emergency Ordinance No. 99/2006 on credit institutions and capital adequacy ("GEO 25/2009")
Publication	Official Gazette of Romania, Part I, No. 179/23.03.2009
Entry into force	23 March 2009
Connections with other enactments	Government Emergency Ordinance No. 99/2006 on credit institutions and capital adequacy
Main provisions	<p>The amendments provided by GEO No. 25/2009 refer to the following main issues:</p> <ul style="list-style-type: none"><li>• The granting of additional regulatory prerogatives to the National Bank of Romania ("NBR") in areas such as the determination of the voting rights in cases of purchase or assignment of interests in credit institutions, the criteria for the assessment of the capacity of the potential purchaser of a credit institution, the securing of the receivables resulting from the loans given by savings and real estate crediting banks, etc.;</li><li>• A more thorough presentation of the moments which require the collaboration of the NBR with other national supervision authorities or supervision authorities from other Member or non-Member States, as well as the modalities of performing such collaborations;</li><li>• The definition chapter is supplemented by "potential purchaser" and "proposed purchase", and the definition of the qualified participation is repealed;</li><li>• The interdiction of carrying out banking operations is extended to include legal entities which are not authorized as credit institutions;</li><li>• The possibility to use the initials, logo, emblem, name or other identification elements used at group level is granted not only to subsidiaries of credit institutions, but also to other Romanian legal entities from the group of which a credit institution is a part;</li></ul>

- The modalities of assessment related to the members of the management of credit institutions are extended to include the shareholders that will hold, directly or indirectly, qualified participations in the credit institution;
- The procedure of notifying the proposed purchases to NBR is slightly modified, to the effect of clarifying the successive operations of the parties to the procedure and the applicable terms, as well as the criteria for the assessment of the capacity of the potential purchaser;
- The regulatory power of NBR is limited in relation to the legal norms concerning the procedure of notifying the purchases and the criteria for the assessment of such purchases;
- The distribution of the capital among the founding members of a credit institution is removed from the reasons for rejecting an authorization request;
- In respect of the managers of the credit institution or the members of the directorate, the obligation to exercise exclusively their position is also limited by the positions it holds in other entities which are in the same perimeter of prudential consolidation;
- It establishes, for the managers of the credit institution or the members of the directorate, the interdiction to be employees of the credit institution;
- The reputation and experience requirements imposed to the members of the board of directors, the managers and respectively the members of the supervisory board and of the directorate are extended to include the persons appointed to ensure the management of the structures that concern the risk management and control, internal audit, compliance, treasury, crediting, as well as any other activities which may expose the credit institution to significant risks; also, the requirement of prior approval by the NBR is extended to include these latter persons;
- It repeals the express provisions concerning the personal data processing by credit institutions;
- It clarifies the possibilities and the limits of disclosure by NBR of the information held thereby;

- It incriminates and submits to sanction by NBR the endangering of the credibility and/or viability of the credit institution by improper fund management;
- It includes in the category of persons who may be sanctioned for the breach of the banking regime those persons appointed to ensure the management of the structures concerning the risk management and control, internal audit, compliance, treasury, crediting, as well as any other activities which may expose the credit institution to significant risks, as well as the persons whom the NBR finds that they do not perform their activity in accordance with the rules of a prudent and healthy bank practice and/or no longer comply with the reputation and competence requirements adequate to the nature, extension and complexity of the activity of the credit institution and the responsibilities entrusted;
- This law repeals the incrimination as offense of opening accounts under fictitious names.

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## Environment

Name of the enactment

Government Emergency Ordinance No. 15/2009 for the amendment and supplementation of Government Emergency Ordinance No. 68/2007 on environmental liability concerning the prevention and remedy of environmental damage ("GEO 15/2009")

Publication

Official Gazette of Romania, Part I, No. 149/10.03.2009

Entry into force

10 March 2009

Connections with other enactments

Government Emergency Ordinance No. 68/2007 on environmental liability concerning the prevention and remedy of environmental damage ("GEO 68/2007")

Connections with the Community law

Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC ("Directive 2006/21/CE")

Main provisions

GEO 15/2009 was passed as a result of the amendment of Directive 2004/35/CE. Thus, the amendments brought by GEO 15/2009 to GEO 68/2007 are a transposition in the domestic law of the amendments brought by Directive

2006/21/CE to Directive 2004/35/CE.

The amendments brought by GEO 15/2009 are of minor importance, as they mainly consist in clarifying the meaning of the notion of “initial state” (a notion frequently used in the text of GEO 68/2007 – the previous form, without being defined), as well as adding a new activity on the list of activities that trigger the operator’s objective liability, *i.e.* the management of waste from the extractive industry.

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## Insurance Law

Name of the enactment

Order No. 4/2009 of the president of the Insurance Supervision Commission for the application of the Norms concerning the acquiring of or waiver to the capacity of significant shareholder in Romanian insurers/reinsurers (“**Order 4/2009**”)

Publication

Official Gazette of Romania, Part I, No. 164/17.03.2009

Entry into force

17 March 2009

Connection with other enactments

Law No. 32/2000 on the insurance and insurance supervision activity, as further amended and supplemented

Connections with the community law

Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards the procedural rules and evaluation criteria applicable to the prudential assessment of purchases and the increase of holdings in the financial sector (“**Directive 2007/44/CE**”)

Main provisions

The norms approved by Order No. 4/2009 (the “**New Norms**”) transpose the provisions of Directive 2007/44/CE and are purported to clarify the criteria and the process of prudential assessment of a purchase project in order to insure the legal security, transparency, clarity and predictability required for the assessment process and its result.

The main provisions of the New Norms whereby the fulfillment of the purpose stated above is ensured, are:

- Introduction, for clarity purposes, of definitions for certain terms;
- Establishment of a term of maximum 60 business days for the completion of the prudential assessment of a purchase project (according to the New Norms, this term may be suspended for a

certain period of time, only under exceptional cases and for strictly determined reasons);

- Regulation of a transparent and clear procedure for the performance of the assessment of a purchase project and to establish for this purpose a limited set of clear, strictly prudential, assessment criteria;
- Establishment of a more comprehensive set of documents and information that need to be communicated by the potential acquirer to the Insurance Supervision Commission (“ISC”);
- Establishment of the situations where the ISC consults competent authorities of the other Member States when performing the assessment of a potential purchaser which is in a certain situation, for instance: when the potential purchaser is an insurer/reinsurer authorized in another Member State, when the potential purchaser is a credit institution or a financial service and investment company authorized in the European Union, etc.

Repealed enactments

Order No. 113.124/2006 of the ISC president for the application of the Norms concerning the acquiring of or waiver to the capacity of significant shareholder in Romanian insurers/reinsurers.

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## Labor Law

### 1. Social protection measures

Name of the enactment

Government Emergency Ordinance No. 28/2009 regulating certain social protection measures (“GEO 28/2009”)

Publication

Official Gazette of Romania, Part I, No. 186/25.03.2009

Entry into force

25 March 2009

Main provisions

GEO 28/2009 contemplates the passing of certain measures meant to ensure a social protection climate better adapted to the current domestic and international economic evolution.

Thus, the most important social protection measures regulated by GEO 28/2009 refer to:

- Extension of the period for granting the unemployment allowance by 3 months for all the jobless persons registered until 31 December 2009;

- Exemption, for a period of maximum 3 months in the year 2009, of the employers as well as of the employees from the payment of taxes and social protection contributions related to the allowances granted to the employees during the temporary cease of activity;
- Establishment of the so-called “sector committees”. The sector committees are social dialogue institutions of public utility, with legal personality, made up of the employers’ representatives and trade unions’ representatives, at the level of activity branches defined in the National Collective Bargaining Agreement. The main responsibilities of the sector committees are related to the involvement thereof in the preparation of national and sector strategies in the field of professional training of adults.

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## 2. Holiday tickets

Name of the enactment

Government Decision No. 215/2009 for the approval of the Methodological Norms concerning the granting of holiday tickets (“GD 215/2009”)

Publication

Official Gazette of Romania, Part I, No. 145/09.03.2009

Entry into force

9 March 2009

Main provisions

The purpose of GD 215/2009 is to detail the procedures for the application of Government Emergency Ordinance No. 8/2009 on granting holiday tickets. It establishes rights and obligations for the following parties involved in the activity of issuing and granting holiday tickets: employers, beneficiaries, issuers, and affiliates (as defined by GEO 8/2009) in relation with the effective application of the system of holiday tickets.

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## Public Procurement and Concessions

Name of the enactment

Government Emergency Ordinance No. 19/2009 on certain measures in the field of legislation on public procurements (“GEO 19/2009”)

Publication

Official Gazette of Romania, Part I, No. 156/12.03.2009

Entry into force

12 March 2009

Connections with other enactments

- Government Emergency Ordinance No. 34/2006 on the award of public procurement contracts, public works concession contracts and services concession contracts, approved with amendments and

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supplementations by Law No. 337/2006 (“**GEO 34/2006**”);

- Law No. 554/2004 on administrative disputes, as further amended and supplemented (“**Law 554/2004**”).
- Directive No. 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts;
- Directive No. 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors;
- Directive No. 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts;
- Directive No. 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts;
- Directive No. 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

Main provisions

GEO 19/2009 brought numerous amendments and supplementations to GEO 34/2006, primarily meant to enhance the efficiency of the procedures for awarding public procurement contracts. Among the most important, please note:

**1 Increases of threshold values concerning the procedures for the awarding of public procurement contracts**

According to the amendments brought by GEO 19/2009, the contracting authority is entitled to directly purchase products, services and works to the extent that the procurement value does not exceed the RON equivalent of EUR 15,000 for each procurement, unlike the previous version, which set a ceiling of EUR 10,000.

The special rules of transparency for the procedures regarding the award of media advertising contracts are to be applied in awarding the media advertising contracts with an estimated annual cumulated value, exclusive of VAT, higher than the RON equivalent of EUR 20,000, instead of EUR 2,000, according to the previous version.



Also, the value thresholds enabling the contracting authorities to apply the request for tender procedure were increased. Thus, the contracting authorities are entitled to apply the request for tenders procedure only if the estimated value of the procurement contract, without VAT, does not exceed the RON equivalent of the following thresholds:

- EUR 100,000 for the supply contract, unlike the previous threshold of EUR 75,000;
- EUR 100,000 for the services contract, unlike the previous threshold of EUR 75,000;
- EUR 750,000 for the works contract, unlike the previous threshold of EUR 500,000.

## **2 Reduction of certain terms within the procurement procedures**

For the purpose of accelerating the public procurement procedures, GEO 19/2009 reduced a series of terms within the procurement procedures, especially in the case of procedures for awarding public procurement contracts having estimated values which are equal to or lower than the thresholds provided under Article 55 paragraph (2) of GEO 34/2006 (i) EUR 125,000 for the supply contracts and service contracts awarded by other contracting authorities than those acting in the utilities sectors, (ii) EUR 400,000 for supply contracts and service contracts awarded by the contracting authorities acting in the utilities sectors or (iii) EUR 5,000,000 for works contracts):

- As regards the open tender procedures for the award of public procurement contracts with estimated values equal to or less than the thresholds mentioned above, the contract notice may be sent for publication to the Public Procurement Electronic System (PPES) no less than 20 days prior to the deadline for the submission of the tenders, unlike the 28-day term stipulated by the previous version (with a possibility to reduce such term by 5 days if the award documentation is published in the PPES and the interested undertakings have free and unrestricted access thereto from the date when the contract notice is published);
- In case of restricted tender procedures for the award of contracts with values equal to or less than the aforementioned thresholds: (i) the contract notice may be sent for publication in the SEAP no less than 10 days prior to the deadline for the submission of the applications in the first stage

of the procedure, unlike the 16-day term provided for by the previous version; (ii) the invitation to participate may be sent to the selected candidates at least 15 days before the deadline for the submission of the tenders, unlike the 22-day term stipulated by the previous version (with the possibility to reduce this term by 5 days remain applicable if the award documentation is published in the PPES and the interested undertakings have free and unrestricted access thereto from the date when the contract notice is published, but without the possibility for an additional reduction in emergency cases);

- In case of restricted tender procedures for the award of contracts with values exceeding the aforementioned thresholds, in emergency cases which justify the acceleration of the procedure, the interval comprised between the dispatch date of the invitation to participate sent to the selected candidates and the deadline for the submission of the tenders cannot be less than 10 days, unlike the previous wording which provided for a 12-day term in such cases;
- In case of competitive dialogue procedures for the award of contracts with values equal to or less than the aforementioned thresholds, the contract notice may be sent for publication in the PPES no less than 20 days prior to the deadline for the submission of applications in the first stage of the procedure, unlike the 30-day term provided for by the previous wording;
- In case of negotiation procedures with prior publication of a contract notice for the award of contracts with values equal to or less than the aforementioned thresholds, the contract notice may be sent for publication in the PPES no less than 10 days prior to the deadline for the submission of applications in the first stage of the procedure, unlike the 12-day term set out by the previous wording.

### **3 The term for determining the winning tender**

By Government Emergency Ordinance No. 19/2009, terms were provided for the contracting authority to determine the winning tender. Thus, the term within which the contracting authority must determine the winning tender is 20 days following the tenders opening date, and this term may be extended by maximum 20 days in well grounded cases, subject to the approval of the head of the contracting authority.

#### 4 Amendments to the norms regarding settlement of disputes

One of the most important amendments brought to Government Emergency Ordinance No. 19/2009 concerns the settlement of disputes related to public procurements.

Thus, further to the amendments brought by GEO 19/2009:

- The procedure for dispute settlement in court is detailed;
- The term within which the person who deems himself/herself injured may notify the National Council for Settlement of Complaints or the court is 5 days or 10 days (according to the value of the contract, less than or equal to, respectively higher than the thresholds set out under Article 55 paragraph (2) of GEO 19/2009, mentioned above), from the date when the person takes note of the contracting authority's deed which is deemed illegal, regardless of whether the deed is issued before or after the tenders opening date;
- The competence to settle disputes in first instance belongs to the tribunal, the administrative and fiscal chamber, with jurisdiction in the area where the headquarters of the contracting authority are located; the tribunal's decision may be challenged by final appeal, which is ruled upon by the court of appeal;
- The award procedure is not suspended *de jure* upon submission of a complaint, but the suspension may be requested by a person who deems himself/herself injured and it may be ordered by the competent court;
- In any case, even if the court does not order suspension of the procedure, it may continue only up to the moment prior to the conclusion of the public procurement contract, when it is suspended until the court rules by final and irrevocable decision on the disputes relating to the procedure;
- As regards the disputes on the procedures for the award of services/works contracts for the national transport infrastructure, the courts of law exclusive competence to rule on the contestations relating thereto is maintained; the contestations are settled in first instance by the Bucharest Court of Appeal, and that rule is applicable according to which it is impossible to conclude the contract prior to the

ruling of a final and irrevocable decision on the complaints.

## **5 Stamp fees**

Another significant amendment brought by Government Emergency Ordinance No. 19/2009 in this matter concerns the implementation of a stamp duty amounting to 2% of the contract value for the application lodged with the courts, on the public procurement contracts/public works concession contracts/service concession contracts.

It is also provided that the stamp duty for the applications for annulment of a non-economic deed, compelling the contracting authority to issue a non-economic deed, acknowledgment of the claimed right and other such financially non-assessable applications amounts to RON 2,000.

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#### Disclaimer

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