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OCTOBER 2003

Number X

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INFRASTRUCTURE / REAL ESTATE

Upon Government Emergency Ordinance no. 84/2003 (published in the Official Gazette no. 694/2003), the Autonomous Regies Romanian National Administration of Roads ("NAR") has been reorganised into the National Company of Highways and National Roads of Romania S.A. ("NCHNR").

By virtue of NAR reorganization, a legal person of national strategic interest has been established as a joint-stock company under the Ministry of Transportation, Constructions and Tourism authority, operating upon the economical management and financial autonomy principles.

Amendment of the legal regime of the assets transferred to NCHNR

It is to be noted that upon NAR reorganization all the assets held in public property, managed by the former NAR, have been leased to NCHNR for a period of 49 years. As regards the movable and real estate assets subject to state private property, previously in NAR management, they have been transferred into NCHNR ownership.

The aforesaid enactment stipulates that during the period the state is a majority shareholder, NCHNR is entitled to sell, rent, lease or grant for free, temporary use of assets held in ownership to individuals or legal persons of private law, at the initiative of board of directors, upon approval of the general meeting of shareholders and special mandate from the Ministry of Transportation, Constructions and Tourism representatives within the general meeting of shareholders.

As an alternative possibility to exploit its patrimony, NCHNR is entitled to contribute capital, pursuant to the laws, to the setting up of companies with similar or related object of activity, together with other individuals or legal persons, domestic or foreign. NCHNR is also entitled to hold shares or social parts in other companies and to decide, in accordance with the laws, the association with domestic or foreign legal persons.

Privatization and listing of the shares

GEO 84/2003 provides for the possibility to privatize the new national company NCHNR, subject to the relevant legal provisions, the state having the option to keep the majority stake or the golden share.

At the same time, the quoted enactment establishes the possibility for the NCHNR shares to be listed and freely traded on the capital market.

Amendments to the construction authorization and execution regime

New amendments have been brought to the legal framework governing construction authorization and execution, further to the passing of Law no. 401/2003 regarding the amendment and completion of Law no. 50/1991 concerning the construction works authorization and execution (the amending

law has been published in the Official Gazette no. 749 of 27.10.2003 and will enter into force in a 60-day term as from its publishing date).

Additional cases requiring obtaining of the mandatory town-planning certificate

Pursuant to the above mentioned enactment, the town-planning certificate becomes mandatory in case of lawsuits and notary operations regarding the real estate circuit, having as object apportionments or aggregations of land plots requested in view of carrying out construction works, as well as creation of rights of way on a real estate. Failure to observe the mandatory town-planning requirement entails nullity of the act.

Obtaining of a new construction authorization when modifying the construction theme

A new completion envisages the situation where during the execution of the work (but only within the validity period of the construction authorization) occur theme modifications with respect to the authorized construction, requiring its amendment. In such a case the law provides for the authorization holder to request for a new authorization, but not a new town-planning certificate.

Thus, in order to obtain a new construction authorization, the holder will submit a prepared documentation, subject to compliance of the new proposals with the provisions contained in the approved town-planning documentations and only within the limits of the permits and approvals obtained for the initial authorization.

Completion of the proceedings relating to the taking the land out of the agricultural circuit

The previous wording of Law no. 50/1991 provided for the taking out of the agricultural circuit to be carried out upon the construction authorization. Interpretation of such stipulation in the way that obtaining of the construction authorization should be enough to change the category of land used for triggered lots of abuses in practice. The purpose was to avoid payment of the duty levied for taking land out of the agricultural circuit, provided by the agricultural Land Law.

The new enactment aims at clarifying this issue, stipulating that lands allotted to construction are taking out of the agricultural circuit, on a permanent or temporary basis, **pursuant to the law** (the agricultural land-o.n.)

Status of the constructions executed without or in non-compliance with the construction authorization

The constructions executed without or in non-compliance with the construction authorization, as well as those not having fulfilled the taking-over procedure at the finalization of the works are not deemed finalized and can not be registered with the land registry. The express regulation of the non-registration thereof affirms the practice generalized even before the new enactment.

Expropriation of the constructions not possible to be finalized

One of the most important amendments brought to the legal regime of the construction works is the declaration as being of public purpose of all the works concerning constructions that can not be finalized according to the construction authorization provisions, including relating lands.

The construction works together with the assets declared to be of public purpose will be expropriated for public purpose cause, according to the law, upon the initiative of local public administrative authorities.

PUBLIC PROCUREMENT

Successive amendments have been brought in less than one month to article 41 of GEO nr. 60/2001 on public procurements. Although said amendments aim at adjusting certain issues faced in practice, the real effect could be a different one.

Updating of financial offer price

The first completions to this article have been brought by Law no. 383/2003 (Official Gazette no. 692/3.10.2003) and have regulated the price within the financial offer and price update conditions, depending on the execution period of the agreement.

Thus, according to art. 41 par. 2) the financial offer price has to be expressed in ROL and within the agreements with an execution period of 12 months or less has to remain fixed for the entire duration of the agreement.

Nevertheless, the requirements provided at par. 2) will not apply to agreements involving financing from EU or international financial institutions.

In case of agreements with execution periods exceeding 12 months, the parties may stipulate updating methods only if events harming parties' valid commercial interests occur, which could not have been foreseen when concluding the agreements. Price protection formula against inflation can not exceed the price expressed in EURO on the date of submitting the offer.

Price updating in case of delay in contractual terms

Pursuant to par. 5 of art. 41 of GEO no. 60/2001, "*the delay of the contractual term-periods cannot be regarded as reason for contractual price updating*". Unfortunately, the legal wording is slightly confusing and may trigger significant malfunctioning when applying it, as it is not specified whether it is envisaged (i) delay to the execution term-periods of the agreement by the contracting parties (concerning the performance of the services object of the public procurement) or (ii) breach of contractual term-periods the contracting authority should pay the established procurement price within, being left open the possibility of abusive interpretations in the aforesaid meaning (ii).

New situations exempted from the application of foregoing rules

The situations exempted from the above quoted art. 41 par. 2 have been significantly amended, by the recent GEO no. 106/2003 (Official Gazette no. 747/26.10.2003), which has included a new paragraph (6). Thus, *"are exempted from the provisions of par. (2) the procurements of replaceable commodities whose prices are set forth based on the external listings of international commodities exchanges or assimilated institutions or, as the case may be, by the regulating authorities or Romanian Commodities Exchange, as well as of fixtures, fittings and services. For the import procurements the financial offer price is expressed in currency, USD or EURO, as the case may be."*

REORGANIZATION OF THE FINANCIAL GUARD

By the Emergency Ordinance no. 91/2003 (EGO no. 91/2003 concerning the organization of the Financial Guard/"Garda Financiara", published in the Official Gazette no. 712/2003), the Government has decided to reorganize the activity of the Financial Guard. Thus, some important amendments have been made as regards the organizational side and the scope of the legal powers granted to the above-mentioned investigation authority.

With respect to the institutional organization of this body, the Financial Guard has been removed from the subordination of the Ministry for Public Finance, and has been placed under the supervision of the National Authority for Control.

Abolition of the powers to perform fiscal investigations

As regard the scope of the powers granted by the law, we note that the capacity of the Financial Guard to perform fiscal investigations has been excluded, as such capacity will be further exercised solely by the fiscal authorities provided specifically with such controlling powers.

According to the said ordinance, the powers of the Financial Guard will regard exclusively the possibility to perform unexpected, operational inquiries in order to prevent, disclose and reprimand any acts in the economic, financial and customs domains which cause fiscal evasion and fraud. In addition to this principle, the EGO no. 91/2003 briefly lists certain main activities which may be investigated:

- the observance of the applicable legislation in order to prevent and reprehend any acts forbidden by the law;
- the compliance with the trading rules, in order to prevent, reveal and eliminate all illicit operations;
- methods of manufacturing, storing, trading and selling of the merchandise, in all places and spaces where the trade entities run the specific business, etc;

The personal liability of the Financial Guard staff

The Financial Guard staff may become liable for the activity performed under the conditions set by the Law no. 188/1999 concerning the Statute of the public servants, as subsequently amended, by the Statute of the Financial Guard officers and by the Labour Code. In case of damages caused by the non-performance of specific duties during the investigating operations, the responsible person might be subject to the penal liability. Insofar as the penal liability cannot be activated, the liability will be set in accordance with the Civil Code rules concerning tort, on the basis of the competent courts decisions or, instead, of the decisions of the National Authority for Control.