

LEGAL NEWSLETTER

— ROMANIA

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“INTERIM” DIVIDENDS FOR ROMANIAN COMPANIES

After being long awaited, Romanian legislation provides for the first time for the possibility for Romanian companies to distribute “interim” dividends. The change has been brought by Law No. 163/2018 for the amendment and supplementation of Accounting Law No. 82/1991, the amendment and supplementation of Companies Law No. 31/1990, as well as for the amendment of Law No. 1/2005 regarding the organization and functioning of cooperatives.

Considering that, in line with the provisions of Directive 2012/30/EU of The European Parliament and of The Council, most Member States of the European Union currently allow for the distribution of dividends during the financial year, the change is welcomed by the Romanian business environment.

In Romania, traditionally, dividends were distributed only at the end of a financial year, mostly as a protective measure for the companies’ creditors. Practically, distribution of dividends was decided after the approval of the annual financial statements, namely, by 31 May of each following year, and payment was done six months after their approval. This meant that the actual payment of dividends could take up to a year.

Currently, dividends are distributed to shareholders pro rata to their participation to the share capital, optionally, each trimester based on interim financial statements and annually, after the adjustment made through the annual financial statements, if not provided otherwise in the constitutive act. Whilst, generally, the constitutive acts of Romanian companies currently reflect the previously existing legal provisions in terms of distribution of dividends, i.e., annual distribution, to be on the safe side and to benefit from the newly introduced possibility to distribute interim dividends, the companies should amend their constitutive documents to specifically allow for distribution of interim dividends. From a practical standpoint, this means holding a general meeting of the shareholders (“GMS”) to approve the amendment of the constitutive act, considering all the statutory requirements for the calling and holding of the GMS (such might be as well simultaneous with the GMS for the approval of the interim financial statements).

Furthermore, the trimestral distribution of profit to shareholders may be made within the limit of the trimestral accounting net profit, plus any retained earnings and withdrawn amounts of reserves available for that purpose, net of any retained losses and amounts deposited in reserves in accordance with legal or statutory requirements.

The payment of such dividends is the equivalent of an anticipated payment, made in instalments. Such payments are regulated at the end of the financial year, based on the annual financial statements. Any excess amounts distributed during the financial year shall be returned by the shareholders to the company within 60 (sixty) days as of the date of approval of the annual financial statements.

For interim dividends’ distribution, the following conditions must be met:

- **Trimestral financial statements, audited or, as the case may be, verified by the company’s censor(s)**

The distribution of interim dividends shall be made based on trimestral financial statements audited or, as the case may be, verified by censor(s).

For large companies and listed companies, this obligation can be a significant drawback, as such an audit/ verification generally implies significant time and costs.

- **Approval of the trimestral financial statements and dividends distribution by the GMS**

Essentially, one should consider all legal and statutory requirements for the calling and holding of the GMS.

Romanian Ministry of Public Finance Order No. 3067/ 2018 on amending certain accounting regulations (the “**Accounting Order**”) has also recently entered into force and is meant to clarify certain accounting aspects.

The Accounting Order provides, inter alia, that the trimestral financial statements prepared for distribution of interim dividends must be submitted to the National Agency for Fiscal Administration within 30 (thirty) days after their approval by the GMS.

Such financial statements should basically be prepared, verified and submitted to the tax authorities following the same rules that the annual financial statements follow. Trimestral financial statements are prepared based on the verification balance that includes the results of an inventory of elements such as assets, debts and equity.

NEW LEGAL REGIME FOR PUBLIC-PRIVATE PARTNERSHIPS

The public-private partnership (“**PPP**”) legal framework was recently entirely replaced by Government Emergency Ordinance No. 39/2018 (the “**PPP Law**”) that entered into force on 18 May 2018.

In brief, the PPP mechanism allows for various projects to be implemented at national level through the co-funding of a public body and a private investor. Through the operation of the project (e.g., consisting of goods or services), the project company established for this purpose is normally granted the right to collect (and further use for the performance of the project) fees from the users of the said good(s)/ service(s).

There are two types of PPP: (a) institutional – where the project company is a new company held by both partners, the private and public one, and (b) contractual – in which case the project company is entirely held by the private investor.

The solution of PPPs, or cooperation in different forms between public authorities and the business environment, to ensure the financing, construction, renovation, management, maintenance of a good

or infrastructure, or the provision of a service, is not a novelty. However, for various reasons, it was never successfully applied in the past in Romania.

According to Romanian officials, the new PPP Law is meant to eliminate the dysfunctionalities of the old regulations and encourage the implementation of such investment projects in Romania. For a better understanding and implementation of the PPP Law, a good practice guideline will also follow.

We note that the PPP Law is not yet fully applicable in terms of institutional PPP, as a Special Financing Fund for PPP projects will have to be put in place no later than 18 May 2019.

The main changes brought by the PPP Law refer to the following:

- **Public services operating contracts**

As a novelty, projects that exclusively imply the operation of public services may be implemented through the PPP mechanism.

- **Shorter awarding periods**

Certain obligations provided by the former legal framework have been eliminated to avoid potential blockages in the procedure, i.e. obtaining by local administration bodies of ex-ante approvals/ notices.

- **Minimum contractual period**

The contractual period will be established mainly depending on investment depreciation and funding method. A minimum contractual relationship of 5 (five) years was regulated, to allow private economic operators to recover their investment and benefit from a reasonable profit margin.

- **Limited public funding**

The contribution of the public partner consisting of financial resources other than non-reimbursable external funds and the national contribution to such funds was limited to 25% of the investment value.

Hence, the mandatory contribution to such partnership of any interested economic operator was substantially increased.

- **Contract management**

The Government may decide that certain contracts deemed strategic be managed by the National Commission for Strategy and Prognosis ("NCSP").

The aim of the new legislation is to finally open the market for PPP in Romania and the first signs are that things are moving forward. Starting May, this year, 21 strategic projects to be managed and implemented by NCSP were already approved. The projects are mainly focused on infrastructure and public health objectives.

As per Romanian Law, any Government Emergency Ordinance must be ultimately approved through an organic law. Such approval may sometimes come with amendments to the normative act. In this respect, the PPP Law is currently undergoing this procedure and, after being approved by the Senate, the law for its approval is now awaiting endorsement by the Chamber of Deputies. There are no contemplated amendments in the current draft of the approval law.

OPTIMIZATION OF THE PUBLIC PROCUREMENT LEGAL FRAMEWORK

In an attempt to increase major investment projects, including with European funding, Government Emergency Ordinance No. 45/2018 (the “**Public Procurement GEO**”), Government Decision No. 419/2018, and Law No. 212/2018 have recently amended the public procurement legal framework. The purpose of the amendments is to adapt the law to “*necessary and urgent measures for perfecting and flexibilization of the public procurement system*”, as stated in the substantiation note of the Public Procurement GEO.

The changes targeted the procedure itself, as well as the challenging procedures, in order to make the procedure more accessible and transparent, as well as eliminate potential delays and other hick-ups which made the procedure cumbersome.

Some of the most important changes are:

- **Awarding criteria for certain services**

For social services and other specific services, having an estimated value above RON 3,376,500 (approx. EUR 734,000), the awarding criteria shall be best quality-price or quality-cost ratio, as opposed to “lowest price” which was the most used criteria so far.

- **Obligation to publish in the Official Journal of the European Union (“OJEU”) certain awarding procedures**

The award procedures for which publication of a participation/ awarding notice in OJEU is mandatory shall apply for awarding public procurement contracts/ framework agreements having estimated value (net of VAT) equal to or greater than the following thresholds:

- (1) RON 24,977,096 (approx. EUR 5,429,803) for works public procurement contracts/ framework agreements;
- (2) RON 648,288 (approx. EUR 140,932) for goods and services public procurement contracts/ framework agreements;
- (3) RON 994,942 (approx. EUR 216,291) for goods and services public procurement contracts/ framework agreements awarded by local administration bodies;
- (4) RON 3,376,500 (approx. EUR 734,021) for public procurement contracts/ framework agreements related to social services and other specific services.

- **Budgetary debts qualification criteria – change of the allowed debts threshold**

Bidders that have budgetary debts amounting to maximum RON 10,000 (approx. EUR 2,175) shall no longer be eliminated from the awarding procedure. Before the amendment, the exception referred to debts amounting to RON 4,000 (approx. EUR 870) or lower than 5% of the total taxes and contributions owed by the bidder at the most recent due date.

- **Clarifications regarding the possibility to amend the price of the public procurement contract**

An amendment that could solve a lasting problem regarding the performance of a public procurement contract is the regulation of price adjustment clauses.

For contracts exceeding a 6-month term, the contracting authority has the right to include price adjustment clauses. However, for contracts exceeding a 24-month term, the contracting authority must include price adjustment clauses in the awarding documentation.

In any event, the price of the contract may be adjusted only to the extent strictly necessary to cover the costs on which the contract price was based.

- **Participation warranty threshold**

The threshold of the participation warranty to be submitted by bidders was diminished to a maximum of 1% of the estimated value of the contract, as opposed to 2% as provided until now.

- **Elimination of the notification procedure prior to submission of an appeal**

Until this change, a special notification procedure was required prior to submitting any kind of appeal regarding the awarding procedure. This resulted in lengthy delays, as it implied first notifying the challenged aspects to the contracting authority, and only if the latter did not remedy them in a given term, you could go forward with the appeal.

Eliminating the notification step is basically one of the remedies for shortening potential delays of the awarding procedure.

- **Obligation for bidders to deposit a bond of 2% of the value/ estimated value of the contract for challenging the procedure. Elimination of stamp tax**

This is one of the measures taken to avoid abusive challenges to the awarding procedure. It is not a novelty for the Romanian public procurement legislation, as a similar warranty (i.e. the good conduct warranty) was regulated before the legal framework changed entirely in 2016.

Such bond is reimbursed to the appellant in a minimum term of 30 (thirty) days after the decision remains definitive or, as the case, after the cessation of the effects of the procedure's or contract execution's suspension.

To diminish the financial burden, however, stamp tax for judicial appeals and challenges to the National Council for Solving Complaints decisions was eliminated.

The Public Procurement GEO is also under approval via organic law process, having passed through Senate, subsequently to be approved by the Chamber of Deputies. Although there are no amendments envisioned, in theory, the decisional chamber may approve an amended version.

NEW SESSION FOR MAJOR INVESTMENTS STATE AID SCHEME

The Romanian Ministry of Public Finance announced that, to stimulate investments with a major impact on the economy, starting with 10 September 2018, a new session for submission of applications for funding under the aid scheme for major investments approved by Government Decision No. 807/2014 (the “**State Aid Scheme**”, respectively the “**State Aid GD**”) was opened.

The applications are subject to the approval and entry into force of the ordinance for rectification of the state budget law for 2018.

The budget allocated to the State Aid Scheme in 2018 for the issuance of financing agreements in the period 2019-2021 is RON 614 mm (approx. EUR 136 mm).

Requests for funding agreements are reviewed and resolved in order of their submission to the relevant authority and within the commitment and budget approvals approved by annual budget laws.

The State Aid Scheme generally regards all industry sectors, except for the sectors and activities specifically excluded by the State Aid GD (e.g., manufacturing and marketing of agricultural products, primary production, certain activities related to mining and processing industries, energy and heat related activities, real estate transactions, are exempted).

The funding conditions are provided by the State Aid GD which was slightly modified recently through Government Decision No. 476/2018, and the Applicant’s Guide approved by Order No. 2629/2018.

Regarding the amendment of the State Aid GD, one important change regards the lowering of the minimum investment value criteria that the interested company must meet to receive state aid from EUR 10 mm (or RON 44 mm) to EUR 3 mm (or RON 13.5 mm).

Depending on the regional location of the investment, the amount granted as state aid has different levels, as follows:

- For Bucharest area: 10% of the eligible value of investment, but limited to EUR 7.5 mm;
- The Western region and Ilfov County: 35%, but not more than EUR 26.25 mm; and

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- For the North-West, Center, North-Est, South-Est, South-Muntenia, South-West Oltenia regions: 50%, but limited to EUR 37.5 mm.

The Ministry of Public Finance should publish on its website, on a weekly basis, the list of requests for financing agreement submitted and the status of their analysis.



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