



## **Analysis of the draft law to permit the Rosia Montana mining proposal**

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The proposed bill entitled *Certain measures for the gold/silver exploitation of the Rosia Montana perimeter and for stimulating as well as facilitating mining activities in Romania* contains several provisions that gravely run against the country's constitution, against international treaties and conventions ratified by Romania and against a series of European Directives transposed by Romania. If the draft law would be adopted in its current form, then its provisions would restrict rights guaranteed by the constitution including property rights, the right of access to justice, the right to a healthy environment and rights addressing the protection of cultural patrimony. Its provisions also undermine the very powers and obligations of public authorities involved in the assessment and issuing of regulatory acts to do with environmental permitting, mining, urban planning, construction works and the protection of natural and cultural heritage of national interest.

**First and foremost, the draft law repeatedly and notably violates provisions of Law no. 24/2000 on the norms regulating the legislative framework for drafting laws, republished and updated, and poses a risk of infringing certain fundamental human rights.**

The act's explanatory note **omits any references to precedent jurisprudence of national and international courts**, such as the European Court of Human Rights (ECHR), and so violates the *res judicata* and blatantly ignores cases<sup>1</sup> where states, including Romania, were convicted for violating the precautionary principle, the right of the public to participate in environmental decision-making, the right to a healthy environment and the right to a fair trial. Importantly, it completely ignores all court sentences<sup>2</sup> that annulled administrative acts issued by Romanian authorities to facilitate mining at Rosia Montana.

What's more, it is inadmissible for a bill that relates to the exploitation of gold and silver using the cyanide leaching method to contain **no reference or preliminary assessment on the environmental impact and no thematic analysis of the impact on human rights regulations**, this particularly given that Romania has experience in cyanide spills and their

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<sup>1</sup> CEDO, Tatar vs. Romania of 27.01.2009, Ockan et al. Vs Turkey of 28.03.2006 and Taskin vs. Turkey, of 10.11.2004

<sup>2</sup> Civil judgment Nr. 2571/2011 by the Court of Appeal Cluj in file no. 7774/117/2011, Civil Sentence no. 157/F/CA-Fisc/26.11.2007 pronounced by the Court of Appeal Brasov - solution irrevocably confirmed by Romania's High Court of Cassation and Justice in Decision no. 4607/9.12.2008

impact and in contrast to the social analysis that forms part of the draft measure and which does not provide a realistic and sustainable solution to the area's unemployment.

The proposed law's reasoning does not contain any assessment of risks, difficulties and conflicts that may arise in its implementation process; this despite the analogous environmental, property rights and cultural heritage issues that the bill gives rise to. In return several of these risks, difficulties and conflicts have been highlighted and communicated to decision makers on several occasions and over many years by non-governmental organizations and research institutes assessing the Rosia Montana mine proposal.

Despite officially declaring the Rosia Montana mine proposal as being one of „public utility and special public interest” the **draft law does not detail and explain the reasons at the base of this conclusion** and so ignores existing legal provisions regulating a ‚local’ or ‚national’ interest; both of which legally require a detailed analysis and legal reasoning.

The bill violates constitutional provisions that guarantee human rights or/ and rights related to the separation of powers and so gives way to violations of the principle of legality and equality of treatment and unduly interferes on numerous occasions with legal attributes belonging to public authorities and/or institutions.

By way of example, the draft law mandates REMIN S.A., a Romanian state-owned company currently facing reorganisation, to sell real estate within the Rosia Montana footprint owned by the State to RMGC, the Rosia Montana project owner. This is how the bill violates both the law on insolvency proceedings and the principle of separation of powers, since the reorganization plan for REMIN SA is still being debated by court judges. The draft law thus interferes with the legislative powers of justice. The bill also violates relevant laws<sup>3</sup> that impose a governmental decision for privatising public goods.

The proposed act also violates principles of transparency, equal treatment, proportionality, non-discrimination and free competition in the issuing of licenses as it gives public authorities the right to directly issue concession contracts to RMGC over public properties and RMGC would obtain these concessions directly, automatically, in an intransparent manner and in a very short time (45 days) without having to respect current legal procedures for granting concession contracts and without having to produce a so-called opportunity study which needs approval of the concessioner.

The legislative proposal provokes three serious violations of the principle of legality. First, it derogates provisions in force regarding administrative acts<sup>4</sup> and the precautionary principle, both of which require the making of new documentation when a new application for issuing authorizations, approvals, permits or a counter bill is submitted. Contrary to these principles, the legislative proposal makes the original acts perennial despite any of the modifications that occurred in the initial conditions for issuing the administrative act. This creates risks for provoking absurd situations where prior acts no longer reflect current conditions. Then, the bill provides the possibility to obtain several construction permits by using approvals, permits and agreements previously issued, with indefinite effects, this despite strict regulations in force on the limits of validity of building permits. This how it violates the principle of legality applicable for licensing procedures. Last but not least, the bill establishes a preferential treatment in favor of Rosia Montana Gold Corporation (RMGC) in permitting it

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<sup>3</sup> Law Nr. 213/1998 regarding public goods.

<sup>4</sup> Art. 43 alin. 1 of mining law Nr. 85/2003.

in an abusive and unjustified manner to interfere with the decision making power that belongs to the administrative authority. By the provisions of the legislative proposal, the mining company would acquire the right to reconfigure the limits of the mining perimeter, on demand and outside any regulatory procedures. All this is despite the fact that according to the current legal provisions, mining perimeters are established solely by the National Agency for Mineral Resources by order published in the Official Gazette before the granting of any operating license.

Another example of serious interference with constitutional guarantees of property rights and the rule of law are enclosed in the bill's disposition that establishes a special procedure for expropriation.

The stipulation that the Rosia Montana project is a „public utility work of special national interest” is profoundly unconstitutional, as the public utility character has not been „established following a procedure stipulated by law”. (Article 44 point 3 of the country's Constitution). The Rosia Montana project was not declared of national interest following a preliminary analysis and following the eslistment of the work into the zone's urban plans, as it is required by Law 33/1994. What's more, the Rosia Montana project can not be considered of public utility under Law 255/2010, as the domain of application of this law does not include the exploitations of gold and silver ores.

According to the legislative proposal, the Romanian state would be represented by the 'license owner' during the expropriation procedure and when establishing the amount of compensation payment. This leads to a profoundly unconstitutional situation as the state's sovereign powers would be exercised by a private entity and the state would be unable to ensure guarantees, protect property rights or provide answers to compensation measures set by the licensee.

This would also give way to a derogatory measure in favor of the 'license owner', who would be directly awarded concession rights over expropriated real estate. This violates legal provisions in force regarding the concession of public goods. In addition, contrary to current legal provisions the 'license owner' would be given an extended period of 36 months (currently it is 12 months) to start works but if he doesn't initiate works within that time frame, no penalty would follow. These provisions clearly violate the principle of equality before the law and create, visavis other commercial actors, an unfair advantage for RMGC.

Another fundamental breach of the provisions of the bill is the public's right to participate in decision making in the framework of the environmental impact assessment of urban plans in mining areas. The legal proposal reduces the period within which to conduct environmental assessment procedures as mentioned above - involving among other things, consultation and public participation in decision-making – to a maximum of 3 months. The bill provides no motivation for reducing this frame and is in contradiction with applicable international laws<sup>5</sup> applicable in Romania which refers to a practical and effective right to access to information, public participation in decision making and access to justice regarding environmental issues within a reasonable and sufficient time frame. Reducing the time frame to a maximum of 3 months means putting the interested public and organizations into a situation whereby they are effectively unable to inform themselves about the proposed plans or to collect technical

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<sup>5</sup> SEA Protocol of the ESPOO Convention on EIA in a trans-boundary context, adopted at ESPOO on 25. February 1991, ratified in Romania with Law Nr. 349 of 11.11. 2009 and the Aarhus Convention – Pillar 2 – public participation in environmental decision making.

information and information about possible risks and impacts on the environment and health that is independent from the one provided by the project owner. In light of premise, the public will subsequently be unable to formulate pertinent and technical and motivated comments regarding the plan's expected impact.

Finally, the bill grants RMGC permission to relocate a natural monument. This violates the state's obligation to protect natural heritage assets of national interest. The proposed legal provision's regulation of the transfer of the regime of protection represents an inference of the legislative authority in the exercise of administrative powers since the regime of a protected natural area is established by a governmental decision.

**Last but not least, the draft law prejudices on numerous occasions the constitutional principle of equality before the law.**

Several provisions of the draft bill set an unjustified distinction between mining industry license owners and other economic operators, including:

- It grants the right to the project owner to conduct environmental assessment (EIA) procedure on urban zoning plans (UZP) either *concurrently* or following the mine project's EIA assessment procedure. Current laws however, establish a different and separate order for the carrying out of these two distinct assessment procedures. The UZP assessment procedure for the plan being the first followed by the assessment procedure for the project proposal. The scope for this exception, as proposed by the draft law, is to 'legitimate' or make permissible the concrete situation in which RMGC is currently enmeshed, as it started the EIA procedure for the project in 2004, without having a valid UZP to this very day.
- It gives the license holder the right to obtain land rights situated on the mining perimeters, without taking into account the preemption right of co-owners and neighbors. This leads to a violation of property rights established by the Constitution, as it restricts in an unjustified manner established guarantees.
- It establishes an exception to the current legal provision that in areas where archeological patrimony has been found during construction works, the construction permit is suspended. The envisaged exception gives RMGC the right to continue mining activities on the remaining area of land where such patrimony has been discovered.
- It absolves RMGC from having to secure archaeological discharge certificates for areas where archaeological heritage has been signaled. This creates the premise for being able to destroy objects susceptible to form part of Romania's cultural and archaeological heritage.