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On May 21, 2019, a new legislative proposal in the banking and financial area has been registered with the Senate and its consultation period expires on June 20, 2019.

This draft law reproduces the provisions of certain laws that were recently declared unconstitutional due to certain procedural flaws. In addition, the draft law also proposes a series of new restrictions (e.g. prohibiting the foreign currency loans and the conversion of the existing loans to the historic exchange rate plus maximum 20%).

To the extent that the hardship conditions would be complied with, the provisions of the new law shall also apply to loans that are ongoing at the time of its entry into force.

Amendments brought in the Energy Industry

Order amending and supplementing the Order of the President of the National Regulatory Authority for Energy no. 18/2019, for the approval of the Methodology regarding the computation and establishment of the annual contribution stipulated in art. 2 par. (3^1) of the Government Emergency Ordinance no. 33/2007 on the organization and functioning of the National Regulatory Authority for Energy

- The Methodology for the computation of the annual financial contribution perceived by the National Regulatory Authority in the Energy Industry is approved;
- The turnover that should be used in the computation represents the total revenues related to the products delivered and the services rendered, which are subject to the licenses granted, out of which certain types of revenues are deducted;
- Starting with 1 April 2019, the annual contribution of the holders of the commercial exploitation licenses for the coal-fired power generation capacity, as well as for the production of electricity and heat in cogeneration, is equal to 0,1 % of the turnover achieved in year n of the activities subject to the licenses. The other licensees in the electricity sector pay a 2% contribution;
- The licensee in the electricity sector who obtained the license in year n pays a2% or 0,1%, respectively, contribution to the turnover he estimated to make in that year.

Order amending the Methodology used for establishing the fees for the system service, approved through the Order of the President of the National Energy Regulatory Authority no. 45/2017 and suspending the applicability of certain provisions in the electricity sector

- The regulated profitability rate (RRR) is considered to be the same as the one used by the competent authority to compute the regulated revenue of the transport service;
- The Order suspends the applicability of specific regulations regarding the rate of regulation of profitability during the period of application of the provisions of art. 79, paragraph (8) of the Law on Electricity and Natural Gas no. 123/2012, as amended and supplemented.

Order amending and supplementing the annex to the Order of the President of the National Regulatory Authority for Energy no. 41/2019 regarding the approval of the Methodology for the establishment of regulatory fees for natural gas transport services and for suspending the applicability of certain provisions in the natural gas sector

- Expenses booked in relation with the staff, including the unforeseen ones, having a permanent nature, labor safety expenses and expenses that occur on a regular intervals, longer than one year, are estimated by an OTS, for each year of the regulatory period, in real terms for the first year of the regulatory period;
- Starting with the second year of the regulatory period, the cost values allowed by ANRE shall be included in the OPEX corresponding to each year of the regulatory period, updated with the inflation rate;
- During the application of the provisions of art. 178, par. (6) of the Electricity and Natural Gas Law no. 123/2012, as amended and supplemented, the applicability of the provisions of art. 3 of the Order of the President of the National Regulatory Authority for Energy no. 41/2019 and the art. 29, par. (2) from the Appendix to the same Order.

Order amending and completing the Order of the President of the National Energy Regulatory Authority no. 217/2018 regarding the approval of the Methodology for setting the regulated fees for gas distribution services

- The annual growth rate of economic efficiency for the 4 th regulatory period is set at 1% per year for each distribution operator;
- Changes are made to the formula for computing:
  - the BAR indicator for the first year of the 4th regulatory period which is set for the beginning and the end of the year;
  - the regulated income which is corrected for each year of the regulatory period;
  - the economic efficiency gain.
- Although the revenues from the connection of third parties to the distribution system and of the associated ones are excluded from the revenues related to the distribution activity, by way of exemption, if the profit rate in a regulatory year exceeds the allowed 5% level, the difference shall be considered as income;
- It is provided the possibility of an OD to achieve a 5% profitability rate on operating expenses that will be included in the adjusted regulated income approved for OD;
- The regulated durations for the depreciation of tangible and intangible assets used in the distribution activity are amended;
- If the new depreciation period for a category of tangible/intangible assets is greater than the statutory depreciation period, the remaining amount is recovered over a period calculated as the difference between the new depreciation period and the depreciation period used.

Order amending and completing the Order of the President of the National Energy Regulatory Authority no. 14/2019 regarding the approval of the Methodology for setting the regulated fees for the provision of underground natural gas storage services

- It is provided that the storage operator submits on an annual basis to ANRE the acquisition policy for goods, works and services for the natural gas storage, including the procedures used for this purpose;
- The profitability rate and the incentive for tangible and intangible assets are those approved in the natural gas sector for the same reference period;
- Corrections will be made once the underground storage charges for the 2020-2021 storage cycle have been established.

For further questions regarding the aspects mentioned in this alert, please contact us.

Alexandra Smedoiu, CFA
Partner – Impozite directe
+40 21 207 98 30
asmedoiu@deloittece.com

Maria Pascu
Senior Manager – Impozite directe
+ 40 21 222 16 61
mapascu@deloittece.com

Amendments to the Tax Code

Emergency Ordinance no. 35/2019 was published on May 30, 2019, bringing the following modifications in the Romanian tax legislation:

- the Ordinance repeals paragraph (5) under art. 122 of the Romanian Tax Code, which provided for the obligation of filing the annual tax return only by electronic means;
- as a consequence, starting with May 30, 2019, individuals have also again the option of filing the Romanian annual tax return in hard copy format, in addition to the electronic format.

The obligation of filing the annual tax return electronically was previously introduced by the Emergency Ordinance no. 18/2018, published on March 15, 2018 to simplify the filing of the annual tax return and administration processes.

In this respect, the individuals had a transition period to comply with the new requirements. Nevertheless, due to the overload of the authorities' online filing system and the reduced number of annual tax returns filed for year 2018 up to date, the authorities decided to allow the filing of the aforementioned documents also in hard copy format.

For further questions regarding the aspects mentioned in this alert, please contact us.

Raluca Bontaș
Partner – Global Employer Services
+40730077921
rbontas@deloittece.com

Adrian Stoian
Senior Manager – Global Employer Services
+40730585856
fstoian@deloittece.com

New draft law proposal on consumer protection in the banking and financial sector, which reproduces certain provisions recently declared unconstitutional and proposes additional restrictions for the creditors

SUBJECTS OF THE LAW

- The law on the protection of consumers against usury and other forms of abuse of economic power shall apply to the legal relationship between **financial creditors** and **consumers**.
- In the concept of **financial creditors** are included not only the credit institutions and the non-banking financial institutions (the "**NBFI**"), but also **the debt collection entities authorized in accordance with the law** (i.e. natural or legal entities who, pursuant to a prior administrative authorization, carry out debt collection activities, whether following to a mandate given by a creditor or to an acquisition of the receivables).
- The definition of the "debt collection entities authorized in accordance with the law" from this draft law proposal is broader in scope than the definition of the "entities who carry out debt collection activities" included in the legislation currently in force.

THE SPECULATIVE ASSIGNMENT OF RECEIVABLES

- The assignment of receivables towards entities that are not financial creditors represents an unfair commercial practice of the financial creditors and is sanctioned in accordance with the Law no. 363/2007 on unfair business-to-consumer commercial practices (the "**Law 363/2007**").
- The conclusion of speculative assignments of receivables represents an **abuse of economic power**. Examples of speculative assignments given in the draft law are as follows:
  - the transfer of a portfolio of receivables from the financial creditor to a subsidiary or to one of its affiliates, backed by a servicing arrangement or a mandate for the administration and collection of the loan portfolio given by the assignee to the assignor;
  - the assignment of receivables or of loan portfolios perfected for the purposes of increasing the solvability index of the financial creditor;
  - the assignment of receivables perfected for the purposes of reducing the tax base of the financial creditor.
- **A speculative assignment of receivables** means any transfer of a receivable, or of a loan portfolio (*author's note*: irrespective whether it is performing or non-performing), from a financial creditor (*author's note*: including a debt collection entity) towards a third party, whether by way of assignment of receivable, assignment of contract or subrogation, transfer which:
  - does not have an equivalent in an economic fact; or
  - is not carried out considering the mobilization of commercial receivables, the refinancing of the financial creditor or for the purposes of creating financial collaterals.
- In case of speculative assignments:
  - **the assignee will not be able to recover from the consumer more than the actual (real) assignment price** (to which the costs and expenses and the interest accrued from the day the assignee paid the assignment price may be added). Thus, the new legislative proposal contains worse rules for the assignees than those which were recently declared unconstitutional (which were intended to limit the assignee's collections to double the price paid by the assignee in exchange of the acquired receivable/receivables).
  - The assigned debtor who is a consumer **may extinguish his/her debt** by paying to the assignee the amounts above mentioned.
  - At the request of the assigned debtor who is a consumer, the assignee shall indicate the **actual (real), effective and individualized price** paid for the acquisition of the receivable. Until the date of the indication of the price, the enforcement proceedings against the debtor is suspended by effect of the law and the penalties and the accessories will be discontinued.
  - The notice of the intention to pay in this manner, delivered through a lawyer, public notary or an enforcement officer, suspends by effect of the law any judicial or enforcement proceedings initiated against the consumer assigned debtor. The creditor must reply to such notice within a 30-day term, indicating the acceptance of the debtor's offer or another way of amiable settlement (in lack of an answer within this term, the offer being presumed to be tacitly accepted).

- This discharging payment may be carried out either with the consent of the assignee or by depositing the amount at the disposition of the assignee. It also determines the lawful termination of the judicial or enforcement proceedings, the release of any frozen amounts or assets taken against the debtor, as well as the release of any mortgage or encumbrance created in favour of the creditor.

- If the assignment of the receivables carried out towards an entity that is not a credit institution or an NBFI, the assigned receivables shall no longer bear interest or any other costs or penalties. Hence, a debt collection entity purchases by way of assignment a receivable that will no longer bear any type of interest. Under the legislation currently in force (i.e. GEO no. 50/2010 on consumer credit agreements and GEO no. 52/2016 on consumer credit agreements for real estate), if the assignee is a debt collection entity, no commissions interest and penalties may be charged, with the exception of legal default interest.

LOSS OF THE WRIT OF EXECUTION OF THE DEEDS CONCLUDED WITH CONSUMERS

- The legal provisions that confer **writ of execution** to an agreement or other deed concluded between the financial creditor and the consumer **shall no longer apply** after the entry into force of the new law.

- If in the previous legislative proposals only the credit agreement and the leasing agreement and their related security and guarantee agreements were no longer writs of execution, in this draft law, in addition to these agreements, are included in such exemption, *inter alia*:

  - the bill of exchange, the cheque, the promissory note, the credit titles or other documents which are writs of execution pursuant to the law;

  - the authentic documents;

  - the document authenticated by the notary public ascertaining a certain, liquid and enforceable receivable;

  - the tenancy agreements executed under private signature which were registered with the tax authorities.

NEW RULES REGARDING THE INTEREST

a) The excessive interest or the usury

- The imposition of an excessive interest represents an **abuse of economic power** and **an unfair commercial practice (within the meaning of the Law no. 363/2007)**.

- **The usury** (or the **excessive interest**) represents a contractual interest that is higher than the current commercial interests used by the credit institutions, clearly disproportionate versus the average of these current commercial interests. The concept of "usury" used in this legislative proposal, synonymous with the excessive interest rate, does not seem to refer to the criminal offence of "usury" criminalized by the Criminal Code, the latter consisting in providing money with interest, on a regular basis, without having an authorization. The purpose of the legislative proposal is to protect consumers and the sanctions provided are of a civil and not criminal nature.

- The interest is presumed as being **excessive** if it exceeds the double of the average of the current commercial interest.

- If the interest is excessive, the credit agreement is **null** (*author's note:* in accordance with the reasoning accompanying this draft law, due to illicit or immoral cause). In case of total nullity of the agreement, the *restitutio*

in integrum refers only to the borrowed principal (but not to the interest and the other costs).

- At the request of the consumer, the credit agreement can still be performed, but the financial creditor will not be able to request from the consumer neither the interest, nor the costs of the agreement.

b) Limitation of the annual percentage rate of charge (APRC)

- **The real estate loans**: APRC cannot exceed with more than 3% the statutory interest and, if the creditor is an NBFI, the APRC cannot exceed the Lombard interest.
  - Within the meaning of this draft law:
    (i) the "real estate loan" is the loan perfected for the purposes of acquiring, construction or the improvement of a real estate asset;
    (ii) the loan is a mortgage loan if the material security created in favour of the creditor is over the acquired real estate asset or over the real estate asset which shall be built based on this financing (in all the other cases where the security is created over real estate assets, the loan shall be a real estate loan, including when the material security is created by a third party).
  - The legislative proposal declared unconstitutional proposed to limit APRC at maximum 3 percentage points for the mortgage loans or real estate loans (as defined by the Law no. 190/1999 on the real estate loans for real estate investments).
- **Consumer loans**: APRC cannot exceed 18% *per annum* (it maintains the same proposal as in the previous legislative proposals declared unconstitutional).
  - Within the meaning of this draft law, the "consumer loan" is a loan whose maximum principal is of EUR 20,000 (in RON equivalent) and whose maximum reimbursement period is of 5 years, irrespective whether it is secured or not with real estate mortgages.
  - In the legislation currently in force, the "consumer loan" is a loan granted to a natural person, other than the loan granted for real estate investments (as defined in the NBR Regulation no. 17/2012 regarding certain lending conditions).
- **Microcredits**: APRC cannot exceed 200% *per annum* (if the maturity date is of maximum 15 days), 100% *per annum* (if the maturity date is between 16 and 90 days) and 30% *per annum* (if the maturity date is over 90 days).
  - Within the meaning of this draft law, the "microcredit" is a loan in a maximum amount of EUR 3,000 (in RON equivalent), whose maximum reimbursement period is of 1 year.
- If the APRC is higher than the legal thresholds mentioned above, then, at the request of the consumer, APRC shall be reduced accordingly, following an amiable settlement or a court decision.

c) Rules on the interest and default interest

- The deed creating a debt executed between natural persons is governed by the Government Ordinance no. 13/2011 on the statutory interest and the legal default interest for monetary obligations, as well as for the regulation of certain financial and tax measures in the banking area (the "**GO 13/2011**").
- If the debtor is a **consumer**, article 9 of the GO 13/2011 **shall not apply** (i.e. article providing that the interests applied by the credit

institutions and the NBFIs, as well as the computation method, are exempted from the application of this ordinance).

- In the legal relationships where the debtor is a consumer:
  - is forbidden the commission applied as a percentage from the value or the balance of the loan;
  - **the interest** shall be established by reference to **the statutory interest**. The statutory interest rate is established at the level of the reference rate of the NBR.
  - **the default interest** (including **delay penalties**) cannot exceed:
    (i). with more than 3% the statutory interest;
    (ii). with more than 2% the statutory interest, if the loan has been accelerated.

    If the level of the default interest is higher than the statutory thresholds, then, at the consumer's request, such levels shall be accordingly reduced, following an amiable settlement or a court decision.
  - The cumulative the interest with the default interest is forbidden after the moment when the consumer's payment obligation becomes due.
- The stipulation of default interest exceeding the total amount granted as loan or as credit, or clauses on the total cost of the credit in excess of the thresholds mentioned above represents an unfair commercial practice of the financial creditors and it is sanctioned in accordance with Law no. 363/2007.
- At the entry into force of this law, articles 53 and 54 of the Emergency Government Ordinance no. 52/2016 on credit agreements for consumers relating to immovable property and on the amendment of the EGO no. 50/2010 on credit agreements for consumers providing that:
  - The default interest rate is computed based on a fixed percentage which cannot exceed 3 percentage points, plus the interest rate, and it is applied to the outstanding balance;
  - If the consumer or his/her spouse is in one of the following situations: unemployment, major cut-off of the earnings (with at least 15% of their value), or decease, the default interest cannot exceed the current interest with more than 2 percentage points. This interest shall be applied until the cessation of the event that caused the reduction of income, but not more than 12 months. In case of decease, this period cannot be shorter than 6 months.
  - The consumer notifies the creditor immediately, but no later than 15 calendar days with respect to the cessation of the event causing the reduction of income.
  - It is forbidden to calculate the default interest to the outstanding balance or the total value of the loan or to the total value payable by the consumer. The amount of the default interests cannot exceed the outstanding principal,

  are repealed.

PROHIBITING THE FOREIGN CURRENCY LOANS

- **It is forbidden to grant foreign exchange loans to consumers having their domicile or residence in Romania**, except where the borrower is naturally covered by the exchange rate risk. It is deemed to be naturally covered by the exchange rate risk the consumer who:
  - obtains most of its regular income in the currency of the credit or in the credit indexation currency;
  - obtains most of the regular income in RON, but these revenues are consolidated by reference to the RON exchange rate against the currency of the loan, at the time of payment.

  Granting foreign currency loans to the persons who are not naturally covered by the exchange rate risk represents an unfair commercial practice of the financial creditors and is sanctioned in accordance with the Law no. 363/2007.
- Moreover, if the debtor is not naturally covered by the exchange rate risk, the deed from which the debt arises shall be **null** and, in case of total nullity, the *restitutio in integrum* refers only to the borrowed principal, but not to the interest and the other costs.
- In case the consumers are in the impossibility to accept the increase of interest or to bear the payment volume pertaining to the **exchange shock, the financial creditor cannot unilaterally terminate the agreement**, but it needs to make an offer to alleviate the debt, to reschedule or to refinance the loan, considering, *inter alia,* the current income of the consumers.
- Within the meaning of the new draft law, the "exchange shock" represents any variation of the exchange rate of the payment currency of the agreement or the indexation currency versus RON, variation that touches the maximum threshold established by the NBR in the NBR Regulation no. 17/2012. Please note that the abovementioned provisions in the NBR Regulation no. 17/2012 have been repealed since January 1st, 2019.

LOAN CONVERSION

- At the request of the consumers, for the purposes of balancing the agreement, the creditors are obliged to carry out the conversion of the payment currency in RON or in any other currency in which the consumers obtain most of their income.
- **The conversion shall be performed at the exchange rate applicable at the time of the execution or perfection of the agreement, plus a variation of maximum 20%.**
- The conversion shall be performed by way of an addendum or through a decision of a court of law, at the request of the consumer. From the date of the request of the consumer and until the date of the addendum or the court of law decision, the effects of the agreement are suspended.
- If the consumer initiates the conversion, the addendum shall be concluded within maximum 90 days.

APPLICATION IN TIME OF THIS LAW

- The law shall apply to both the agreements concluded after its entry into force and to the ongoing agreements, in this latter case subject to the fulfilment of the hardship conditions.
- The law sets two legal assumptions when the hardship conditions are considered to be complied with, respectively:
  - the credit agreement is concluded in a foreign currency and the conditions for the exchange shock are complied with; or
  - the indebtedness degree of the consumer exceeds with at least 20% the maximum indebtedness degree established by the NBR.

For further questions regarding the aspects mentioned in this alert, please contact us.

Andrei Burz-Pînzaru
Managing Partner
Reff & Associates, the law firm representing Deloitte Legal global network in Romania
+40 (21) 2075 205
aburzpinzaru@reff-associates.ro

Andreea Șerban
Managing Associate
Reff & Associates, the law firm representing Deloitte Legal global network in Romania
+40 726 310 463
andserban@reff-associates.ro

Deloitte.