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Legal Bulletin



Environmental Law

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1. **New procedure for authorisation of the undertakings taking over the responsibility of managing packaging wastes (responsibility transfer operators - “RTOs”)**

New legal framework for authorisation of RTOs

Law No. 249/2015 on the modality of managing packaging and packaging waste (“**Law No. 249/2015**”)¹ repealed, as of its coming into force, Order No. 2.742/3.190/305/2011² regarding, *inter alia*, the procedure for authorisation of undertakings for the purpose of taking over the obligations regarding the achievement of the annual objectives of recovery and recycling of packaging waste. Also, Article 16(5) of Law No. 249/2015 provides for the establishment of a new authorisation procedure within 120 days following its coming into force (2 November 2015). Under these circumstances, Order No. 932/481 of 18 May 2016 of the Minister of Environment, Waters and Forests and of the Vice Prime Minister/Minister of Economy, Commerce and Relationships with the Business Environment approving the Procedure for authorisation of the undertakings to take over the responsibility to manage packaging waste (“**Order No. 932/481/2016**”)³ came into force on 4 June 2016. This new regulation regarding RTOs authorisation brings several novelties, as follows:

1. **Actual procedure for obtaining the authorisation to operate as RTO**

Several additional requirements are introduced, such as:

- The submission of a tax record revealing that the future RTO has not perpetrated any deeds punishable under the tax, financial, customs laws, or deeds breaching financial discipline;

1 Published in the Official Gazette of Romania, Part I, No. 809 of 30 October 2015.

2 Order No. 2.742/3.190/305/2011 issued by the minister of environment and forests, the minister of economy, commerce and business environment, and the minister of administration and interior approving the Procedure, the criteria for authorisation, reauthorisation, revision, annual endorsement, issuance and annulment of the licence to operate, of the minimum percentage of recovery of the packaging waste taken over from the population, of the undertakings with a view to taking over the obligations related to the achievement of the annual objectives regarding the packaging waste recovery and recycling, as well as approving the structure and powers of the authorisation commission, as further amended.

3 Published in the Official Gazette of Romania, Part I, No. 409 of 31 May 2016.

- The submission of a tax certificate revealing the absence of any debts of the future RTO to the State budget;
- The submission of evidence attesting to the fact that the shareholders of the future RTO are only the undertakings provided under Article 16(1) of Law No. 249/2015⁴;
- The submission of the evidence attesting the registration of the RTO as taxpayer with the Environmental Fund Administration;
- The requirement that the issuance of the license to operate as an RTO is endorsed by the State secretary with powers in the field.

The new procedure for issuance of the authorisations to operate as RTO may take maximum 60 days (as compared to the 90 day-term set forth under the former regulation), without the applicant's possibility to interrupt the process of verification and assessment of the file.

An important aspect of the new regulation is determined by the elimination of the specific section regarding the authorisation criteria. Such approach may raise issues with regard to the assessment of the applications for authorisation, since there are no expressly defined criteria to ensure an objective assessment of the authorisation commission. Nevertheless, some of the old criteria have been incorporated in the rules regarding the actual documentation provided in Order No. 932/481/2016 (e.g., the ascertaining certificate submitted by the applicant must attest to the specific scope of business and the share capital of RON 400,000; also, the compliance with the specific requirements regarding the shareholders of the future RTO must be evidenced).

Furthermore, the new regulation no longer sets time limits for the validity of the license to operate, no longer establishes the necessity for the annual endorsement of such license or for the reauthorisation procedure, which may lead to the conclusion that the license is issued for an undetermined period.

Also, the situations in which the license to operate is annulled have changed, according to new procedure, and such license may be annulled if, for 2 consecutive years following the finding, the RTOs fail to achieve at least: (i) the objectives provided under Appendix No. 3 to Government Emergency Ordinance No. 196/2005 on the Environmental fund, established in relation to the packaging waste resulting from the packaging introduced on the national market/taken over under an agreement while ensuring the traceability thereof, or (ii) the obligations provided by Order No. 932/481/2016.

Subsequent to the annulment of the license to operate, according to the new provisions, the RTOs have a longer time period (namely, 30 days instead of 10) to inform the undertakings for which they took over the responsibility, of the annulment of the license to operate.

4 Namely, the undertakings which: (i) enter packaged products on the market; (ii) over package individually packaged products to resell/redistribute them; (iii) enter packaging for sale on the market, and which (iv) rent packaging, in any form, on a professional basis.

In this context, please note that Order No. 932/481/2016 provides that the undertakings which submitted the documentation for authorisation/reauthorisation according to the former regulation, i.e., Order No. 2.742/3.190/305/2011, but which have not been authorised/reauthorised due to the fact that such order ceased to apply (during 2 November 2015 - 3 June 2016), shall submit the documentation redrafted according to the provisions of the procedure approved by Order No. 932/481/2016, except for the evidence attesting the payment of the fee for the issuance of the license to operate, within 30 days following the coming into force of Order No. 932/481/2016.

2. Obligations incumbent upon the authorised RTOs

The new regulation amends several obligations incumbent upon RTOs, among which are the following ones:

- Obligation to execute agreements with the collectors authorised to take over packaging waste, and with the undertakings authorised to recycle and/or recover, respectively to incinerate in incineration plants with energy recovery, which accept the contractual conditions, within the limits of the quantities and types of packaging taken over from the responsible undertakings, with the observance of the proximity principle;
- Such principle is not yet defined and the new regulation does not provide for the modality to apply such principle. Please note that, according to the general environmental law principles, the proximity principle implies choosing the collector/undertaking which is closest to the area where the waste to be collected/recovered are located;
- Obligation to inform the authorisation commission in writing of any change in the data underlying the issuance of the license to operate, as provided under to new procedure, within maximum 15 days following the coming into force of the amendment;
- Obligation to treat the responsible undertakings in a non-discriminatory manner, as provided under the new procedure, solely by reference to the packaging materials and not to the quantities planned to be contracted.

At the same time, Order No. 932/481/2016 regulates several new obligations, such as:

- The annual performance of the external financial audit according to Romanian CECAR financial audit standard, and of the external operational audit, according to the minimum requirements provided in Appendix No. 5 to Order No. 932/481/2016, related to the activities performed by independent auditors, and the submission of the results thereof to the authorising commission, by 1 September of the following year;[□]

- To submit, by 15 September of the following year, to the undertakings for which they took over the responsibility, the result of the external financial audit and of the external operational audit performed for the preceding year;□
- To publish on their own website, the list of undertakings for which they took over the responsibility, as well as the tariffs stated in the relationship with all the undertakings for which they took over the responsibility;□
- To reinvest the potential profit in the same kind of activities performed with a view to fulfilling the responsibilities incumbent upon the undertakings provided under Article 16(1) of Law No. 249/2015 (i.e., mentioned in footnote 3 above);
- To submit with the authorising commission, 60 days prior to the expiry, a new operation plan, according to the requirements provided under Appendix No. 12 of Order No. 932/481/2016, which would be valid for the following 3 (three) years.□

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