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Outlook on the legality of the Environmental Impact Assessment Report for the *Rosia Montana Project*

Preceding remarks: The norms of the positive law that include the frame law on environmental protection and derivative legislation, that the project titleholder Rosia Montana Gold Corporation SA and the Ministry for the Environment and Water Protection have to take into consideration in the design of the Environmental Impact Assessment Study and during the review proceedings are annexed to this study (see appendix 1).

Even though the Environmental Impact Assessment Study (EIA)¹, designed by authors accredited by the Ministry for the Environment and Water Management, pretends to be an exhaustive document, we will herein analyze several aspects that concerns the legality of this study. Upon careful scrutiny, these aspects can lead to the dismissal of the request for an environmental license through a governmental decision², according to art 19 of the Emergency Governmental Ordinance no.

¹ The abbreviation for the Environmental Impact Assessment is henceforth EIA

² The environmental license and the authorization/integrated environmental authorization for mining activities that use dangerous substances in the processing work and concentration process, with production capacities larger than 5 million tones/year and/or if the surface the activity is conducted on is larger than 1000 hectares, the Government has to pass a decision, based on a proposal by the central

195/2005³. If it is the case that the environmental accord - an individual authoritative administrative act - will be issued, it could be attacked in an administrative court by any person who has an interest to so do.

The first essential aspect that involves the evaluation of the pre-existing factual situation refers to the manner in the consultants have understood to treat the “Zero Alternative”. There are several arguments to be made that the EIA Report does not start from a proper basis for the evaluation of the “Zero Alternative”. The report contains instead statements that are overwhelmingly subjective about the economic consequences, concluding that poverty in the area will increase if the project does not granted an environmental license.

We have to point out that the assessment algorithm for the Zero Alternative entails an anticipation of the evolution of environmental factors in the absence of the project⁴. The EIA report lacks a spatial and temporal projection on the evolution of the environmental factors which would start from the very important premise that the Romanian State, through Minvest Deva SA, is in the course of fulfilling its legal obligations to ecologically rehabilitate the area of the mining operation in Rosia Montana, after all its operations ceased in June 2006. Even though the project owner is aware of Minvest Deva SA’s intentions⁵, it nevertheless assumes that the former’s

environmental protection authority and according to the project titleholder the yearly production of ore will be between 7.3 and 15.4 million tones/year. See table 1-1 on page 10 of 49, Chapter 1- General Information about the EIA Report.

³ Modified and approved by Law no. 265/2006.

⁴ In the best practices manual approved by the Ministry for the Environment and Water Management, Order no. 117/2006, the Zero Alternative is defined as *„the forecast for the state of the environment and the population’s health in the case of the non-implementation of the respective plan/project (the so called Zero Alternative)”*.

⁵ Please see the project owner’s (RMGC) declaration « Our cooperation with Minvest for the Ecological Rehabilitation of Existing Operations », Vol. 7, *General Outlook on the EIA Report*, p. 12 and “according to graphic for the closure of inadequate dumps, approved through the Governmental Decision no. 349/2004 on waste dumps, all dumps in rural areas, including those in the Rosia Montana area will be close until 2009. The larger waste dumps in the region, like those in Abrud, Campeni and Zlatna will be closed in 2009” (volume 22, Waste Management Plan of the EIA Report, p. 83 which stands in contradiction with the statement: “we have no intention to restore the social and ecological conditions in

mining operations will not be followed by the environmental rehabilitation of the old mining operation area, against the precise provisions of article 3, point 25 corroborated with article 32, paragraph 1, letter c and d, linked with article 39, paragraph 1, letter k and article 52, paragraph 1, letters b and d of the law no. 85/2003 (Mining Law). Minvest Deva is currently working on a closure and ecological rehabilitation plan⁶ and has already been allocated 1.17 million Euros by the Ministry for the Environment, for the first stage of these procedures⁷.

The respective plan will be the subject of an environmental impact assessment procedure that will include public consultations. This means that the mining impacted environment in Rosia Montana will be rehabilitated through reforestations, the treatment of acid waters, the stabilization of waste dumps and that socio-cultural and infrastructure rehabilitation⁸ measures will be taken.

This should have been the premise that the project owner should have started from when examining the baseline conditions and not the erroneous alternative that starts from a negative impact assessment: "...the continuing pollution of waters and the soil through uncontrollable streams and ex-filtrations caused by the RosiaMin

Rosia Montana to the pre Rosia Montana project conditions", vol. 31, Community Sustainable Development Plan of the EIA Report, p. 12.

⁶ The closure and ecological rehabilitation plan includes among other things : filling up of galleries, ecologic rehabilitation of the mining platform, the planting of saplings and grass, the maintenance of plantations, a 4 year monitoring of the stability of the waste dumps and the plantations; on the tailing pond: the transportation of residues and concentrates to ponds, concrete thresholds in the valley basins, creation of monitoring channels, creation of support walls, drenches, deposits of fertile soil, planting of grass and saplings, rehabilitation of neutralization plants and the post-monitoring of waters, the post-monitoring of the stability of tailing ponds for a period of 30 years.

⁷ Please see the article *Rosia Montana Mine closes temporarily* published in the newspaper Bucharest Daily News, no. 538, 1 August 2006. 2006 "According to Alba Deputy Prefect Clement Negru, the mine and the mud-setting pond in the Rosia Montana area will be made safe by 2011. For now, said the Alba official, the greatest problem is the ecological recovery of the zone, of the mud-setting pond in particular. The Ministry of the Environment allocated for this purpose funds totaling 1.17 million euros."

⁸ According to letter no 3206 dated 09.06.2006 from Minvest Deva S.A., the company's board issued the decision no. 94 dated 31.03.2006 on the closure of all its mining activities in Rosia Montana. At the moment the Mine Closure and Environmental Rehabilitation Plan is being finalized (projected to be final in the third semester of 2006) and will then be submitted to an EIA procedure, which was also confirmed by the National Agency for Mineral Resources in its letter no 6090/09.06.2006.

operations, the historical mining works and the practice of uncontrolled waste deposits and the status quo which results from the Romanian state's (through Minvest Deva SA) finalizing of the closure and environmental rehabilitation operations⁹".

Consequently, the two projects - the closure and the environmental rehabilitation of the present state-owned mine and the RMGC plan to open a new mine - are clearly incompatible. Thus, the two environmental licenses cannot be issued by the environmental protection authorities simultaneously or successively, within a short time interval. The only legal solution, according to article 94, paragraph 1, letters g,h, i of the Governmental Emergency Ordinance no. 195/2005 would be to have the Romanian state that is a shareholder in the National Company Minvest Deva SA to abide by the principle "the polluter pays", to continue and finalize the closure and ecological rehabilitation project for the old operation Rosia Min and to have the investor, RMGC wait until this process ends and rewrite its studies about the baseline conditions, with reference to this Zero Alternative.

The EIA Report does not evaluate the impact of deforestations on a significant surface of land. The EIA Report shows that in the perimeter of the proposed industrial area there are 234.8 hectares of forests¹⁰. The impact of such massive deforestations is obvious: landslides, erosions, climatic change, the significant alteration of socio-cultural conditions in the respective areas, the loss of some key habitats for the native fauna and flora, the loss of genetic diversity, a quantitative and qualitative impact on waters, all representing a direct and permanent impact on the environment.

The scoping list explicitly asks the project owner to evaluate in detail the impacts of deforestation, both on the environment¹¹ and on human health¹². The requested information can not be found in the EIA report.

⁹ See Volume 16 of the EIA report, page 8 "Analysis of the Alternatives".

¹⁰ See Volume 7 of the EIA report, "General Information", page 37;

¹¹ The remark made by the Ministry for Transport, Constructions and Tourism, point 11, see http://www.mmediu.ro/dep_mediu/rosia_montana.htm;

¹² The question asked by the Institute for Public Health, pct. 8: "An evaluation of the risk on health generated by the losses of agricultural and forestry land: - the disturbance of air's capacity for self-purification generated by the loss of vegetation in the area; - the extinction of natural obstacles that use

The authorization procedures¹³ for the permanent tenancy of forest areas which belong to the national forest fund, the subsequent deforestation of these surfaces and the entire gamut of financial obligations¹⁴ that the project owner has for these operations are also not described. This fact impedes a cost-benefit analysis of the proposed project

Even though from a purely formal point of view, the project owner will have to undergo a separate environmental impact assessment procedure for the permanent tenure of surfaces from the national forest fund and for the deforestation of these woods, this does not mean that the present EIA Report has to obscure the assessment of the environmental impact these deforestations will have. This because, as we have shown above, this impact is one of the most severe types of direct impact, it is irreversible and has, in its turn, indirect effects upon other environmental factors in the Rosia Montana Project area. The project owner has not given an adequate response to questions about the Prognosis on direct effects included in Annex 3 of the MAPAM Order no. 863/2002. Consequently, the public authority cannot evaluate and impose via

to offer protection against the movements of polluted air.“ See http://www.mmediu.ro/dep_mediu/rosia_montana.htm;

¹³ According to Article 26 of the Governmental Ordinance no. 96 /1998 republished, on the regulation of the silvic regime and the administration of the national forest fund, *The permanent tenancy or the temporary use of lands which belong to the national forest fund, according to the provisions of article 23 and 24, can be realized only with the agreement of the property owners and it is approved as follows [...]* c) for an area larger than 50 hectares, through a Governmental Decision, at the request of the legal persons who are the beneficiaries and following the proposal of the public central authority responsible for forestry.

¹⁴ According to Article 23, point of the Governmental Ordinance no. 96 /1998 republished, *The permanent tenancy of lands which belong to the forest fund, stipulated at point (1) lit. a) and b), is made after the payment of the following taxes and compensations: a) the tax for permanent tenancy of forest lands which goes to the Fund for land improvements, according to article art. 92, point (4) of Law on land fund 18/1991, republished, and which is a fund administered by the central public authority in charge of forests; b) the value of the land and the wood which goes to the property owner of that respective land; c) the value of the loss in growth, generated by the exploitation of wood before its standard age of exploitability, this in the case the land is covered with forest, compensation which goes to the land owner.*

the environmental accord measures that would mitigate this impact (e.g. reforestations for forest boundary land surfaces).

Another serious flaw in the EIA Report is the manner in which responsibility over the issue of mining waste management is assumed. The “Waste Management” section of the Report in its current form represents a structural deficiency that renders the granting of an environmental accord impossible. The erroneous premise the project owner starts from is the inapplicability of Directive no. 1999/21/EC on land filling of waste, published in the Official Journal of the European Communities (OJEC), no. L 182 from the 16th of July 1999 and transposed into the Romanian legislation with Governmental Decision no. 349/2005 published in the Official Gazette no. 394/2005. Following an erroneous interpretation of art 3 of G.D. no. 349/2005 against point no. 8 of the Preamble of the new European Mining Waste Directive 2006/21/CE, the project owner concludes that the European Directive 2006/21/CE, as a special norm, prevents the enforcement of the Governmental Decision no. 349/2005.

Even though, *ad absurdum*, we would at present consider the EU accession process over, we would still have to wait for the transposition of this Directive into the internal legislation, because the directive contains recommendations and doesn't include any sanctions. We also have to mention that the European Communities Court of Justice, in its judicial practice, has acknowledged that it is only exceptionally¹⁵ that a directive can have a general normative character. Only at that moment would one be able to state with certainty that the transposition norm is or is not a special law in relation with the governmental decision no. 349/2005. The Romanian state can decide whether it understands to enact norms that are stricter than the directives now in force but at present no such technical and juridical elements for the transposition of the 2006/21/EC directive are known. Consequently, given that the governmental decision no. 349/2005 excludes from its provisions only the land filing of uncontaminated soil, of inert waste resulted from prospecting and exploitation operations, the treatment and

¹⁵ C.J.C.E., 22 February 1984, Kloppenburg, file no 70/1983, Recueil de jurisprudence 1984 page 01075 on <http://eur-lex.europa.eu/> and TPI, Ord. 20 October 1994, Asociación Española de Empresas de la Carne contre Conseil de l'Union européenne, File T-99/94. Recueil de jurisprudence 1994 page II-00871 on <http://eur-lex.europa.eu/>.

stocking of mineral resources, it follows, *per a contrario*, that this text is applicable to processing waste.

Another argument in favour of this conclusion is the fact that table 5.10, annex 5 of this governmental decision mentions Minvest Deva SA's tailing pond from the Salistei Valley where Rosia Min has deposited its current mining waste. The processing waste fall into the category of dangerous waste according to the annexes I B, I C, I D and I E of Law no. 426/2001 for the approval of the emergency governmental ordinance no. 78/2000 on waste regime.

Consequently in the design of the Corna Valley tailings pond, the project owner has to abide by the provisions of the governmental decision no. 349/2005 that regulates:

- requirements on location: according to the above mentioned legal requirements, a waste deposit has to be situated 1000 metres away from any inhabited community. The construction of the waste deposit on fissured rock (as is the case of the Corna Valley), in the areas of protection of potable water sources (as is the case of the water sources for the town of Abrud) or in the areas protected for their natural or cultural patrimony (as are the archaeological vestiges from the Carnic Massive and the natural monuments Piatra Corbului and Piatra Despicata) is also banned.
- requirements on insulation: a deposit owner has to apply artificial insulation which abides by the norms for physical and chemical resistance and stability over time, in agreement with the rules for its imperviousness and an airtight system for the collection of levigate liquids, to ensure the accumulation of levigate at the base of the deposit is maintained at a minimal level. In subchapter 2.8.1.9 of the chapter "Waste Deposits" which describes prophylactic measures which have been taken to minimize the effect of toxic waste - the resulted waste from the processing plant – there is no mention of an insulation method of the deposit's tub (base and interior slopes of the protection dams of the tailing pond) even though at point 1.2.2 corroborated with point 1.3. of Annex 2, General requirements for all classes of waste deposits of the Governmental Decision no. 349/2005 sets quantitative and qualitative conditions for the layers of insulation, both natural and artificial.

- requirements for authorization: the waste deposit operator must present, as part of the documentation for obtaining the environmental accord/authorization, an avis for water management, issued by the competent public authority
- requirements for establishing the financial guarantee: a waste deposit operator is obliged, before starting the land filling activity, to prove the existence of the financial guarantee that it will fulfill its obligations on the deposit's security, environmental and human health protection, all stipulated in the environmental authorization. This financial guarantee has to be maintained and adjusted all throughout the period of operation, closure and post-closure monitoring of the deposit. The operator is obliged to constitute a fund for closure and post-closure monitoring of all environmental factors (monitoring which has to last at least 30 years).
- monitoring and post-closure requirements: the post-closure monitoring period is determined by the competent environmental protection authority. This period is of at least 30 years and can be extended if through the post-closure monitoring program it is established that the waste deposit is not yet stable and presents a potential risk for the environmental factors.

As a conclusion, the EIA Report shows that the project owner is not in compliance with the provisions of the Governmental Decision no. 349/2005 on land filling of waste.

Building on the integrated pollution prevention and control principle, legislated through the Emergency Governmental Ordinance no. 152/2005 approved by law no. 84/2006, this juridical analysis must be extended onto the other stages of the licensing procedure for the Rosia Montana Project because they themselves can be the object of EIA procedures. From our analysis of the urbanism documents we have come to the following conclusions:

- Being in the impossibility to continue the environmental licensing procedure because of the suspension¹⁶ of the urbanistic certificate no. 68/2004, the project owner RMGC

¹⁶ The urbanistic certificate no. 68/2004 makes no reference whatsoever to the administrative territory of Campeni. It was suspended through the civil court sentence no.205/CA/15.06.2005 of the Alba Iulia

has requested and received from the Alba County Council a new urbanistic certificate no. 79/2006 for the purpose of planning and executing the construction works for the Rosia Montana mining project;

- From the analysis of the content of the new urbanistic certificate we can observe the Rosia Montana project has suffered substantial modifications from its form described in the document "Project Presentation Report¹⁷" submitted by SC Rosia Montana Gold Corporation S.A. in order to start the environmental licensing procedures, at least under the following aspects:

a) The total land surface is 12.573.164,63 square metres and not 13.461.656,42 square metres as it was stated in the old urbanism certificate;

b) The construction works are proposed in the administrative territories of the Rosia Montana and Bucium communes and the towns of Abrud and Campeni;

c) The construction of several industrial objectives is no more proposed:

- the tailing pond with a tailing surface of 363,13 hectares;

- the main dam of the pond (180 metres high, with a final storing capacity of 153 million cubic metres of processing waste and one million cubic metres of technological water);

- the dam for the secondary retention system;

- the semi-passive treatment lagoons.

Consequently, the two administrative acts with an individual character that will be issued at the end of this licensing procedure - the environmental accord granted through a governmental decision and the construction license issued by the Alba County Council - will be in flagrant contradiction with each other because the first act will make reference to the industrial facilities enumerated above and the urbanistic certificate and implicitly the construction license (which compels the project owner) will make no mention of all these.

We therefore conclude that the urbanistic certificate no. 78 dated 26.04.2004 reflects an intention for a new project, incompatible with the one exposed in the urbanistic certificate no. 68/20.08.2004 and in the project presentation report submitted

Tribunal, file no 2637/2005, irrevocable following the rejection of the appeals against it introduced by the Alba County Council and RMGC (Alba Iulia Court of Appeal's decision no 2092/2005 file no 4373/2005)

¹⁷ See http://www.mmediu.ro/dep_mediu/rosia_montana/PPR%20Rev_01_ROM_fara_comentarii.pdf

to the local environmental protection agency in Alba Iulia on the 14th Dec. 2004 in order to initiate the environmental licensing procedure.

Therefore RMGC has modified its project¹⁸, as one can see from urbanistic certificate no. 78/26.04.2006 issued by the Alba County Council. This however means that the initial request for an environmental accord dated 14 December 2004 has remained without object. Therefore, the ministry for the Environment and Water Management should have not continued, based on the latest urbanism certificate, the EIA procedure. The legal solution would have been to reject the request for an environmental accord as being without object.

According to article 32 corroborated with articles 44 and 47 of Law no. 289/2006 which modifies and updates Law no. 350/2001 on urbanism and territorial management, and with article 10 of Law no. 50/1991 modified and republished, the urbanistic certificate no. 78/26.04.2006 should have included on page 3 the obligation to elaborate and approve through a local council decision four zoning plans¹⁹ for surfaces to be included in the project proposal. These are administrative territories belonging to the towns of Campeni and Abrud and to the communes of Bucium and Rosia Montana. The Alba County Council should at the very least have requested via the urbanistic certificate the design of a new county territorial management plan for the Rosia Montana industrial area. Like this at least the industrial area would have been compliant with articles 22 and 23 of Law no. 350/2001.

In addition to these four Zoning Plans, according to articles 17, 21, 28 of Law no. 422/2001 on the protection of historical monuments, the Commune of Rosia Montana is

¹⁸ As such Volume no 31 of the EIA report entitled *Community Sustainable Development Plan* makes reference on page 38 that “*the community sustainable development plan includes the Commune of Rosia Montana as well as the two towns of Abrud and Campeni*”.

¹⁹ The obligation imposed in the urbanistic certificate no 76/26.04.2006 to design one single Zoning Plan for the whole Rosia Montana Industrial Development Area violates article 38 alin 2 pct. b, alin. 4 lit. d, e, f and alin. 5 lit. c of Law no 215/2001 on local public administration corroborated with article 25 alin 1 of Law no 289/2006 which modifies and updates Law no 350/2001 on territorial management and urbanism; this because each of the four local councils has the competence to vote a local council decision approving a corresponding Zoning Plan for the respective portion in its administrative territory that will be occupied by the project.

compelled to elaborate and approve through a local council decision an urbanistic plan for the protected area²⁰ which includes thirty-three historical monuments, the entrance to the mine gallery Catalina-Monulesti and the proposal to establish a new museum. Even though the project owner has stated that this Zoning Plan will be elaborated and approved “in a future design phase”, in reality this should have been the first phase that the project owner and its partners - the local public authorities - should have necessarily undertaken before the submission of the project presentation report to the Environmental Protection Authority in Alba in order to receive the environmental license. This procedural course is the sole possible from a legal point of view. According to article 5, paragraph 2, letter A corroborated with art 9, paragraph 3 of the new Strategic Environmental Assessment procedure (evaluation of the impact on the environment for plans and programs) instituted through the Governmental Decision no. 1076/2004, corroborated with article 9 of the Emergency Governmental Ordinance no. 195/2005 these plans must be validated through an environmental avis separately and prior to the environmental license required for the mining project itself.

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²⁰ See Volume 7 of the EIA report, *General Information*, page 37 „ The ministry for Culture and the Cult’s National Commission for Historical Monuments approved the establishment of a Protected Area, based on the permits no 61 dated February 2002 and no 178 dated June 2002. The second authorization stipulates that in a future design stage the project owner has the obligation to submit a Zoning Plan for the protected area and a Management and Rehabilitation Plan for Protected Area. The later needs to be sequenced with the progressive classification of the valuable buildings and the establishment of their legal statute. “