

# Legal Bulletin

April 2011

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## Accounting

Name of the enactment	Emergency Ordinance No. 37/2011 amending and supplementing Accounting Law No. 82/1991 and amending other applicable enactments (“ <b>GEO No. 37/2011</b> ”)
Publication	Official Gazette of Romania, Part I, No. 285 of 22 April 2011
Entry into force	22 April 2011
Connections with other enactments	Accounting Law No. 82/1991, as further amended and supplemented (“ <b>Accounting Law</b> ”)
Main provisions	GEO No. 37/2011 brings significant amendments to the Accounting Law, in the following areas:

- **Manner of keeping accounting records by individuals generating income**

Individuals carrying out activities generating income have the obligation to hold simplified accounting records according to single-entry bookkeeping rules, pursuant to the regulations drafted to this effect. Such individuals must fill in the General Ledger and the Inventory Record.

- **Manner of keeping accounting records by other entities**

Collective investment units, which are not established based on articles of incorporation, as they are regulated in the capital market law, optional pension funds, private pension funds and other entities organized under the Civil Code, have the obligation to organize and coordinate their financial and management accounts.

- **Manner of keeping accounting records by public institutions**

The provisions on the accounting records meant for the analysis of the costs of approved programs, part of the public institutions’ accounting records, were repealed.

- **Manner of keeping accounting records in another currency**

The provision according to which the persons subject to Accounting Law may choose to draft their financial statements in another currency, for their own informative needs, was repealed.

- **Accounting regulations particular to certain lines of business**

As regards the drafting and issuance of accounting norms and regulations, particular to certain lines of business, GEO No. 37/2011 expressly stipulates the institutions having competence in this respect, on the one hand, and the entities to which such norms are applicable, on the other.

- **Manner of keeping accounting records by sub-units opened in Romania by companies residing in other states belonging to the European Economic Area**

The sub-units opened in Romania by companies residing in States belonging to the European Economic Area have the obligation to organize and manage their own accounting records, without drafting annual financial statements concerning their own activities.

- **Simplified accounting system for small size companies**

Entities which had a net turnover below the RON equivalent of EUR 35,000 and the total assets below the RON equivalent of EUR 35,000 in the previous financial year may choose for a simplified accounting system, which shall be approved by order of the minister of public finance. Such entities shall use a simplified account plan and shall draft annual financial statements, including a simplified balance sheet and profit and loss account, considering as well the related EU Law provisions. The classification according to the aforementioned criteria is based on the indicators determined in the annual financial statements, *i.e.* the trial balance, drafted at the end of the previous financial year, using the rate of exchange notified by the National Bank of Romania, valid at the end of the same financial year. The level of indicators may be changed only by Government decision.

- **Liability for the accounting records**

In case of small companies, such as defined above, accounting records may be organized and managed based on agreements/service agreements executed under the Civil Code with individuals having higher economic studies, and in this case the liability for accounting operations management lies with such individuals.

In case of individuals generating income, liability for accounting activities lies with same, particularly if they keep their own accounting records. In case accounting records are kept based on agreements/service agreement executed with

individuals having higher economic education, the liability for the accounting records is assigned to the latter, in accordance with the law and the contractual provisions.

- **Prohibiting the non-entry of items in the accounting records**

It is prohibited to hold items such as assets and debts, under any title, as well as to perform economic-financial operations without entering them in the accounting records.

- **Drafting the trial balance**

In order to verify the correct entry in the accounting records of carried out operations, the trial balance must be drafted at least at the end of the financial year, on the terms established for the filing of financial statements and of accounting reports, and also at the end of the period for which the entity must draft the income/profit returns. Initially, it had to be drafted at least annually, at the end of the financial year or on the terms established by law for the drafting of the accounting reports.

- **Storing and Archiving Accounting Data**

Persons using automated data processing systems have the obligation to ensure the processing of accounting data in accordance with the applicable accounting regulations, as well as their control and storage on technical media for 10 years. They have the obligation to ensure the tax authorities' access to the data stored on technical media.

In case of reorganization of legal entities, they shall take measures to store and archive supporting documents and accounting records, in accordance with the law.

In case of loss, theft or damage of the financial-accounting records, measures shall be taken to restore them within 30 days at the most as of the acknowledgement of the event, and in force majeure events, within 90 days as of the cessation thereof.

- **Obligations of the individuals choosing to apply a financial year different from the calendar year**

Subsidiaries headquartered in Romania and consolidated branches of mother-companies headquartered abroad, except for certain entities expressly provided by law, choosing a financial year different from the calendar year, have the following supplementary obligations: a) to draft and submit annual accounting

reports with the local units of the Ministry of Public Finance; b) to notify in writing the local unit of the Ministry of Public Finance on the chosen financial year, at least 30 calendar days prior to the beginning thereof. Except for the cases in which the mother company changes its reporting date or reorganization proceedings occur, under the law, the date selected for drafting the annual financial statements cannot be changed from one financial year to another.

- **Redefining the concept of “legal entity of public interest” subject to financial auditing**

The following entities were included in the definition of this notion: payment institutions and institutions issuing electronic currency, defined by the law, granting loans in relation to payment services, whose activity is limited to providing payment services, *i.e.* issuing electronic currency and payment services; companies with full or majority state-owned share capital; *regies autonome*; non-profit organizations benefiting from public funds financing. Moreover, the annual financial statements are audited in case of winding-up operations, if such persons have the obligation to audit the annual financial statements.

- **Drafting, submitting and signing financial statements**

Non-profit legal entities draft annual financial statements, *i.e.* the balance sheet and the outturn account, waiving the accounting policies and explanatory notes.

Annual financial statements shall be signed by:

- Economic Manager, Chief Accountant, or another person authorized to hold this position;
- Individuals or legal entities, authorized under the law, members of the Body of Expert and Licensed Accountants of Romania, which may draft annual financial statements;
- Persons organizing and managing the accounting activity of individuals which may hold simplified accounting records;
- The director or the person who is in charge of managing the entity;
- In case of public institutions, the budget manager and the financial-accounting department manager or another person authorized to hold this position, or the individual or legal entities, authorized under the law, members of the Body of Expert and Licensed Accountants of Romania, as the case may be.

The annual financial statements and, as the case may be, the consolidated annual financial statements must be filed with the local units of the Ministry of Public Finance, in accordance with the legal provisions in force, on the various terms expressly provided under the law, according to the related entity.

Legal entities, which have not carried out any activity since their incorporation, as well as subunits without legal personality from Romania owned by legal entities headquartered abroad, which did not carry out any activities as of their incorporation, shall file a statement to this effect, within 60 days as of the end of the financial year, before the local units of the Ministry of Public Finance.

During the winding-up procedure, such legal entities undergoing winding-up must submit, within 90 days as of the end of each calendar year, with the local units of the Ministry of Public Finance, an annual accounting report the contents of which is established by the order of the minister of public finance.

To ensure the information meant for the state's institutional system, the Ministry of Public Finance may request the persons falling under the scope of Accounting Law (except for the individuals generating income) to submit, within 150 days as of the end of the financial year, respectively the calendar year, with the local units of the Ministry of Public Finance, an annual financial report, the contents of which is established under the order of the minister of public finance.

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## Employment and Social Security Law

Name of the enactment

Law No. 52/2011 on occasional activities carried out by day laborers ("Law No. 52/2011")

Publication

Official Gazette of Romania, Part I, No. 276 of 20 April 2011

Entry into force

23 April 2011

Connections with other enactments

Law No. 53/2003 – Labor Code (the "Labor Code")

Main provisions

Law No. 52/2011 introduced the possibility for occasional activities to be carried out by day laborers, Romanian or foreign individuals, for a beneficiary which is a business entity, without concluding an employment agreement.

These activities may be performed in the following areas: (i) agriculture; (ii) hunting and fishing; (iii) forestry, logging excluded; (iv) fish farming and aquaculture; (v) fruit-growing and viticulture; (vi) apiculture; (vii) livestock; (viii) entertainment shows, cinema and audiovisual productions, advertising, cultural

activities; (ix) cargo handling; (x) maintenance and cleaning.

As regards the duration of the activity carried out by a day laborer to the same beneficiary, it can span from one day to maximum 90 days in the course of a calendar year.

Day laborers work 8 to 12 hours a day. Even if the parties agree on fewer work hours per day, day laborers shall be paid for the equivalent of at least 8 hours of work.

According to the new regulation, the wage payable by the beneficiary to the day laborer shall be established by direct negotiation between the parties; however, it shall not be less than RON 2/hour nor higher than RON 10/hour. The wage thus settled shall be paid at the end of each day of work. A 16% income tax corresponding to the gross wage, payable by the beneficiary shall be owed, without any further mandatory social contributions being owed.

As for keeping record of the work carried out by day laborers, the beneficiary shall have the obligation to create a Day Laborers' Ledger and submit it on a monthly basis to the territorial labor inspectorate with jurisdiction over its headquarters.

The sanction applicable to the beneficiary for failure of the obligation to pay the day tax afferent to the laborer wage is a RON 20,000 fine and the interdiction to use day laborers for the entire duration of the beneficiary's existence.

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## Public Procurement, Concessions, Public Private Partnership

Name of the enactment

Government Emergency Ordinance No. 39/2011 amending and supplementing Public Private Partnership Law No. 178/2010 ("GEO No. 39/2011")

Publication

Official Gazette of Romania, Part I, No. 284 of 21 April 2011

Entry into force

21 April 2011

Connections with other enactments

Public Private Partnership Law No. 178/2010 ("PPP Law")

Government Emergency Ordinance No. 34/2006 on the award of public procurement contracts, public works concession contracts and service concession contracts, approved as amended and supplemented by Law No. 337/2006, as amended and supplemented ("GEO No. 34/2006")

Main provisions

With a view to securing conformity with the European Union legislation in the

field of public contracts, GEO No. 39/2011 brought various amendments to the provisions of the PPP Law, the most important being detailed below.

- **Project Company**

GEO No. 39/2011 established that the project company be incorporated and operated as a joint-stock company, with the public partner and private partner as shareholders, eliminating the possibility of organizing the project company as a limited liability company, but keeping the requirement of the public partner to participate in the share capital of the project company by way of in-kind contribution, exclusively.

- **Procedures of Awarding the Public Private Contract (“PPP Contract”)**

- General Issues

GEO No. 39/2011 brought numerous amendments to the provisions of the PPP Law on the procedure of awarding the PPP Contracts.

Consequently, further to the entry into force of GEO No. 39/2011, the PPP Contracts may be awarded following the completion of two stages: (i) the open stage or (ii) the competitive dialogue.

In the case of both procedures, the EUR 5,000,000 threshold, VAT not included, was amended and, depending on this threshold, the notice of intent shall be or shall not be published in the Official Journal of the European Union.

Consequently, following the amendments brought by GEO No. 39/2011, the PPP Law regulates, in a fashion similar to GEO No. 34/2006, two threshold, as per the object of the PPP Contract (EUR 125,000, VAT not included, for the PPP Contracts for goods or services, or EUR 4,845,000, VAT not included, for the PPP Contracts for works); the notice of selection shall have to be published in case of the PPP Contracts whose forecasted value exceeds such thresholds.

In addition, similarly to GEO No. 34/2006, GEO No. 39/2011 regulates a 10-day waiting term for the submission of complaints; within such term, the conclusion of the PPP Contract with the private investor declared successful shall be prohibited.

- Open Procedure

Any interested person may participate in the open procedure, which shall be a single-stage procedure; further to the assessment of the bids submitted, the successful bidder shall be established and the PPP Contract shall be concluded



with such bidder.

The open procedure is basically similar to the open tender procedure regulated under GEO No. 34/2006. In addition, further to the amendments brought by GEO No. 39/2011, the terms of the open procedure may be longer or shorter, as per the above threshold.

- **Competitive Dialogue Procedure**

The competitive dialogue procedure is a two-stage procedure (evaluation and negotiation). During the evaluation stage, the private investors to execute the project agreement and to participate in the second stage of the procedure are selected, and further to the completion thereof and to the evaluation of the final bids submitted, the successful bid and the private investor with whom the PPP Contract is to be executed shall be established.

The competitive dialogue procedure may be enforced only in major projects from a technical and/or financial standpoint, when the public partner is not able to define, in the absence of any assistance and in advance, the necessary technical means, or to make the necessary financial or legal arrangements for the project.

The competitive dialogue procedure is basically similar to the competitive dialogue procedure regulated under GEO No. 34/2006. As with the open procedure, following the amendments brought by GEO No. 39/2011, the terms of the procedure may be longer or shorter, depending on the above thresholds.

• **Complaint/Dispute Resolution**

GEO No. 39/2011 inserted many provisions on the resolution of the complaints regarding the procedures of awarding the PPP Contracts and the disputes related to the PPP Contracts, which provisions basically restate the similar provisions of GEO No. 34/2006.

Consequently, the National Council for Solving Complaints is made competent over solving the complaints filed throughout the procedures for the award of the PPP Contracts. In case of disputes related to the PPP Contracts, the provisions of GEO No. 39/2011 regulate the exclusive competence of the courts of law.

• **Bid Bond**

GEO No. 39/2011 inserts express provisions on the establishment by the participants in the award procedure of a bid bond amounting to 1% of the forecasted value of the PPP Contract.

- **Conclusion of the PPP Contract**

As to the conclusion of the PPP Contract, GEO No. 39/2011, removes the requirement provided by the former regulation of the PPP Law regarding the approval of the PPP Contract by way of a Government Decision or decision of the local public administration authority, as holders of the right to administer the asset contemplated by the PPP Contract. Consequently, in the case of public private partnerships implemented by the central authorities, the PPP Contract shall be concluded by the public partner and private partner, while the public private partnerships implemented by local authorities shall be subject to the specific rules governing the activity of such authorities, as the conclusion of the PPP Contracts is concerned.

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## Real Estate

Name of the enactment

Emergency Ordinance No. 33/2011 amending and supplementing Art. 1 of Government Emergency Ordinance No. 60/2009 on certain measures for implementing the "First House" Program, and adopting certain measures for continuing the "First House" Program ("GEO No. 33/2011"); and

Government Decision No. 404/2011 amending and supplementing Government Decision No. 717/2009 approving the norms implementing the "First House" Program ("GD No. 402/2011")

Publication

GEO No. 33/2011 – Official Gazette of Romania, Part I, No. 235 of 4 April 2011

GD No. 404/2011 – Official Gazette of Romania, Part I, No. 286 of 22 April 2011

Entry into force

GEO No. 33/2011 - 4 April 2011

GD No. 404/2011 – 22 April 2011

Connections with other enactments

Government Emergency Ordinance No. 60/2009 on certain measures for implementing the "First House" Program ("GEO No. 60/2009");

Norm dated 17 June 2009 for implementing the "First House" Program (the "Norm")

Government Decision No. 717/2009 approving the norms implementing the "First House" Program

Main provisions

GEO No. 33/2011 amends the provisions of GEO No. 60/2011 by extending the category of persons benefiting from the "First House" Program, within the allocated guarantee thresholds, by regulating the equal allocation of risks and

losses between the State and financiers, subject to similar costs.

To this end, with GEO No. 33/2011, the beneficiaries from the “First House” Program are such individuals that, upon applying for the secured loan, state on their on liability, either that they hold no house in exclusive ownership or together with the spouse, irrespective of how and when was acquired, or that they hold one house, at the most, in exclusive ownership or together with the spouse, acquired by any other fashion than the “First House” Program, and having a net area of less than 50 sqm.

Both GEO No. 33/2011 and GD No. 404/2011 provide that the eligible financiers in the program shall be entitled to transfer, within the allocated and used threshold, the granted loan portfolio to other eligible financiers in the program, without prejudice to the rights and obligations of the beneficiaries from ongoing contracts, subject to notifying the beneficiaries in advance; the contracts securing the transferred loans shall remain valid without the fulfillment of other formalities being required. The conditions of such transfers are detailed under GD No. 404/2011.

GEO No. 33/2011 establishes the financiers’ possibility of choosing to reuse a threshold up to 50% of the total amount of guarantees granted under the program, subject to the proportional allocation of risks and losses between the State of Romania, represented by the Ministry of Public Finance, through National Guarantee Fond for Small and Medium Undertakings S.A. – N.B.F.I. (in Romanian, *Fondul Național de Garantare a Creditelor pentru Întreprinderile Mici și Mijlocii S.A. - I.F.N*) (the “Fund”), and financier. To this end, financiers shall be given the possibility to express such option in writing to the Ministry of Public Finance and the Fund, within 90 days from the entry into force of GEO No. 33/2011.

As a result of the above regulations, for the purpose of securing the financing granted under the “First House” Program, both GEO No. 33/2011 and GD No. 404/2011 regulate the procedure of establishing a 1<sup>st</sup> rank legal mortgage right until the completion of the enforcement proceedings against the real estate subject to the guarantee, according to law, over: (i) the real estates purchased under the program, (ii) the land on which the housing shall be built under the program, and over the future housing and the housing built by the individual beneficiary, as well as over (iii) the land on which the housings are to be built under the program, and over the future housings and housings built through associations without legal status, in favor of the State of Romania represented by

the Ministry of Public Finance, and in favor of the financiers, *pro rata* to the percentage of guarantee, subject to the interdiction of transferring the housing for a 5-year period and of encumbering the same with encumbrances throughout the full term of the guarantee.

According to the new amendments, the financier (and not the Ministry of Public Finance) shall be entitled to express its approval for the takeover of the secured financing and housing/future housing by an individual meeting the eligibility criteria laid down under the program and/or by other persons provided under certain enactments.

For the purpose of implementing the new regulations on the "First House" Program, the Fund shall be authorized to conclude an agreement laying down the applicable terms and conditions, with the financiers choosing to reuse a threshold of 50% of the total balance of guarantees given under the "First House" Program, under the conditions of law.

As to the full cost of the financing given under the program, as amended by GEO No. 33/2011 and GD No. 404/2011, it should be noted that, both the margin of maximum 4.00% per year for the loans in EUR to be added to the EURIBOR interest rate every 3 months, and the margin of maximum 2.50% per year for the loans in RON to be added to the ROBOR interest rate every 3 months, such cost shall not include the cost of the real estate's appraisal, the cost for registration formalities and the administration cost due to the Fund.

To this end, GD No. 404/2011 provides that the amount of the administration fee and of the sole analysis fee, calculated on the balance of the State guarantee, shall be negotiated every six months between the Minister of Public Finance and the Fund, and shall be established by order of the minister of public finance.

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## Taxation

Name of enactment

Order No. 1853/2011 approving the Procedure implementing the provisions of Government Emergency Ordinance No. 29/2011 regulating the award of payment schedules ("**Order No. 1853/2011**")

Publication

Official Gazette of Romania, Part I, No. 249 of 8 April 2011

Entry into force

8 April 2011

Connections with other enactments

Government Emergency Ordinance No. 92/2003 on the Fiscal Procedure Code, as republished and further amended and supplemented ("**Fiscal Procedure Code**")

which is considered as the general law in relation to the provisions of Government Emergency Ordinance No. 29/2011 (“GEO No. 29/2011”) and to Order No. 1853/2011, as well.

#### Main provisions

Order No. 1853/2011 is the enactment implementing GEO No. 29/2011, issued by the Ministry of Public Finances in view of detailing the procedure of scheduling fiscal debts, particularly with respect to the supporting documents which have to be submitted by the applicant taxpayer and to the content of the acts issued by the fiscal authority in different stages of the procedure.

As compared to the provisions of GEO No. 29/2011, Order No. 1853/2011 details the concept of fiscal debt administered by the National Agency for Fiscal Administration, which is the sole type of debt which may be subject to scheduling. To this end, Order No. 1853/2011 lists a set of main fiscal debts such as taxes, duties, contributions and other amounts due to the general consolidated budget and ancillary fiscal debts, both established under fiscal statements or decisions of relevant tax authorities.

As to the contents of the award application filed by the taxpayer, such application shall basically include the following details:

- Taxpayer’s identification details;
- The term (in months) for which scheduling is sought, accompanied by a justification of such term;
- The amount for which scheduling is sought, broken down by types of fiscal debts;
- Causes and the justification of the difficulties encountered upon paying the fiscal debts.

A set of supporting documents shall be attached to the award application, depending on the applicant being individual or legal entity. Therefore, legal entities shall submit, *inter alia*, the following documents:

- Copy of the latest annual financial statement submitted to the relevant authority;
- Statement of proceeds and payments for the past 6 months prior to the application;
- Copy of the latest trial balance;
- Financial restructuring/recovery plan;

- Other details on the situation of the bank accounts' balances and the informative indicators listed under Appendix No. 6 to Order No. 1853/2011.

Applicant individuals shall submit a register of proceeds and payments, income supporting documents for the past 6 months, and a financial recovery plan or any other document certifying that payments may be made in the scheduling term.

If the amounts for which scheduling was requested are found not to coincide with the amounts filled in the fiscal registration certificate, the fiscal authority shall notify the taxpayer to appear before its headquarters to clarify the situation, which meeting shall end with an agreement minutes.

As to the contents, the fiscal certificate shall include the fiscal debts existing in the balance upon the issuance of the certificate, broken down by the type thereof, emphasizing those which may or may not be subject to the payment scheduling.

In order to check whether the conditions for the award of such schedule are met, the fiscal authority shall mainly analyze the sustainability and positive development of the applicant's financial capacity, in consideration of the relevant documents attached to this end to the award application.

After having checked the award conditions, the fiscal authority shall prepare Report "A" as per the template provided under the appendix to Order No. 1853/2011. At the same time, the fiscal authority shall also issue a preliminary endorsement establishing the scheduling term and the amount of the guarantee to be established. At this point, the scheduling decision may also be issued directly, if the applicant is a public institution or the amount of the debt to be scheduled does not exceed RON 5,000 for individuals and RON 20,000 for legal entities, respectively. Accordingly, the fiscal authority may also decide to dismiss the application.

Order No. 1853/2011 also regulates the contents of the letter of bank guarantee, should this be the chosen form of security, as well as the documents which have to be submitted in the case of the guarantees which are intended to secure assets of the applicant or assets owned by third parties.

Subsequent to the establishment of the required guarantees, the fiscal authority shall recheck the conditions for awarding the scheduling and shall prepare Report "B" as per the template provided in Order No. 1853/2011. This report shall be accompanied by a scheduling decision to be served on the applicant (to the bank issuing the guarantee, should the form of security be the bank letter of

guarantee, respectively) or by a decision dismissing the application.

The number of months shall coincide with the number of scheduling installments in the scheduling decision, each installment being due on the 15<sup>th</sup> of each month.

Upon the full payment of the scheduled amounts, the fiscal authority shall issue a payment scheduling completion decision. Should certain fiscal debts be discharged prior to the service of the scheduling decision, such amounts shall be offset against the final installments in the scheduling.

Should the applicant legal entities be subject to spin-off or merger, the fiscal authority shall issue new scheduling decisions depending on the distribution of the assets in the spin-off draft, or the totaling of the amounts of the merging entities.

Challenge may be filed subject to the conditions of the Fiscal Procedure Code against the decisions issued in the scheduling procedure.

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