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Newsletter

Attempt to Accelerate the Transport Infrastructure Projects

I. General Presentation of the Government Intention

1. The Romanian Government has recently adopted the Emergency Government Ordinance no. 7/2016 ("**EGO**") on several measures for acceleration of the implementation of trans-European transport infrastructure projects, as well as for the amendment and supplementation of certain laws.

2. The main stated objectives for adopting this piece of legislation are connected with increasing of the absorption rate of the structural funds and the speeding up of the implementation process of the trans-European transportation infrastructure projects.

3. The EGO's scope is very clearly defined and solely includes projects regarding trans-European road, rail, air and water transport infrastructure situated on the trans-European (TEN-T) central (Core) and global (Comprehensive) network, as defined by the Regulation no. 1.315/2013 of the European Parliament and of the Council.

4. As a consequence, not all infrastructure projects will benefit from the acceleration measures provided by the EGO, but only the trans-European „queens". The reason for this is that these projects will benefit, at least on the paper, from substantial European funding.

5. The EGO establishes some legislative simplification measures in order to address the reasons for delay of the transport infrastructure works, in the following areas:

   (i) Planning and urbanism;
   (ii) Authorisation for the performance of construction works;
   (iii) Removal of lands from agricultural circuit;
   (iv) Forestry domain;
   (v) Preparation of the documentation prior to the performance of infrastructure works, meaning the feasibility studies;
   (vi) Allocation of the financial resources necessary for the performance of infrastructure works;
   (vii) Settlement of disputes between the beneficiaries of the works and the construction companies.

6. If the first set of measures is destined to accelerate the administrative procedure prior to the performance of the works, meaning to create a legislative frame for simplification of the procedure for obtaining the authorisations/permits, the last two types of measures have direct implications in assuring the necessary funding flow for the performance and release of the works.

II. The Release of the Projects through Assuring a Mechanism for Implementing of DAB Decisions (Technical and Financing)

7. The performance by the Romanian State of big European infrastructure projects has as a consequence the standardisation of works contracts used with the contractors. Worldwide, there have been some attempts for standardisation of the works contracts: NEC, JCT, FIDIC contractual rules. In Romania, according to Government Decision no. 1405/20100, FIDIC contractual conditions are mandatory for all institutions

subordinated to the Ministry of Transportation in case of works contracts for investments in developing the national transportation network, financed from public funds and with an amount of over Eur 5 mil., as provided by public procurement legislation. Due to the fact that the trans-European transport infrastructure is as well of national interest, FIDIC contractual rules are mandatory in this case.

8. Nevertheless, the obligation to use FIDIC contractual rules does not rule out the conflict that might arise between the contractual clauses agreed with the constructor and the rigidity of the administration, based or not on the provisions of the Romanian public law legislation. It is well known that in FIDIC contracts the dispute settlement is done in a specific manner in accordance with art. 20 from the respective contractual rules. This clause sets a gradual dispute settlement, being „an escalation clause", according to the wording from the international arbitration practice. Depending on the party that has a claim against the other one, up to four steps might be necessary until obtaining an enforceable award. One of the steps to be taken is deferring of the dispute to the dispute adjudication board („**DAB**"). After this board issues the decision, the party which lost the case has to submit a notification to the other party within a contractual established deadline. If no notification is filed, the decisions are deemed as definitive and binding. In case of decisions against which a party filed a notification, these are only binding, meaning that they have to be immediately put in place, in accordance with the „pay now, argue later" principle.

9. Even a definitive and binding decision of DAB does not represent an execution writ, under Romanian law. As a consequence, the entitled party can use arbitration for obtaining an arbitral award that can be subsequently enforced. All this procedure can severely affect the confidence relationships between the parties, lead to disruptions in construction works or cash flow of the construction company and trigger the postponing of the works and of the traffic opening on that particular infrastructure.

10. The EGO's goal is to address this issue and allows beneficiaries to enforce DAB decisions, if certain conditions are met. The law imposes two other conditions, apart from the manifest ones: (i) existence of a valid contract and (ii) existence of a contractual provision regarding the possibility to settle the conflict through DAB. Moreover, there is a budgetary limit providing that the money paid as a result of DAB decision cannot exceed 35% from the value of the annually budget credits approved by the State budget for trans-European infrastructure transport projects.

11. The first out of the two additional requirements is the waiver by the construction company, through an additional act, to payment of ancillary rights. In our assessment, the meaning of the term "ancillary rights" might lead to different interpretations. In common language, ancillary rights means interest and other penalties due for untimely performance of an obligation. Expenses incurred due to the dispute settlement do not belong to this category and hence the State could claim only the waiver to the ancillary rights after the date when DAB decision was issued, but not to expenses occurred for the dispute settlement, which should be reimbursed.

12. The second condition is the issuing of a letter of bank guarantee for the disputed amount that will be paid and for all ancillary rights calculated at the level of National Bank of Romania's interest rate from the date of issuing the bank guarantee letter, to which 3% will be added for a period of three years since the issuing date. This is an onerous condition for the contracting party and will determine it to be reluctant to demand immediate payment of the disputed sums, with the consequence of taking the arbitration step, which is anyhow mandatory to be initiated by the Romanian State when paying the disputed sum.

13. Additionally, the EGO obliges the beneficiary paying up the disputed sums to go through all contractual stages until an award having the nature of an execution writ is rendered. Taking into account that the arbitral award is an execution writ, the EGO does not impose the beneficiary to also file the action for annulment of the arbitral award. Expressly, ceasing to go through a contractual stage can be ordered by the main credit release authority based on justified reasons.

14. To conclude, the existence of new legal provisions allowing the beneficiaries to pay the amounts established by DAB decisions is welcome. It remains to be seen if the two above mentioned conditions do not represent a too heavy burden for the construction company in order to immediately obtain the disputed sum.

III. The Release of the Projects through Simplification of the Advance Payments Mechanism

15. In the attempt to accelerate infrastructure projects, the Romanian Government amended several laws with regard to the allocation modality of necessary funds for implementation of infrastructure projects.

16. As a general rule, the law on public finances does not allow the granting of advance money for payments done from public money. As a consequence, public money payments can be made only based on justifying

documents and only after the quantitative and qualitative reception of goods/services/works.

17. As an exception from this rule, the Government can establish the actions and categories of expenses for which advance payments can be done up to 30% from the public funds. Government Decision no. 264/2003 was issued in this regard.

18. The justifying of the awarded advance payments must be done through delivered goods, executed works and provided services, until the end of the year.

19. Through the EGO, new particular exemptions regarding the advance payments were provided.

20. Without the permit of the Government, beneficiaries can make advance payments up to 15% from the value of the contracts regarding the performance of works/providing of services/delivery of goods for the transport infrastructure projects carried out by the Ministry of Transportation and financed from non-reimbursable, external, post EU-accession funds awarded to Romania from the European Fund for Regional Development, the European Social Fund, the Cohesion Fund and the Fund for European Aid to the Most Deprived in the period 2014-2020.

21. A new exception represents the justifying of such advance payments that has to be made until the deadline provided in accordance with the concluded financing contracts, but not later than the eligibility final date of the operational programme.

22. For trans-European infrastructure transport projects, financed by the State budget and from expenses derived from reimbursable financing programmes, advance payments can be annually made, as follows:

    a) up to 15% from the value of the contracts regarding the performance of works/providing of services/delivery of goods, in the first year of the performance of works;

    b) up to 30% from the budgetary credits annually approved for the respective project, in the following years of the performance of works.

23. As regards the justifying of these advance payments, the rule according to which the justifying must be done at the end of the year is applicable.

24. These legislative measures designed to assure the necessary financing for starting the infrastructure projects, should represent a help for the construction companies that could start the works immediately after signing the contracts, because theoretically the financing is in place. Evidently, this swiftness depends moreover on the capacity of the beneficiaries to understand how to report themselves to these governmental measures, without unnecessarily hindering the work of construction companies.

IV. The Release of the Projects through Simplification of the Procedure for Preparing Feasability Studies

25. The feasibility study represents the technical-economic documentation through which the main the technical-economic indicators connected to the investment objective are established, based on the necessity and opportunity of the implementation decision. The technical-economic documentation features the functional, technological, constructive and economical solutions that will be approved.

26. The feasibility study is prepared based on the pre-feasibility studies issued for the same project and which constitutes the technical-economic documentation grounding the necessity and opportunity of the investment, based on technical and economic data.

27. There is a complicated procedure regarding the analysis of such studies for significant public investments (i.e. transport infrastructure included), fact that determines the participation of several public authorities.

28. The Unit for assessing public investments from the structure of the Ministry of Public Finances plays a very important role, because, according to the law, it analyses the pre-feasibility studies and proposes to the heads of the Ministry the admission or, as the case might be, the rejection of the requests from the main credit release authorities regarding the preparation of the feasibility study. Without the admission issued by the Ministry of Public Finances, it is not possible to go to the stage of preparing the feasibility study.

29. Through the EGO, the Government eliminated the role of the Ministry of Public Finances from the procedure regarding the preparation of the feasibility study for trans-European infrastructure transport projects.

30. Consequently, by derogation from the general rules, for such projects, the feasibility studies are prepared based on a justifying note drafted by the beneficiaries and approved by the main credit release authority

(Ministry for Transportation).

31. Moreover, the law provides the obligation for the feasibility studies for trans-European infrastructure transport projects to include as well the connection roads to the networks of important cities, or nearby cities or to the existing roads connecting these cities, as well as the connections to agricultural lands located outside the city limits.

32. This obligation is welcomed in order to avoid the situation occurred in recent projects (such as A3 highway Bucharest-Ploiesti), that does not have connection roads with the nearby cities, being just a road connecting these two cities (the highway still does not benefit by a way of entrance to Bucharest).

33. The simplification of the procedure regarding preparation of such documentation should lead to a shortening of the time necessary for taking a decision regarding the building of a transport infrastructure, being known very well the saga of the feasibility study for the highway Pitești-Sibiu.

34. Nonetheless, the intention of the Government already „benefits" from a red light, because the Ministry for Regional Development and Public Administration and the Ministry for Transportation have not yet approved the application instructions through a joint administrative act, even though this must have been happened within 30 days from entering into force of the EGO.

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