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Legal Bulletin



Environmental Law

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Amendments with an impact on the validity of environmental permits and on the procedure for the annual endorsement of such permits further to the issuance of Constitutional Court's Decision No. 214/2019

Decision No. 214/2019 of the Constitutional Court on admitting the unconstitutionality objection against the provisions of the Law on the approval of Government Emergency Ordinance No. 75/2018 for the amendment and supplementation of legislative acts on environmental protection and foreigners' status, and against Government Emergency Ordinance No. 75/2018 in its entirety ("Decision No. 214/2019") was published in the Official Gazette of Romania, Part I, No. 435 of 3 June 2019.

Under this decision, the provisions of Government Emergency Ordinance No. 75/2018 for the amendment and supplementation of legislative acts on environmental protection and on foreigners' status ("GEO No. 75/2018"), and all the provisions of the law for the enforcement of GEO No. 75/2018¹ were declared unconstitutional in their entirety.

The decision was published in the Official Gazette on 3 June 2019, and for a 45-day term as of its publication, the enforcement of the legislative provisions declared unconstitutional was

¹ The approval law is available here: http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=17405.

suspended, based on Article 147 (1) of the Constitution of Romania². At the end of this period, more precisely as of 18 July 2019, these provisions ceased to have legal effects.

The court found the provisions of GEO No. 75/2018 to be unconstitutional on **grounds of extrinsic unconstitutionality**³, which do not refer to substantive issues of the criticized legislative act, but to the way in which it was adopted, as follows:

- In breach of Article 115(4) of the Constitution requiring that the Government has the obligation to adopt emergency ordinances only in exceptional cases the regulation of which cannot be postponed, and must provide grounds for emergency therein;
- In breach of Article 6(1) of Law No. 24/2000 on the rules of legislative technique for preparing legislative acts, according to which: “[...] *the solutions provided [our note: in the legislative act] must be thoroughly substantiated [...]*”;
- In breach of Article 14 of Law No. 24/2000, as in GEO No. 75/2008 the Government regulated two distinct areas, without any connection between them and envisaging distinct purposes (environmental protection and foreigners’ status).

The amendments brought by GEO No. 75/2018 on environmental protection envisaged provisions from: (i) Article 16 of Government Emergency Ordinance No. 195/2005 on environmental protection (“**GEO No. 195/2005**”); (ii) Government Emergency Ordinance No. 57/2007 on the regime of protected natural areas, conservation of natural habitats, wild flora and fauna; (iii) Law No. 95/2016 on the establishment of the National Agency for Natural Protected Areas and for the amendment of the aforementioned ordinance No. 57/2007.

The amendments on the status of foreigners envisaged Article 4 of Government Ordinance No. 25/2014 on the employment and posting of foreigners in Romania and for the amendment and supplementation of legislative acts concerning the status of foreigners in Romania.

Further to the cessation of the legal effects of GEO No. 75/2018, all the legislative acts mentioned above were reinstated to the form they had before the publication of GEO No. 75/2018.

In this context, the following significant legislative changes occurred:

² Article 147 of the Constitution: “(1) The provisions of the laws and ordinances in force, as well as those of the regulations, which are found to be unconstitutional, shall cease their legal effects within 45 days of the publication of the decision of the Constitutional Court if, in the meantime, the Parliament or the Government, as the case may be, cannot bring into line the unconstitutional provisions with the provisions of the Constitution. For this limited length of time the provisions found to be unconstitutional shall be suspended *de jure*. (4) Decisions of the Constitutional Court shall be published in the Official Gazette of Romania. As from their publication, decisions shall be generally binding and effective only for the future.”

³ Considering that the grounds for extrinsic unconstitutionality upheld by the Court were substantiated, the Court found that it was no longer necessary to examine the intrinsic unconstitutionality criticisms submitted by the authors of the unconstitutionality objection (concerning the substance of the criticized regulations).

1. Validity period of environmental permits and integrated environmental permits (together, the “Permits”) and the modification of such validity period

GEO No. 75/2018 eliminated the provision of Article 16 of GEO No. 195/2005 which stipulated a validity period for the environmental permit/integrated environmental permit, after which such permit expired (5 years and 10 years, respectively). In this context, the Permits acquired an undetermined validity period, conditional on obtaining the annual endorsement.

Further to the cessation of the legal effects of GEO No. 75/2018, Article 16 of GEO No. 195/2005 was reinstated to the form it had before it was amended by GEO Nr. 75/2018, and consequently the Permits will be subject again to the validity periods provided below, without the requirement of obtaining an annual endorsement:

- A validity period of **5 years** for environmental permits;
- A validity period of **10 years** for integrated environmental permits.

Also, the new para. (2⁴) of Article 16 of GEO No. 195/2005 introduced by GEO No. 75/2018, which provided that the Permits could be modified only to the extent that their revision was requested, has been eliminated.

2. Procedure for the annual endorsement of the Permits

Eliminating the constitutional ground of Article 16 of GEO No. 196/2005 on the annual endorsement also causes a cessation of the effects of the subsequent acts issued on the basis of this article, i.e. Order No. 1171/2018 and Order No. 324/2019 detailing the procedure for the annual endorsement of the Permits⁴.

This rendered unenforceable the favourable provisions in Order No. 324/2019 which provided as follows:

- That the economic operators whose Permits were to expire from 1 January to 31 August 2019 could apply for an annual endorsement as of year 2020;
- That the economic operators whose Permits will expire from 1 September to 31 December 2019 could request the annual endorsement as of year 2019.

In this legislative context, in absence of a law issued to regulate the provisions declared unconstitutional by the Constitutional Court as regards annual endorsement, and unless the environmental authorities issue clear guidelines, the economic operators whose permits expired or are to expire shortly will have difficulties; it may therefore be advisable for them to initiate

⁴ Order No. 1171/2018 on the approval of the Procedure for the annual endorsement of the environmental permit and the integrated environmental permit (“Order No. 1171/2018”) and Order No. 324/2019 for the amendment and supplementation of the appendix to Order No. 1171/2018 of the Vice Prime Minister, Minister of Environment concerning the approval of the Procedure for the annual endorsement of the environmental permit and the integrated environmental permit (“Order No. 324/2019”). These orders were issued for the enforcement of Article 16 of GEO No. 195/2005 (as amended by GEO No. 75/2018) which provided for the obligation to have an annual endorsement.

a re-permitting procedure so as to avoid any penalties due to the inexistence of an environmental/ integrated environmental permit.

Law No. 324/2019 on the amendment and supplementation of Article 16 of GEO No. 195/2005 on environmental protection (“Law No. 324/2019”)

To counteract the effects of Decision No. 214/2019, on 12 June 2019 a draft law⁵ was registered with the Senate for debates, and it was approved by both Chambers on 3 July 2019 as Law No. 324/2019 in the form accessible here http://www.cdep.ro/pls/proiecte/docs/2019/pr316_19.pdf.

This law provides, *inter alia*, for the following:

- Elimination of the validity period for the Permits (5 and 10 years, respectively);
- Obligation to annually endorse the Permits and circumstances in which the Permit holder may apply for a new Permit. In this respect, it is stipulated that:
 - a) The Permits remain valid throughout the entire period when their beneficiaries obtain the annual endorsement;
 - b) It is mandatory to obtain endorsement for the Permits issued after the date this law enters into force;
 - c) It is mandatory to obtain endorsement for the Permits which are issued on the effective date of this law. For such Permits, it is specified that: (i) the validity may be changed at the holders’ request, meaning that such regulatory acts remain valid throughout the entire period when the holder obtains the annual endorsement; (ii) if the holders request such change of the Permit validity, they will not apply for and will not go through the procedure of obtaining a new permit.
 - d) If the holder does not request the change of the Permit validity as provided above, it must apply, at least 6 months before expiry of the regulatory act, for the issuance of a new permit within the periods provided by the laws in force, even if it obtained the annual endorsement during the validity period.

On 8 July 2019, a **notice** was submitted on the alleged unconstitutionality of the substance of this law, essentially on the following grounds⁶:

⁵ https://senat.ro/legis/lista.aspx?nr_cls=L324&an_cls=2019 (Senate’s website);
http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?nr=316&an=2019 (Chamber of Deputies’ website).

⁶ Please see footnote 5.

1. Violation of the principle of non-retroactivity of the law and the principle of legal certainty

Although, from a *per a contrario* interpretation of the provisions at letter c)(i) above, it follows that the Permits issued until the effective date of Law No. 324/2019 remain valid for the period provided under the former regulation, by providing for the obligation to obtain an annual endorsement Law No. 324/2019 provides *de facto* for a new validity period of one year, as the absence of such endorsement results in the invalidity of the permit.

Also, Law No. 324/2019 does not include transitional provisions to regulate the situation of economic operators which undergo a re-permitting process upon the effective date of this law, as it is not clear whether they will be subject to the provisions of the former law, which limits the validity period of the environmental permit to 5 years and the validity period of the integrated environmental permit to 10 years, or whether they will be subject to the provisions of Law No. 324/2019, whereby the time quantification of the validity is eliminated.

2. Violation of the principle of equality before the law

Law No. 324/2019 provides for a different legal treatment of economic operators, which discriminates by reference to the time of permitting (i.e., before/after the effective date of this law).

Thus, based on the provisions described at letter d) above:

- Economic operators which obtained the Permits under the former law and which did not apply for the amendment of the validity thereof have the obligation to apply, at least 6 months before expiry of the validity of the regulatory act, for the issuance of a new permit, in accordance with Order No. 1798/2007 and Order No. 818/2003⁷ even if they obtained the annual endorsement,
- While economic operators obtaining permits after the date of entry into force of Law No. 324/2019 should only obtain the annual endorsement for the successive extension of the permit validity.

The aforementioned notice will be settled upon by the Constitutional Court on 18 September 2019⁸. To the extent that, further to the constitutionality review, the Court finds that this legislative act does not comply with the provisions of the Constitution, such law cannot be enacted.

roxana.pana@tuca.ro

⁷ Order No. 1798/2007 of the Minister of Environment for the approval of the Procedure for the issuance of the environmental permit, and Order No. 818/2003 of the Minister of Environment for the approval of the Procedure for the issuance of the integrated environmental permit even if the economic operators obtained the annual endorsement.

⁸ <http://www.cdep.ro/proiecte/2019/300/10/6/316sesiz.pdf>

Editors

Environmental Law and Permitting are two of the niche practice areas of Romanian and EU law in which Țuca Zbârcea & Asociații's attorneys have gained unique expertise by handling some of the most complex projects undertaken so far in Romania in the mining sector, energy and oil & gas, as well as in the steel industry. Our services cover all procedural steps to be undertaken before the competent authorities (city halls, local environmental authorities, Ministry of Environment, Water and Forests, etc.) in relation to complex procedures such as IPPC, BAT, environmental impact assessment procedures, issuance of city planning certificates, public debates and environmental organisations, cross border environmental procedures, etc. Also, our services include advice on the environmental aspects of projects such as mergers and acquisitions, partnerships, long term exploitation contracts etc. and drafting and negotiating environmental agreements for the separation of environmental liabilities, both historical and forthcoming.



Ciprian Dragomir
Partner
+4 021 204 88 98
ciprian.dragomir@tuca.ro



Bogdan Halcu
Managing Associate
+4 021 204 88 90
bogdan.halcu@tuca.ro

TUCA ZBARCEA ASOCIATII

Șos. Nicolae Titulescu nr. 4-8
America House, Aripa de Vest, et. 8
Sector 1, 011141, București, România
T +4 021 204 88 90
F +4 021 204 88 99
E office@tuca.ro
www.tuca.ro

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