Case no. 8318/117/2011

Romania

Covasna Tribunal

Civil Section

Civil Sentence no. 455

Public hearing of April 15th, 2014

Panel of judges made of

Presiding Judge Alexandra Daniela Benegui

Court clerk Kotroczo Emese

[...]

Analyzing the documents and papers of the case, the court retains the following:

XXII.

[...]

Drawing the conclusion, the court retains that the authorities of local public administration have the obligation to draft the urban planning documentations in order to effectively define and establish the protection zones of historical monuments (art. 34 para. 5 letter d of Law 422/2001 with reference to the "building of protection zones") and also have the obligation to define, based on some specialised studies, the protection zones of cultural heritage values (declared by Law 5/2000); they also have the legal obligation to draft and update the General Urban Planning document which should include regulations regarding the protection zones and the protected areas, respectively, all these legal obligations being conditioned by the observance of some imperative deadlines (e.g. the first one within 3 years following entry into force of Law 259/2006, the second one within 12 months following entry into force of Law 5/2000, and the third one within 12 months following entry into force of Law 350/2001).

Retaining these legal provisions and obligations, the court will also consider that historical monuments are declared as such by Order of the Minister of Culture (Order 2314/2004), and protected areas are declared as such by Law (Annex III to Law 5/2000), so that at the environmental assessment moment they are clearly individualized, known by the environmental authority, which consequently has the obligation to analyze the potential significant environmental effects, concretely related to these historical monuments and their protection zones and to the protected areas listed by the legislator.

However, such an analysis obviously implies that the environment authority has available the documentations elaborated by local public authorities which define and actually individualize the protection zones and the protected areas, in the absence of which the environmental assessment is obviously lacking substance.

As related to the above reasons, the court notices that in the case, as explicitly shown by the Environmental Report (page 19), until the moment of its elaboration no documentation has been drawn up to define the protected zones for any of the historical monuments within the studied perimeter.

As regards this aspect, the court will not retain the defence of intervener RMGC, according to which, at the respective moment, the approval was in course of being endorsed for the documentation for the protection zone of the Historical Centre of Roșia Montană Commune (documentation which was not approved at least until the moment when the decision was issued), and the authorities of local public administration issued decisions favourably endorsing Roșia Montană Project; such assertions are irrelevant, as the decisions issued by local councils obviously cannot replace the legal documentations for identifying and defining the protection zones of historical monuments.

Neither the defence of intervener RMGC will be retained regarding the fact that the case is about an initiative of a private investor and the consequences of failing to draft the documentations (for the historical monuments declared over 10 [years] ago) cannot be borne by the latter, considering that the environmental authority that performs the assessment, as an environmental protection body, has the obligation to notify the lack of those mandatory documentations, in the absence of which the assessment of the criteria provided by Annex 1, point 2, letters f.i) and g) to Governmental Decision (HG) 1076/2004 can only be a formal one at most, and the environment approval is a document lacking substance.

3. As regards the third reason, this refers to the fact that the challenged document does not specify the complete and current status of the elements belonging to the national heritage, does not mention the protection zones around the monuments provided by law for such objectives and does not consider the list of historical monuments as shown in the List of Historical Monuments in force on the issuance date of the document; while in its turn, the intervener, Asociatia Salvati Bucurestiul (Save Bucharest Association) claims that the environmental approval does not include provisions regarding the protection of national heritage objectives.

The court notices that this reason regards the environment assessment criterion provided by Annex 1 point 2 letters f-i to HG 1076/2004, namely, the characteristics of the effects and of the possibly affected zone, mainly as regards the value and vulnerability of the possibly affected area, given by the special natural characteristics or the cultural heritage, as they refer to the protection of historical monuments (which are part of the cultural heritage, as specifically provided by Art. 2 para. 1 of Law 422/2001); Consequently, also considering the previously presented reasons, the court notices that this reason is relevant as regards the legality of the administrative document and it will be analyzed by the court.

In this respect, the court will consider that as regards this legal evaluation criterion, the environment authority has the obligation to indicate the potential significant effects on the respective zones covered by

the urban planning document under analysis, taking into consideration the cultural heritage present within that perimeter, that is, (also) the historical moments present in that area.

Consequently, the first mandatory step aims at identifying the historical monuments, which is obviously relying on the regulatory document which declared them as such, and it is also obvious that when issuing the administrative document, the issuing body has the obligation to consider the regulatory document in its form in force at the respective date, analyzing the potential significant environment effects upon the classified historical monuments identified as such (including as regards their surface) by the Ministry of Culture until the respective date.

However, in this case, as shown by the analysis of the documentation, of the environmental Report and of the drawings which are an integral part of it, administrative operations substantiating the administrative document as an integral part of it (the decision and the approval are obviously not documents which can be regarded separately from the Environment Report), the environmental authority did not analyze the potential significant environment effects over the historical monuments declared as such until the issuance date of the document, that is, in the form in which they were shown in the List of Historical Monuments in force on the issuance date of the challenged decision.

As regards this aspect, the court will retain that the List of Historical Monuments was approved by the Order of the Minister of Culture no. 2314/2004 regarding the approval of the updated List of Historical Monuments and of the List of disappeared historical moments, which was updated again in 2010 by Order 2361/2010 (published on MEC website and electronically submitted to the case file – on a CD attached to sheet 94 vol. 5 Tb Covasna), and by comparing the two lists, namely LMI 2004 to LMI 2010, the court notices that the historical monuments present in the perimeter included in the Regional Urban Planning document – the industrial development zone Roșia Montană - suffered changes as regards their shape, configuration, the initial list of 2004 being more limited from this point of view, as follows:

As regards the historical monument "**Galleries of Cârnic Mountain"**, it was shown in the List of Historical Monuments at position 146, located in Roșia Montană village, Roșia Montană commune, but in LMI 2004 its description included only the "zone of Piatra Corbului", and the dating (protection of vestiges) referred only to the "Roman Epoch", while in LMI 2010 this historical monument is declared as such on a surface including *the whole Cârnic Mountain*, and not only Piatra Corbului, and the dating of vestiges is extended to the "Roman, medieval and modern epoch".

On the other hand, other two historical monuments, namely the **"Roman settlement of Alburnus Maior, Orlea zone"** and the **"Roman mining exploitation of Alburnus Maior, Orlea Mountain",** included in the List of Historical Monuments at positions 141 and 142, both located in Roșia Montană village, Roșia Montană commune, were located in "Orlea" according to LMI 2004, while in the updated list of 2010, their description is the following: *"Orlea, the whole locality on a radius of 2 km"*.

The court will also notice that the perimeter subject to the PUZ (Regional Urban Planning document) – industrial zone, also includes other historical monuments, shown as such in LMI 2010, as follows:

- "Roman vestiges of Alburnus Maior, Zone Carpeni" – code AB-I-m-A-00065.03 (position 143), dating – Roman epoch;

- "Roman funerary precinct in zone Hop-Găuri" – code AB-I-m-A-00065.04, dating – Roman epoch;

- "Gallery "Cătălina Monulești" from the protection zone of the historical center of Roșia Montană locality" – code AB-I-m-A-00065.05 (position 145), dating – Roman, medieval and modern epoch.

Retaining that the 2010 List of Historical Monuments includes significant changes as regards the surface of the areas classified as such, as compared to that of 2004, in case of three historical monuments within PUZ perimeter – industrial development zone Roșia Montană, the tribunal has found out after studying the documentation underlying the issuance of the challenged decision, that the Environmental Report drafted in 2010, which is an integral part of the urban planning document (as specifically provided by art.2 point 57 of OUG (Governmental Emergency Ordinance) 195/2005 regarding environmental protection) did not consider the configuration of historical monuments at the issuance date of the administrative document, but it considered the previous configuration – on a significantly narrower surface – of the respective historical monuments.

Therefore, the court retains that during the environmental assessment procedure (regulated by HG 1076/2004) the initial Environment Report was elaborated in 2007, which was later remade in the final version of the Environment Report of 2010, which was considered in the decision to issue the environment approval and which is part of the PUZ, according to art. 2 point 57 of OUG 195/2005.

Both versions of the Environment Report were attached to the court case file, with the final version – which the court will consider when analyzing the legality of the decision issued based thereon– being enclosed to volume II of Covasna Tribunal – sheet 145 and the following ones.

The Environment Report reveals that the only part of the Report including information on the historical monuments within the analyzed perimeter was that of Chapter 2 – "Content and main goals of the plan", in the section regarding the connection to other plans and programs (2.2.1.3 – page 18), referring to the historical monuments shown in the List of Historical Monuments of 2004 (LMI 2004).

However, as regards the chapters in the Environment Report which should have strictly referred to that component of the assessment, there are no concrete references to the natural monuments.

Thus, Chapter 3.2.6. (page 124 of the Report), which describes the current condition of the monuments (as the headline says), makes no reference to the above mentioned historical monuments, that is, it does not show that the respective monuments lie within the perimeter of the designed industrial development zone, they are not mentioned and even less described according to the actual identification shown in the List of Historical Monuments approved by the Order of the Ministry of Culture, and the only concrete references are regarding Piatra Corbului and Piatra Despicată, which are mentioned as natural monuments and not as historical monuments.

Given this perspective, a distinction should be made between the notion of "historical monuments", whose legal regime is regulated by Law 422/2001 (as they are defined in art.1 para. 2 as "real estate, constructions and lands located on Romania's territory, significant for the national and universal history, culture and civilization") and the notion of "natural monuments" defined by art. 2 point 45 of OUG 195/2005 regarding environmental protection, as "species of rare or endangered plants and animals, isolated trees, geological formations and structures of scientific or landscaping interest" and declared as such by Law 5/2000.

However, the section of the Report called "Condition of natural and historical monuments, of the values of cultural, historical and natural heritage", does not show which are the historical monuments within the respective perimeter, it just mentions generically that "a series of churches, historical monuments and residential buildings are abandoned, showing structural damages or are in a precarious conservation condition", and that "a series of underground mining works from antiquity were flooded, clogged or caved in", as well as that the "mining operations in modern and contemporary times generated a series of negative effects upon the landscape, as well as upon the historical heritage", the mining operations generating "a landscape affected by quarries, mine tailings scattered along the valleys and rivers with water polluted by heavy metals and high acidity", with no reference to the above-mentioned historical monuments.

Then, Chap. 6.6.7 (page 171-172 of the Report) – shows which are the *criteria* considered for the forecasting and assessment of the significant effects upon the cultural, architectural and archaeological heritage, making reference, as regards the existing historical monuments, to the opinion of the County Division for Culture and National Heritage of Alba, forwarded by letter no. 395/19.04.2010 which specified "the historical monuments/archaeological sites which have to be protected and valorised by the plan owner", letter issued before the updating of the List of Historical Monuments in October 1st, 2010 and which obviously made reference to the historical monuments classified according to the List of 2004.

Chapter 7 of the Environment Report, which treats the assessment of the potential significant effects upon the environmental factors relevant for the plan (for PUZ), table 16 (pages 202-205 of the Report) shows the Assessment Matrix for the environmental aspect "Cultural, architectural and archaeological heritage", stating that the impact of the mining project will be " a significantly positive one" and negative only as regards the "continuation of preventive archaeological researches for Orlea-Paru Carpeni zone and the protected zone, their conservation and restoration in situ".

Analyzing the prevention/impact reduction measures presented in the Report, it can be seen that they consist, among others, in setting up some protected zones for the historical centre of Roșia Montană commune and for natural areas, for Carpeni Hill, the mining sector of Catalina Monulești, the funerary monuments Tăul Găuri, Piatra Corbului and "the other historical monuments located outside the historical centre", such as the commitment to maintain in conservation 41 buildings which are historical monuments and to renovate the buildings in the property of RMGC.

However, as regards the setting up of protected zones, as retained in the previous point, according to the law, they should have existed before and should have been clearly determined by urban planning

documentations elaborated by the authorities of the local public administration, so that this chapter of the Report should have essentially included the obligation of the plan owner *to observe them* (provided that the historical monuments had already been classified as such).

In the respect of the above, it is noticed that this section of the Environment Report makes no clear, concrete and unequivocal reference to the historical monuments in the respective perimeter, with their description from LMI, and does not show which is the potential significant, concrete and distinct impact on each of them and what are the prevention or mitigation measures for each of them

On the other hand, the court will mainly retain that the drawings representing a component of the Environment Report of 2010 (final version) unequivocally show that on its issuance and respectively on making the decision to issue the environment approval, the current configuration of the historical monuments was not considered as shown in LMI 2010, but the previous, more limited configuration, described in LMI 2004.

These drawings were submitted to the case file also on electronic support, the CD being attached to the sheet 107 of volume 2 of Covasna Tribunal.

The study of the drawings clearly shows that when the challenged administrative document was issued, LMI 2004 was considered, as specifically mentioned in the explanatory part, "legend", and analyzing the drawings it can also be seen that Cârnic Mountain is shown as a historical monument *only as regards Piatra Corbului zone*, although now its whole perimeter has the same legal status, with all its elements, both as territorial surface, and as types and chronology of vestiges, the current dating covering not only the Roman epoch, but also the medieval and modern ones.

At the same time, Orlea Mountain is registered in the documentation as a historical monument only as a point, ignoring its territorial surface, although at present the whole Orlea locality is included in the list of monuments on a 2 km radius; therefore, we can conclude that the potential significant effects were not analyzed for the whole zone classified as historical monument (in this line it is relevant to see, for example, the drawings in folder "PUZ-R.M. Drawn Parts" from the CD submitted with sheet 107 volume 5 of Covasna Tribunal, no. 02_3 under the headline "PUZ –INDUSTRIAL ZONE ROSIA MONTANĂ – Urban Planning Regulations – *Zone setting upon activity close down"* or the drawing in the same folder nr. 02_1 under the headline – *Regulations at the end of the year 07_2010"*).

Studying the content of the decision to issue the environmental approval, it is noticed that it does not include any mention about the historical monuments in the area, but only brief references to the *natural* monuments Piatra Corbului and Piatra Despicată, and the environment approval shows, among others, in Chapter 10, which includes "Measures for the protection of cultural heritage" (sheet 55 vol. 1 Cluj Tribunal) that the protection, conservation and valorisation will be ensured for the cultural and architectural heritage and for the historical monuments listed in OM 2314/2004, with further amendments and additions made by OM 2182/2005 (*before* the last updating of 2010), mostly resuming the measures included in the Environment Report.

In the light of the above, the court retains that the challenged administrative document did not refer to the historical monuments classified as such until the date of its issuance, with the description of the related area, and essentially no clear assessment was performed of the potential effects the mining works would have upon each of them; this conclusion is obvious, given that the decision is nowhere clearly showing which are these historical monuments, that the environment report lists them generally in a chapter regarding another component of the environment assessment, namely the relation with other plans and programs, and the environment approval does not mention at all the historical monument "Galleries of Cârnic Mountain", it does not describe anywhere the current condition of each of them, it does not show concretely how they will be affected by the mining exploitation; this aspect can only be investigated at most by analyzing the drawings submitted in the case file which show the *location* of the historical monuments *inside the mining exploitation and the considered contour*, which does not reflect their current configuration.

From this perspective, the defence of the intervener RMGC cannot be admitted, defence according to which the environmental authority is not entitled to make references to historical monuments and to their protection zones, considering that the environmental authority has the legal obligation to effectively assess the potential significant impacts upon the historical monuments in the studied area (which are part of the cultural heritage), being obliged to consider them and to verify if they are correctly shown in the drawings within the urban planning documentation , and in the drawings which are an integral part of the environmental report, respectively; a contrary interpretation (according to which an assessment can be performed in the absence of a documentation that reflects the complete and *current* status of the elements belonging to the national heritage and which does not include the related protected areas) would entail that the evaluation of the criterion provided in Annex 1, point 2, letter f.i) of the Government Decision(HG) 1076/2004 on the cultural heritage, is unsubstantiated and ungrounded.

In addition, the assertion made by the same party cannot be admitted, assertion according to which it is enough to insert in the administrative document some requirements to comply with Order no. 2314/2004, the reference being made to the normative act that approves the list of historical monuments, and not the list of historical monuments itself, considering that, in addition to the fact that the approval actually refers to Order no. 2314/2005 updated in 2005 (so not to the current form from 2010), what it is essential, from this perspective, is not to mention legal provisions or some normative acts, but to make clear reference to the historical monuments assessed, a reference that does not exist in the document subject to analysis, their existence being basically minimized.

On the other hand, according to the assertions of the intervener, the environmental approval represents a deed issued formally, in which it would be enough to reiterate possibly the text of the obligations stipulated in the legislation in force or to generically establish the obligation to comply with certain normative acts (e.g. the generic obligation to observe the provisions of Law no. 422/2001, stipulated as such by the environmental approval), such opinion being contrary to the purpose for which the obligation to perform the environmental assessment prior to the approval of the plans and programs that may have a significant environmental impact was regulated, and ignoring the fact that, according to Annex 2 point 8

of the Government Decision no. 1076/2004, the Environmental Report provides mandatorily the measures proposed to prevent, reduce and compensate as fully as possible any adverse impact on the environment, the legislator obviously referring to practical measures, and not to the possible listing of some legal provisions.

4. As for the fourth ground invoked by the plaintiffs, this also refers to the protection of the cultural heritage, basically asserting that the environmental assessment does not reflect the fact that the provisions of the documentation analysed have the meaning of the complete or partial destruction of the historical monuments and their protection zones, invoking the breach of the imperative provisions of Law 422/2001, of Law 85/2003 and of the Government Emergency Ordinance OUG 195/2005; the ground is relevant, from the perspective of the legality of the challenged administrative document, considering that it regards the integrity of the cultural heritage and the impacts upon it – issues whose investigation falls under the competence of the environmental authority.

As for the first normative act, the court will keep in mind that, according to art. 10 para. 4 of *Law 422/2001* on the protection of historical monuments, it is forbidden to apply servitudes that have as consequence the dissolution, partial destruction or the degradation of historical monuments and their protection zones.

At the same time, according to art. 11 paragraph 1 of *Law 85/2003 – the mining law* – it is forbidden to perform mining activities on the land on which historical, cultural and religious monuments, archaeological sites of special interest, natural reservations are located, as well as to enforce the easement right for mining activities on such land (paragraph 2 stipulating that the exceptions to the provisions of paragraph (1) are established by Governmental decision, with the approval of the competent authorities in the field and by establishing damages and other compensatory measures).

In the end, art. 70 letter e, second thesis, of the Government Emergency Ordinance OUG 195/2005 on environmental protection stipulates that it is forbidden to place operating units and to perform some harmful activities in their perimeter and protection zones.

Thus, these imperative legal norms include express interdictions related to the performance of mining activities on the land containing historical monuments or archaeological sites or natural reservations, as well as of any activities resulting in the dissolution, , partial destruction or degradation of historical monuments and their protection zones.

It is true that, as asserted by the plaintiffs and the interveners in their favour, the environmental approval does not give, by itself, the right to perform such activities, but the court will keep in mind that the rationale of these legal interdictions is to prevent the possibility of having some negative impact on these cultural heritage elements, so that, if within the perimeter of the planned industrial area, subject to environmental assessment, such heritage elements exist, a thorough assessment implies a minimum

reference to the incidence of these legal norms, and such interdictions cannot be ignored by a body that analyses the possible significant effects of a mining project on the environment.

However, in this case, even though the drawings that are part of the Urban Planning documentation and the Environmental Report, respectively, show quarries located over these historical monuments (e.g. *Cârnic Quarry, Orlea Quarry*, as it significantly results from the two drawings no. 02_1 and nr. 02_3 on the CD submitted at sheet 107 volume 5 of Covasna Tribunal), the administrative authority makes no reference to these legal norms and interdictions and does not even, at least, justify the grounds based on which they can be removed, meaning that, in practical terms, they were ignored.

[…]

6. As for the next ground invoked by the plaintiffs, regarding the unlawfulness of issuing an environmental approval for the works to open a new mining operation in parallel with the approvals already issued for the works for the closure and clean-up of that area, the court retains first of all that this ground is pertinent, in so far that it regards the relation between the Regional Urban Planning document – the Rosia Montana industrial development area and CNCAF Minvest Deva' Plan to Cease the Activity in the Rosia Montana Mine, thus the invoked ground refers to one of the *information* that the environmental approval has to include mandatorily, namely *the relation with other plans and programs* (according to Annex 2 to the Government Decision HG 1076/2004 point 1).

Analysing this ground invoked by the plaintiffs, the court will admit first of all that *in the decision* (page 4) there is a reference, regarding the compatibility between the PUZ – Regional Urban Planning document - and the Activity Closure Plan (PIA), to the letter of the Ministry of Economy, Trade and Business Environment no. 250.20/28.04.2010, according to which the activities for the closure and clean-up of the mine "do not interfere with the activities for the exploitation of the same mine by RMGC", referring also to the information from chapter 2.2.1.5. of the Environmental Report, while in the *environmental approval* there is no mention about this, although it lists the above-mentioned letter among the documents based on which it was issued.

Further, the court will take into consideration that, according to Annex 2 to the Government Decision HG 1076/2004 point 1) that regulates the general content of the environment report, the latter must provide information about the relationship between the plan for which the environmental assessment is performed, and other plans and programs, and, after having studied the environmental report, it is noted that in chapter 2 there is a section – 2.2.1.5. – page 19 and the following (sheet 157 vol. 2 Covasna Tribunal case) where the relationship is analysed between the Rosia Montana PUZ - Regional Urban Planning document and the Activity Closure Plan of Minvest Deva in the Rosia Montana Mine.

This section provides information on the content of the Activity Closure Plan – PIA, the environmental report actually describing the activities in the Technical Conservation Plan, the point of view of MECMA – Ministry of Economy being provided entirely, which describes the stages for the closure and clean-up of

this mining objective, in relation to the provisions of the Government Decision 644/2007 and to the Mining Law, presenting the reasons for which the mining activity stopped in 2006 and stipulating the legal provisions that regulate mine closure.

Basically, the Environmental Report admits that the responsibility for the dismantling of the equipment and installations, as well as the rehabilitation of the damages caused to the environment during the entire activity, belongs to Minvest Deva S.A , the current holder of the exploitation license, with RMGC taking over the exploitation license without environmental obligations (according to the opinion of MECMA), with two possible options:

- If the intervener RMGC does not obtain the authorizations required for the Plan to Build the Mine, the closure and environmental restoration works for the objectives within the perimeter will continue according to the budget already approved (according to the Government Decision 644/2007), remaining the responsibility of Minvest Deva;

- If the intervener RMGC obtains the authorizations required for the mining project in the Rosia Montana Perimeter, the activities for mine closure and *environmental restoration* resulting from the mining activities carried out by Minvest, RosiaMin Branch, *will cease*, and the equipment and installations will be removed from the perimeter according to the license.

On the other hand, however, in the final part of the same section it is shown that the Regional Urban Planning document has clear provisions regarding the "works for the closure and remediation of the damages brought to the environment by the previous mining activities within the perimeter of the studied area" (however these works are not practically analysed in the environmental report).

In terms of these mentions, the court notes that the environmental report includes contradictory information on this topic, because it shows, on the one hand, that if the mining project is authorized the activities for the closure and rehabilitation of the environment *will cease*, and, on the other hand, it is shown that the urban development plan contains clear provisions – without mentioning what they consist of – regarding the *performance* of some works for the closure and remediation of the damages caused to the environment by the previous mining activities.

The contradiction is even more obvious as from the documentation it clearly results that there are perimeters with elements that are subject to closure and clean-up that overlap with elements that will be subject of exploitation (page 22 of the Report), but it also shows, at the same time, that the closure and clean-up activities "do not interfere with the RMGC activities" (page 22 of the Report).

The court will also admit that Annex I point 1 letter b to the Government Decision 1076/2004 stipulates that one of the *criteria to determine the potential significant impacts on the environment* refers to the 'extent to which [the plan] or the program influences other plans and programs, including those in which it integrates in or those that derive from it".

In relation to this legal provision, when studying the chapter in the Environmental Report where the criteria on the potential significant impacts on the environment are presented, mentioned in Chapter 6.3 (page 156), it is noted that among the criteria presented in Table 9 (page 156 and the following) there is no reference to the correlation between the PIA and the PUZ for which the environmental assessment was carried out.

In conclusion, compared to the way in which the environmental report treats this issue, the court basically notes that the information provided is unclear, being said that the two plans do not interfere, even though the perimeters overlap (for certain elements).

Also, it is not clearly shown if the closure or environmental rehabilitation activities will continue if the new project is authorized, and if yes – how will these be correlated with the new activities, and on the other hand, related to the (contrary) statement that the closure and environmental rehabilitation activities will cease and the equipment and installations will be removed from the perimeter, there is no indication of the possible impact on the environment generated by stopping the plan of closure, clean-up and rehabilitation of the environment already approved for the ceasing of the previous mining activity.

[…]

8. Regarding the last ground for unlawfulness invoked in the last comment of the action, regarding the non-compliance with the Government Emergency Ordinance OUG 57/2007

[…]

After analysing this ground, the court admits that, in fact, in the decision to issue the approval (page 4, vol. 1, Cluj Tribunal case – sheet 72) there is a reference to the "relocation of the Piatra Despicata monument", a similar reference existing also in the environmental approval issued based on this decision (page 14), showing that the Piatra Despicata monument, with an area of 0.2 ha, will be relocated to a site which will not be affected by the future exploitations (vol.1 Cluj Tribunal case – sheet 62 reverse page).

In this respect, the court will admit that Piatra Despicata represents a natural monument ranked as such in Annex I. point I. 2.8 to Law 5/2000 on the approval of the national territorial development plan – Section III Protected Areas, its description being the following: "Piatra Despicata – area of 0.2 ha – location – Rosia Montana Commune".

As for the expression 'natural monument' (different, as it was shown, from that of 'historical monument'), this is defined in Annex 1 letter c to the Government Emergency Ordinance 57/2000 as representing a protected area the purpose of which envisages the protection and preservation of some natural elements of special environmental, scientific and landscape value and significance, represented, among others, by *geological phenomena*, e.g. caves, outcrops, gorges, water streams, cascades and other

geological manifestations and formations, as well as other natural elements of natural heritage value due to their *uniqueness and rarity*.

The court admits, from the corroborated interpretation of art. 4 point 16 paragraph 1 letter a and of art. 42 paragraph 1 of OUG 57/2007, that the natural monuments, namely the geological formations are components of the natural heritage that require a special regime of protection, preservation and sustainable use *to the benefit of the current and future generations*, and their protection and preservation are done ***in situ***, namely, as this notion is defined by art. 4 point 19, '*in their natural environment of genesis, existence and evolution*'.

In the sense of the above-mentioned, art. 47 letters a and d of the OUG 57/2007 on the regime of natural protected areas, the preservation of natural habitats, wild flora and fauna, approved as completed and amended by Law 49/2011, expressly stipulates that, in order to avoid the negative impact on the geological heritage assets, *it is forbidden*: to destroy, disturb or alter preservation sites for geological objectives, as well as to change the legal status of a site or land that includes a preservation site of geological interest owned by public property, thus, being *forbidden to move such natural monuments* (category that includes, for example, Babele or the Sphinx in Bucegi Mountains – position 2.672 or the Râmețul Gorge – position 2.12. in Annex 1 to Law 5/2000), from one place to another, as the reasons are obvious.

Regarding the relocation of this natural monument, related to which it is noted that it is declared as such for an area of 0.2 ha (2000 sqm), the challenged administrative document refers to the letter of the Romanian Academy no. 316/01.07.2002, a letter that was issued almost nine years before the issuance of the decision, before the accession to the European Union and, basically, before the OUG 57/2007 entered into force, that transposes Directive 79/409/EEC on the conservation of wild birds and Directive 92/43/EEC on the conservation of natural habitats and wild flora and fauna, so that, obviously, such point of view cannot be one that would justify in 2011 a decision to issue an environmental approval.

The court also notes that the decision does not make any reference to these legal provisions, even though the OUG 57/2007 concerns the actual essence of the field of activity of the issuer of the administrative document, the environmental authority being the first one called to apply and comply with the provisions of this legislative act and although HG 1076/2004, which regulates the environmental impact assessment procedure carried out by this environmental body, refers expressly and imperatively to the provisions of OUG/2007 (art. 5 letter b and Annex 2, point 4), these being practically ignored.

On the other hand, when analysing the environmental approval that materializes, implements the challenged decision, it is noticed that in chapter 8 (page 13, vol. 1 Cluj Tribunal case, sheet 62) it is said, contrary to the Environmental Report (and contrary to the reality), that "the location of the plan *does not overlap and is not next to natural protected areas of national interest"*, and afterwards a contradiction follows, by referring to the two natural monuments, Piatra Corbului and Piatra Despicata and showing, in

generic terms, that “the provisions of OUG 57/2000 shall be strictly observed”, the actual method to observe this provisions, in terms of Piatra Despicata, being to move it; this leads to the conclusion that the measures to protect biodiversity and the landscape inserted in this regulation are formal and lacking substance, not being able to have as outcome the real protection of the protected areas included in the perimeter of the industrial area.

XXV. Taking into account all the recitals above, admitting the fact that the challenged administrative document violates imperative legal provisions, namely art. 2, art. 10 paragraph 1 and 4 of Law 422/2001 on the protection of historical monuments corroborated with the Order of the Minister of Culture no. 2314/2004 on the approval of the List of Historical Monuments, updated, and of the List of Disappeared Historical Monuments updated in 2010 - points 140-146, art. 11 paragraph 1 of Law 85/2003 – the Mining Law, Art. 47 letters a and d OUG 57/2007 which transposes the *Directive 79/409/EEC on the conservation of wild birds and the Directive 92/43/EEC on the conservation of natural habitats and wild flora and fauna,* corroborated with Annex I. point I.2.8 to Law 5/2000 on the approval of the National Territorial Development Plan – Section III – protected areas and art. 70 letter e second thesis of OUG 195/2005 on environmental protection, as the environmental authority failed to perform a proper assessment of the possible significant impact of the PUZ - Rosia Montana industrial area on the cultural, natural and historical heritage existing in the perimeter envisaged by the plan submitted for environmental assessment, as the challenged administrative document does not comprise a pertinent analysis to reflect the fulfilment of the *legal criteria* stipulated by HG 1076/2004 - Annex 1 point 2 letters f-i and a mention of the *mandatory information* provided by the same legislative act - Annex 1, point 1, point 4 and point 6, the court finds the administrative document as unlawful, its annulment being required.

As a consequence, the action brought by the plaintiffs being grounded, it will be admitted, ordering thus, according to art. 18 paragraph 1 of Law 554/2004 of the administrative law, the annulment of the Decision no. 2849/07.03.2011 on the issuance of the environmental approval for the ‘Amendment of the Regional Urban Planning document – the Rosia Montana industrial development area’.

XXVI. As a result, admitting that the solution to the ancillary intervention request depends on the solution for the main request, in relation to its ancillary nature, the court will admit the request for intervention in the interest of the plaintiffs, submitted by the intervener - Asociația Salvați Bucurestiul (Save Bucharest Association).

XXVII. Also, in relation to the same recitals, given that the other requests for intervention have supported the legal position of the defending parties, the parties that pleaded unsuccessful, the court will reject the ancillary request for intervention submitted by S.C. Rosia Montana Gold Corporation SA and, respectively, the ancillary request for intervention submitted by the interveners: Asociația Pro Dreptatea Roșia Montană Association, Pro Roșia Montană Association and Sindicatul Viitorul Mineritului (the Future of Mining Trade Union).

[...]

On these grounds, in the name of the law, the court decides:

It rejects the exception of the lack of passive capacity to pursue the proceedings of the defendant the Alba Environmental Protection Agency invoked in the statement of defence.

It admits the action brought and stated by the plaintiffs Asociația Aurarilor Alburnus Maior Rosia Montana (The Alburnus Maior Rosia Montana Goldminers Association) and Centrul Independent pentru Dezvoltarea Resurselor de Mediu (the Independent Centre for the Development of Environmental Resources), both with address for service in Cluj-Napoca, 7 Zrinyi Miklos St., apt. 3-4, Cluj County, against the defendants Alba Environmental Protection Agency, with offices in Alba Iulia, 7B Lalelelor st., Alba County and the Sibiu Environmental Protection Agency, with offices in Sibiu, 2A Hipodromului St., Sibiu County.

It admits the ancillary request for intervention brought by the intervener Asociatia Salvati Bucurestiul in favour of the plaintiffs, with the address for service in Cluj-Napoca, 7 Zrinyi Miklos St. 7, apt. 3-4, Cluj County.

It annuls the Decision no. 2849/07.03.2011 issued by the defendant Sibiu Environmental Protection Agency (successor of the former Sibiu Regional Environmental Protection Agency) regarding the issuance of the environmental approval for the 'Amendment of the Regional Urban Planning document – the Rosia Montana industrial development area' promoted by S.C. Rosia Montana Gold Corporation S.A.

It rejects the ancillary request for intervention brought by the intervener SC Rosia Montana Gold Corporation SA in favour of the defendant Sibiu Environmental Protection Agency, with address for service in Bucharest, 4-8 Nicolae Titulescu St., America House Building, entrance the West Wing, 8th floor, sector 1.

It rejects the ancillary request for intervention brought by the interveners Pro Dreptatea Rosia Montana Association, with offices in Rosia Montana Commune, Rosia Montana Village no. 306, Alba County, Sindicatul 'Viitorul Mineritului' Trade Union, with offices in Rosia Montana Commune, Rosia Montana Village, no. 554, Alba County and the Pro Rosia Montana Association, with offices in Rosia Montana Commune, Rosia Montana Village no. 554, Alba Country, in favour of the defendant Alba Environmental Protection Agency.

Takes note that no legal expenses are claimed.

An appeal to the point of law can be filed within 15 days from notification.

Announced in open session, today - 15.04.2014

Chairman	Clerk
Alexandra Daniela Benegui	Kotroczo Emese