

Legal Bulletin

October 2011

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Energy

Name of the enactment	Government Emergency Ordinance No. 88/2011 amending Law No. 220/2008 establishing the system of promoting the generation of energy from renewable sources (“ GEO No. 88/2011 ”)
Publication	Official Gazette of Romania, Part I, No. 736 of 19 October 2011
Entry into force	19 October 2011
Connections with other enactments	Law No. 220/2008 establishing the system of promoting the generation of energy from renewable sources, as republished and further amended (“ Law No. 220/2008 ”)
Connections with European Union Law	Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC
Main provisions	<p>GEO No. 88/2011 was passed in the context of the European Commission authorizing the system of promoting the generation of energy from renewable sources regulated under Law No. 220/2008 (<i>i.e.</i> the system of mandatory shares combined with the trade of green certificates) with a view to harmonizing this law with both the provisions of the European Union Law, and the provisions of the decision of authorizing the promotion system.</p> <p>The main amendments to Law No. 220/2008 brought by GEO No. 88/2011 are the following:</p> <ul style="list-style-type: none">• The producers of energy from renewable sources accredited by the Romanian Energy Regulatory Authority (“ANRE”) pursuant to a regulation issued by the latter, starting from the calendar month in which the accreditation decision was issued shall benefit from the promotion system. With a view to accessing the promotion system, the accreditation of power plants shall be done in stages, as each power group of a power capacity is commissioned, in which case the term of application of the promotion system shall differ as per the authorization time.• Producers of electricity from biomass, bioliquids and biogas shall benefit from the promotion system only if they hold certificates of

origin for the biomass used as fuel or raw material, which shall be issued based on certain procedures to be approved within 60 days as of the entry into force of GEO No. 88/2011. Nevertheless, such producers shall be temporarily accredited by ANRE for a 6-month period with a view to benefiting from green certificates without presenting certificates of origin for such sources.

- The number of green certificates granted for electricity produced from geothermal energy, biomass, bioliquids and biogas is reduced from 3 to 2 green certificates for each MWh generated and delivered, and the number of green certificates granted for electricity generated from gas generated by waste processing and waste fermentation gas is reduced from 3 to one green certificate for each MWh generated and delivered.
- During the trial period, irrespective of the renewable energy source used, energy producers shall benefit from a green certificate for each 1 MWh generated and delivered.
- Green certificates shall be valid for 16 months.
- The producers shall have to purchase green certificates for the quantity of electricity used for (i) the own final consumption, other than its own technological consumption and (ii) supplying electricity to consumers connected by means of direct lines to the power plant.
- The equivalent value of the green certificates which are not purchased by the suppliers and producers failing to meet the annual mandatory share of green certificates (i.e. equal to EUR 110 for each green certificate which is not purchased, calculated in RON at the average value of the exchange rate established by the National Bank of Romania for the month of December of the previous year and indexed by ANRE according to the average annual inflation rate for the previous year, calculated at the level of the Eurozone, officially notified by EUROSTAT) shall be collected by the Environmental Fund Administration.
- Failure to pay the equivalent value of the green certificates which are not purchased by the suppliers and producers that have to meet the annual mandatory purchase share of green certificates shall be sanctioned by a civil fine equal to the total value of the non-purchased

green certificates multiplied by 3, but not less than RON 10,000, or more than RON 100,000.

- Electricity generated from renewable energy sources in power plants with installed capacities of up to 1MW per plant, at the most, which is to be sold at regulated prices shall not benefit from the promotion system. The regulated prices and selling regime shall be established by ANRE based on a methodology and shall be notified to the European Commission.
- Access to the grid shall be secured for the electricity benefiting from the promotion system, and which is contracted and sold on the energy market.
- Electricity generated from renewable sources which benefits from the promotion system shall be sold only to cover Romania's gross final consumption of electricity until the national targets regarding the share of electricity generated from renewable energy sources in the final gross consumption of energy are reached.
- Suppliers and producers which sale electricity to end consumers shall have to inform them from time to time, according to ANRE regulations, on the cost of purchase of green certificates pertaining to one kWh of electricity sold to them.
- In the case of producers of renewable energy that benefited from green certificates prior to the implementation of the promotion system provided under Law No. 220/2008 (as amended by GEO No. 88/2011), the terms for the application of the promotion system shall be decreased accordingly by the periods for which such producers already benefited from green certificates.
- Undertakings developing plants generating power from renewable sources with installed capacities exceeding 125 MW shall be subject to a detailed assessment of the support measure by the European Commission, from the standpoint of the State aid, and may benefit from the promotion system only subsequent to the completion of such assessment, while ANRE may amend the number of green certificates in accordance with the provisions of the European Commission's decision.
- Energy producers that, upon the entry into force of GEO No. 88/2011

operate plants generating power from renewable sources with installed capacities exceeding 125 MW shall be accredited by ANRE and shall benefit from the number of green certificates provided under Law No. 220/2008 (as amended by GEO No. 88/2011) for a period of 24 months from authorization. Within 3 months from obtaining the accreditation decision, such producers shall have to provide the relevant authorities with the documentation required to conduct a detailed assessment of support measure by the European Commission, and, should positive differences be recorded between the number of received green certificates and the number of green certificates to which such producer was entitled as per the authorization decision of the European Commission, such differences shall be offset within 24 months from the authorization decision.

- Should the power plants benefit from one or several additional State aids, pursuant to certain secondary regulations to be issued, ANRE shall reduce the number of green certificates to which such producers would be entitled, by decreasing the reference investment value/MW by the value of the aid received/MW and keeping the value of the internal rates of return considered upon the calculations submitted to the European Commission during the process of authorizing the promotion system.
- Should the data of the feasibility surveys for new investment projects and the results of monitoring investment and operating costs/income of producers reveal that overcompensation may occur (a situation in which, taking into account the average specific technical and economic indicators achieved each year per each technology, the cost-benefit analysis conducted for all generation capacities using the same technology reveals an internal rate of return higher by 10% as compared to the value taken into account for such technology upon the authorization of the promotion system), ANRE shall propose measures to decrease the number of green certificates. Such measures shall be approved by means of a Government decision and shall be applied to the producers of electricity from renewable sources starting to generate electricity subsequent to the entry into force thereof.

Repealed enactments

Upon the entry into force of GEO No. 88/2011, the following enactments are to be repealed:

- Government Decision No. 443/2003 on the promotion of electricity from renewable sources of energy; and
- Government Decision No. 1479/2009 establishing the system of promoting the generation of electricity from renewable energy sources.

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Environmental Law

Name of enactment

Government Decision No. 935/2011 promoting the use of biofuels and bioliquids (“GD No. 935/2011”)

Publication

Official Gazette of Romania, Part I, No. 716 of 11 October 2011

Entry into force

10 November 2011

Main provisions

Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC was passed in 2009. The provisions of a general nature of this Directive were partially transposed by Law No. 220/2008 establishing the system promoting energy from renewable sources, as republished and further amended, and, at the same time, the provisions on biofuels and bioliquids shall also have to be transposed.

GD No. 935/2011 sets out the national mandatory targets regarding the share of energy from renewable sources used in transportation and sustainability criteria for biofuels and bioliquids. The regulation is aimed at promoting the biofuels and other renewable fuels for replacing gasoline or diesel oil with a view to meeting the commitments regarding climatic changes, security in providing gasoline and diesel oil under conditions compliant with the environment and promotion of the use of renewable energy sources. GD No. 935/2011 lays down a progressive schedule for the period -2019 with respect to the minimum content of biofuels to be complied with by petrol and diesel fuels to be placed on the market. For example, at the moment GD No. 935/2011 entering into force, at least 5% of the diesel fuel must represent biofuels and at least 4% and 5% at the most of the petrol fuel must represent biofuels. As of 1 January 2013, both abovementioned quotas shall increase to 6%, while as of 1 January 2015 the quota shall increase to at least 7% for diesel fuels and to at least 8% for petrol fuels. In respect of petrol

fuels, the biofuels quota shall be further increased to at least 9% starting with 1 January 2017 and to at least 10% starting with 1 January 2019.

The monitoring system of the quality of diesel and petrol fuels shall be approved within 30 days as of the entry into force of the GD No. 935/2011 by order of the minister of economy, commerce and business environment. In addition, only biofuels and bioliquids made of raw materials compliant with the sustainability criteria provided under GD No. 935/2011 may be placed on the market, irrespective of the fact that the raw materials originate from the agricultural zone of the EU or from that of third countries.

The greenhouse gases saving from the use of biofuels and bioliquids as compared to the use of traditional fuels shall be of:

- At least 35% starting with 1 January 2012;
- At least 50% starting with 1 January 2017;
- At least 60% starting with 1 January 2018 in the case of the installations where the production has started after 1 January 2017.

In the case of the installations which are currently in operation, the requirement mentioned at letter (a) above shall be applicable starting with 1 April 2013.

Economic operators placing biofuels and/or bioliquids on the market shall have to demonstrate that they meet the sustainability criteria provided by GD No. 935/2011. To this effect, they shall have to provide the Ministry of Economy, Commerce and Business Environment with annual reports presenting the data used (the first report shall be sent by 31 March 2012). Such annual reports shall be the object of an audit performed by third party inspection entities recognized by the Ministry of Economy, Commerce and Business Environment ("**Ministry**"). In addition, the economic operators shall have to provide the Ministry each year, by 31 January, on paper and electronic media, information from the previous calendar year on the quantities of biofuels and/or bioliquids placed on the market. Should the content of biofuels in the gasoline or diesel oil exceed 10% in the amount of the product, the end distributor shall have to post a label on the station specifying the content of biofuels. The enactment sets out a set of penalties for the failure to comply with the provisions thereof, ranging from RON 10,000 to RON 50,000.

Repealed legal enactments

Government Decision No. 1844/2005 promoting the use of biofuels and other renewable fuels for transportation

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Public Procurement, Concessions, Public-Private-Partnership

Name of enactment	Government Emergency Ordinance No. 86/2011 amending Public-Private Partnership Law No. 178/2010 (“ GEO No. 86/2011 ”)
Publication	Official Gazette of Romania, Part I, No. 729 of 17 October 2011
Entry into force	17 October 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, public work concession and service concession contracts, approved as amended by Law No. 337/2006, as further amended (“ GEO No. 34/2006 ”)
Main provisions	<p>With a view to securing compliance with European Union legislation and case law in the field of public procurement and concessions, GEO No. 86/2011 brought various amendments to the provisions of the PPP Law, generally setting out regulations that are similar to those provided under GEO No. 34/2006, the most important amendments concerning the aspects below.</p> <p>1 Private investors</p> <p>GEO No. 86/2011 inserted in the PPP Law, in a similar fashion as GEO No. 34/2006, provisions on the bid jointly submitted by several private investors and the possibility of the public partner to require a certain legal status of the joint venture, should the joint bid be declared successful.</p> <p>2 Applicability of Public-Private Partnership Contracts in the Sector of Public Utilities</p> <p>Further to the amendments to the PPP Law under GEO No. 86/2011, it was clarified the issue concerning the applicability of the PPP Law in the case of contracts awarded by public undertakings performing relevant activities or by other entities enjoying special or exclusive rights for the provisions of such activities. Consequently, similarly to GEO No. 34/2006 on the entities that have the capacity as contracting authority, the scope of the concept of “<i>public partner</i>” was extended to reach the subjects of law mentioned above, also providing the possibility of concluding public private partnership contracts with a view to performing relevant activities in sectors of public utilities regulated under GEO No. 34/2006: gas, heat and electricity, water, transport, postal services, exploration or extraction of petroleum, gas, coal or other solid fuels, as well as ports and airports.</p>

3 Exceptions from the Application of the PPP Law

GEO No. 86/2011 inserted two new exceptions from the application of the PPP Law, as follows:

- Contracts regulated under Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defense and security, and amending Directives 2004/17/EC and 2004/18/EC, respectively
- Contracts with respect to which, further to the award, the public partners may provide or may operate public telecommunications networks or may provide one or several telecommunications services to the public.

Moreover, the PPP Law shall not apply when an international agreement was executed in accordance with the provisions of the Treaty of Lisbon with one or several States which are not members of the European Union and which contemplate the supply of products or performance of works intended for the implementation or operation of a project jointly with the signatory States, if such agreement provides for a specific procedure to award such contract. All such agreements shall be submitted to the European Commission by the Central Unit for the Coordination of Public-Private Partnership.

4 Causes for being excluded from the selection procedure

Further to the amendments brought by the provisions of GEO No. 86/2011, the PPP Law regulates in a similar fashion as GEO No. 34/2006 the situations of excluding certain economic operators from the selection procedure.

Consequently, the public partner shall have to exclude from the selection procedure held for the conclusion of the public-private partnership contract, any private investor of whom he learned that, he has been sentenced in the past 5 years by means of a final court award for participating in the activities of an organized crime group, corruption, fraud and/or money laundering.

In addition, the public partner shall be entitled to exclude from the procedure any private investor that: i) went into bankruptcy following a decision of the syndic judge or was subject to similar procedures provided by the national legislation of other countries; ii) failed to meet the obligations to pay taxes, duties

and social security contributions to the budgets forming the general consolidated budget, in accordance with the legal provisions in force in Romania or in the country he is residing; iii) has been sentenced for the past 3 years by means of a final award of a court, for a deed which prejudiced professional ethics or for committing a professional error; iv) gives inaccurate information or fails to give the information requested by the public partner with a view to demonstrating the qualification and selection criteria.

5 Absolute Nullity of Public – Private Partnership Contracts

Due to the amendments brought by the provisions of GEO No. 86/2011, the initiation, execution or performance of certain public-private partnership contracts in which the public authority takes risks which lead to classifying the project as public expense shall be sanctioned by absolute nullity of such contracts. In such cases, the concluded contracts would be public procurement contracts, and the transfer of most risks on the private sector is addressed by the public-private partnership.

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Real Estate

Name of enactment

Government Emergency Ordinance No. 85/2011 amending Law No. 50/1991 on authorizing the performance of construction works (“**GEO No. 85/2011**”)

Publication

Official Gazette of Romania, Part I, No. 716 of 11 October 2011

Entry into force

11 October 2011

Connections with other enactments

Law No. 50/1991 authorizing the performance of construction works (“**Law No. 50/1991**”)

Main provisions

This enactment proposes the amendment of the legal authorities provided under Article 3 (1) e) and repeal of paragraph (5) of Article 4 of Law No. 50/1991.

The obligation to obtain a building permit for the drilling operations and underwater prospecting in territorial seas, adjacent area and exclusive economic area of Romania in the Black Sea was deemed not to be justified.

Consequently, the amendment of Article 3 (1) e) of Law No. 50/1991 and the repeal of Article 4 (5) are aimed at eliminating the obligation to obtain the building permit for such operations.

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Security Interests

Name of enactment	Order No. 2034/2011 approving the registration endorsement forms for the entries in the Electronic Archive of Security Interests in Movable Property (“ Order No. 2034/2011 ”)
Publication	Official Gazette of Romania, Part I, No. 731 of 18 October 2011
Entry into force	23 October 2011
Connections with other enactments	<ul style="list-style-type: none">• Government Emergency Ordinance No. 79/2011 for the regulation of certain necessary measures for the entering into force of Law No. 287/2009 on the Civil Code (“GEO No. 79/2011”);• Law No. 287/2009 on the Civil Code (“Civil Code”);• Regulation for the organization and operation of the Electronic Archive of Security Interests in Movable Property.
Main provisions	<p>Order No. 2034/2011 approves the registration forms based on which the entries in the Electronic Archive of Security Interests in Movable Property are performed.</p> <p>Order No. 2034/2011 amends the registration forms, mainly in terms of terminology, as the concept of <i>security</i> is replaced by that of <i>hypothec</i>:</p> <ul style="list-style-type: none">• Initial hypothec endorsement form;• Initial hypothec endorsement form;• Hypothec extension endorsement form;• Endorsement form limiting the hypothec to part of the assets contemplated by the initial hypothec endorsement;• Endorsement form terminating the initial hypothec endorsement;• Endorsement form revealing the nullity of the initial hypothec endorsement;• Endorsement form extending the initial hypothec endorsement;• Initial hypothec endorsement form – hypothec obligations;• Amending hypothec endorsement form – hypothec obligations;• Endorsement form extending the initial hypothec on other assets – hypothec obligations;• Endorsement form limiting the hypothec to part of the assets

contemplated by the initial hypothec endorsement – hypothec obligations;

Order No. 2034/2011 inserts the following new forms in accordance with the provisions of the Civil Code:

- Intention endorsement form;
- Endorsement form for intention changing;
- Endorsement form maintaining the hypothec;
- Endorsement form for hypothec assignment;
- Endorsement form changing the rank of hypothecs;
- Enforcement endorsement form;
- Endorsement form for taking over in the account of the debt;
- Endorsement reinstating the initial hypothec endorsement;
- Endorsement form for initial surety;
- Endorsement form for accepting the surety;
- Amending endorsement form for surety;
- Endorsement form terminating the initial surety endorsement;
- Endorsement form revealing the nullity of the initial surety endorsement.

Repealed enactments

Order of the Ministry of Justice No. 1929/C/2008 approving security endorsement forms for the entries in the Electronic Archive of Security Interests in Movable Property and instructions to fill in such forms.

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Taxation

Name of enactment

Order of the Minister of Public Finance No. 2604/2011 on the enforcement of the provisions of Article XI of Government Ordinance No. 30/2011 amending Law No. 571/2003 on the Fiscal Code, and regulating certain financial and fiscal measures (“**Order No. 2604/2011**”)

Publication

Official Gazette of Romania, Part I, No. 707 of 06.10.2011

Entry into force

6 October 2011

Connections with other enactments	<ul style="list-style-type: none">• Government Ordinance No. 30/2011 amending Law No. 571/2003 on the Fiscal (“GO No. 30/2011”);• Order of the President of the National Agency for Fiscal Administration No. 3253/2011 approving the templates of certain forms issued in the application of Article XI of GO No. 30/2011 (“Order No. 3253/2011”);• Government Ordinance No. 92/2003 on the Fiscal Procedure Code, republished (“Fiscal Procedure Code”).
Main provisions	<p>Order No. 2604/2011 details the method of enforcing the provisions of Article XI of GO No. 30/2011, on erasing/decreasing delay penalties for the taxpayers that pay their tax debts by the end of 2011, or in the first semester of the following year.</p> <p>According to Order No. 2604/2011, the reliefs consist of:</p> <ul style="list-style-type: none">• Cancellation of the delay penalties, and cancellation of a 50% share of the late payment charges (in Romanian, <i>majorări de întârziere</i>) related to the main tax debts, if the main debts and interest related thereto are extinguished by payment or offset by 31 December 2011;• Decrease by 50% of the delay penalties, and decrease by 50% of a share of 50% of the late payment charges related to the main tax debts, if the main debts and interest related thereto are extinguished by payment by 30 June 2012. <p>As to the interest due until the extinguishment and established by means of decisions submitted subsequent to such date, the requirement shall be deemed met if the interest is extinguished by the payment term provided under Article 111 (2) of the Fiscal Procedure Code. In this case, the payment term shall be until the 5th day of the following month if the decision submission date falls during the interval 1-15 of the month, and until the 20th day of the following month, respectively, if the submission date falls during the interval 16-31 of the month.</p> <p>The above reliefs shall not be granted for the tax debts extinguished by means of garnishment or by amount collected further to capitalizing the seized assets.</p> <p>Order No. 2604/2011 defines the main outstanding tax debts:</p> <ul style="list-style-type: none">• The tax debts individualized in the taxpayer’s tax returns submitted by 31 August 2011 and/or taxation decisions issued and submitted to the taxpayer by such date, for the tax debts managed by the National Agency for Fiscal Administration (“ANAF”);

- Tax debts individualized in instruments which are enforcement orders submitted to the taxpayer by 31 August 2011, for the tax debts established by the specialty divisions of the Ministry of Public Finance;
- The amounts representing payable fines of any nature whatsoever, except for those situations in which, according to law, the enforcement of the instrument applying the fine was suspended.

The interest related to the main debts shall also include the 50% share of the late payment charges representing the interest component thereof. Late payment charges to which reliefs are granted shall be those due for the period 1 January 2006 – 30 June 2010.

The authorities entitled to grant the reliefs shall be:

- ANAF, via its subordinated relevant tax authorities, for the tax debts managed by the former;
- National Customs Authority, via its subordinated authorities, for the tax debts managed by the former;
- Specialty divisions within the Ministry of Public Finance, for the debts established by the former and referred to ANAF for recovery.

The procedure to obtain the cancellation/reduction of the delay penalties entails the following stages.

With a view to granting the reliefs, until 15 October 2011, the tax authorities shall identify and notify taxpayers that have debts which may be subject to reliefs. The taxpayers may file an application requesting a status report on the payable debts, which are to be extinguished.

Within 5 days from the submission of the application, the relevant authority shall submit the tax statement and shall prepare an interim list for purposes of erasing the debts which may be subject to the relief from the tax records. If, within 10 days from the service of the statement, the taxpayer extinguishes the main debts and related interest, the relevant authority shall validate the interim list and, within 3 days from the date of extinguishment, shall issue the decision on the secondary debts; if the secondary debts are also extinguished, the relevant authority shall issue a decision to cancel, or reduce, as the case may be, the late payment penalties and the 50% share of the late payment increases;

If within the abovementioned 10-day term, the main debts and the related interest are not extinguished, or, within the term provided under Article 111 (2) of

the Fiscal Procedure Code the secondary debts are not extinguished, respectively, the tax debts that were subject to the interim list shall be listed again in the tax debts records. In this case, the taxpayer shall continue to enjoy the relief, but shall have to resume the process by filing a new application, inasmuch as it meets the requirements to enjoy the reliefs.

Taxpayers that extinguished the outstanding tax debts by payment or offset without filing the application for being granted the relief, may request this by filing the application with the relevant authority. In this case, taxpayers may request to be repaid the amounts that are subject to the facility in accordance with Article 117 of the Fiscal Procedure Code.

The decision to grant the relief may be appealed before the issuing tax authority within 30 days from service, subject to losing such right.

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