



**Nestor Nestor Diclescu Kingston Petersen**  
ATTORNEYS & COUNSELORS

## **What is the Member States' reaction?**

### **The accident in Baia Mare – a lesson learnt by Romania. Community and national implications**

**By Ana Diclescu-Şova, Attorney-at-Law**

**Co-Managing Partner, Nestor Nestor Diclescu Kingston Petersen**

*Ladies and Gentlemen,*

*Distinguished Guests,*

*Honourable Audience,*

Allow me to affirm, from the outset, by deep commitment to the fundamental values of the European construction, as a citizen, and to the rigours of community law, as a legal specialist.

The topic of my intervention deals with the harmonisation of the national legal order with community regulations, with particular focus on the specific mining activities and related fields, such as environmental protection.

Like in all fields that are relevant for both the community construction, as a political phenomenon, and its law, as a working instrument, mining, and the exploitation of the soil riches, in general, give rise to lively controversies among the public opinion and the civil society, as well as to intense debates among national and European decision-makers.

There is a confrontation between, on the one hand, the objectives to be attained, as defended by the European Commission, and, on the other hand, the real implementation possibilities of the Member States.

The confrontation can be, and actually is, an *ex post* cooperation in most cases, when the Member State has supported the established solution by negotiations at the EU level, or can be and become an attempt to nuance the objectives, when the outcome of the negotiations is not satisfactory.

After the adoption of community legislation, the Member States often feel the need to reconcile the community law, whose enforcement can be ensured via its prevalence over the national law or via its direct effect, with the national specificities/real situation of the newly regulated field.

Thus, as a general rule, in the process of transposition and enforcement of community laws into the national law, the objectives that have been so difficulty established by the community players are more often than not “affected” /modelled by the concrete potential of each member state, in terms of political will and functionality of the administrative system.

Today’s understanding is part of this agreement, in the sense of knowing:

- Whether the Romanian state has transposed all community regulations into national law;
- Whether it has the proper institutions and mechanisms for controlling and regulating mining projects;
- Whether the activity of the institutions truly has an impact and, finally,
- Whether the functioning of the administrative system suffocates, by excess, any viable economic initiative in line with European requirements.

In other words, it may happen that today, in Romania, which has been a member of the EU for two years already, for fear of the past, the institutional system may be calibrated too tightly and becomes excessive and inertial, compared to what might be satisfactory to Brussels?

For time and concision reasons, I will structure by presentation into the following components:

*I. Analysis of the dialogue between Romania and the EU with regard to the cyanide pollution of the Danube, following the breaking of tailings dams in Baia Mare region and*

*II. Appreciation of the real capacity of the Romanian State to prevent such ecological disasters, to watch over the implementation of the technical standards in force, and to allow for the implementation of important mining projects, subject to all community safeguards.*

**I. Analysis of the dialogue between Romania and the EU with regard to the “Baia Mare Incident” – or diagnosis of an institutional organisation problem and lack of administrative rigour**

The consequences of the incident which occurred in January 2000 in Baia Mare cannot and must not be challenged or trivialised.

The case Tătar versus Romania, referred to the European Court of Human Rights in 2001, has maintained the consequences of the accident under the spotlight and has been drawing attention on the need for urgent, coherent and efficient interventions at legislative level, but mainly in terms of increasing the authorities' responsibility.

Equally, but on a different level, the accident from Baia Mare resulted in the adoption of significant legislative amendments and the European and hence national level.

While the balance seemed to tilt towards the state's economic interest in the past, there is currently an obligation for the mining principles to be in line with human health and environmental concerns.

There is no doubt that the State has the sovereign right to exploit its national resources in compliance with the national interest and the environmental policy. Economy and environment are interrelated.

As a result of a new global approach to the effects of industrial activities, in general, the performance of mining operations currently depends on the operator's ability/performance/experience in designing these operations so as to ensure the proper conditions to prevent accidents or to mitigate the consequences of any such events. Such a **conduct is mainly reflected in the legal framework which sets out obligations that are binding for all.**

#### **A) Mining law – relation between mining and environmental regulations**

The Mining Law no. 85/2003 (as amended by law 237/2004), sets as a condition for the *approval of a mining project, the availability of the environmental impact assessments and of the environmental rehabilitation plans once the mining activity is over.*

**NOTE:** The environmental impact assessment and the environmental rehabilitation plan after the termination of the activity need to accompany the application for the issuance of the mining exploitation license. (Art. 20 par. (1) let. (c) and (d) of the Mining Law no. 85/2003).

Moreover, the ***owner of the activity must establish a financial guarantee for environmental rehabilitation***, so that any future events that may affect the operator's financial stability should not impact its capacity to fulfil its environmental rehabilitation obligations.

**NOTE:** The guarantee must be established from the very beginning, being regulated by the exploitation licensing procedure (Art. 20 par. (4) of the Mining Law no. 85/2003). The guarantee is to be established according to the guidelines issued by the National Agency for Mineral Resources, currently in the form of Order 58/2004 approving the technical instructions for the enforcement and follow-up of the measures established in the compliance programme, the environmental rehabilitation programme and the technical project, as well as regulating the financial guarantee for the rehabilitation of the environment affected by mining operations (as amended by Order no. 27/2005).

Also, the ***validity of the mining permits or licenses depends on the validity of the environmental approvals and authorisations.***

**NOTE:** The exploitation permit or license is suspended if the owner's environmental permit and/or authorisation have been suspended (Art. 33 par. (1) let. (c) of the Mining Law no. 85/2003), and shall be cancelled if the owner has been cancelled its environmental permit and/or authorisation (Art. 34 let. (e) of the Mining Law no. 85/2003).

These aspects reflect the interdependence of the laws and consequently the severe requirements that authorities and operators must comply with for prevention purposes.

Consequently, if we are to take a look at the actions generated by the Baia Mare accident, we can easily notice that they were reasons for the amendment of the **environmental protection legislation**, followed by **amendments/supplements to the mining legislation**.

## 2. National transposition of the community legal framework – reaction in terms of state reform

*Table no. 1: Comparison between the community and national legal frameworks:*

COMMUNITY LAWS	NATIONAL TRANSPOSITION ACTS
<b>Control of the major accident risk as a result of hazardous substances</b>	
<p><b>Directive 96/82/CE of December 9<sup>th</sup>, 1996, on the control of major accident risk as a result of hazardous substances</b></p> <p><i>Amended by:</i></p> <ul style="list-style-type: none"> <li>• <i>EU Regulation no. 1882/2003 of September 29<sup>th</sup>, 2003, adapting to Council Decision 1999/468/EC the various provisions on the committees assisting the Commission in the exercise of its execution competences, as provided by the regulations subject to the procedure referred to under Art. 251 of the EC Treaty</i></li> <li>• <b>Directive 2003/105/EC of December 16<sup>th</sup>, 2003, amending Directive 96/82/EC – adopted following several accidents, including the one from Baia Mare</b></li> <li>• <i>EC Regulation no. 1137/2008 of October 22<sup>nd</sup>, 2008, adapting to Council Decision 1999/468/EC certain acts which are subject to the procedure under Art. 251 of the Treaty, as regards the control regulatory procedure</i></li> </ul> <p><i><b>NOTE:</b> The legal framework regarding the control of major accident risks provides for the obligation of the operators conducting activities falling under its scope to take all necessary measures in order to prevent major accidents and mitigate their effects for humans and for the environment. Directive 96/82/EC, amended by Directive 2003/105/CE, provides for the following main requirements:</i></p> <p><i>(i) The operator's obligation to notify the competent authority with regard to entities/activities falling under its scope, which are to be conducted on the territory of another</i></p>	<p><b>Government Decision no. 804/2007 on the control of major accident risks involving hazardous substances, as subsequently amended</b></p>

COMMUNITY LAWS	NATIONAL TRANSPOSITION ACTS
<p><i>member state;</i></p> <p>(ii) <i>The operator's obligation to prepare a major accident prevention policy, under observance of the general principles established by the Directive, as well as to guarantee the enforcement of this policy;</i></p> <p>(iii) <i>The operator's obligation to establish a security report with the minimal content set out by the Directive;</i></p> <p>(iv) <i>The operator's obligation to develop emergency plans, with the consultation of its own staff, with a view to achieving the objectives established by the Directive;</i></p> <p>(v) <i>The competent authority shall exert permanent control over the concerned entities, including with regard to the accident prevention policy and preparation and implementation of the security report and emergency plan.</i></p>	
<b>Mining waste management</b>	
<p><b>Directive 2006/21/EC of the European Parliament and Council of March 15<sup>th</sup>, 2006, on mining waste management, amending Directive 2004/35/CE – <i>adopted following several accidents, including the one from Baia Mare</i></b></p> <p><i>Amended by:</i></p> <ul style="list-style-type: none"> <li>• <i>EC Regulation no. 569/2009 of June 18<sup>th</sup>, 2009, adopting to Council Decision 1999/468/CE certain acts subject to the procedure referred to in Art. 251 of the Treaty, as to the control regulatory procedure</i></li> </ul> <p><i>NOTE: The regulation of mining waste management is considered as a priority by:</i></p> <p>(i) <i>Commission Communication „Safe development of mining operators: study of the consequences of recent mining accidents“ (COM(2000)664 final).</i></p> <p>(ii) <i>Decision no. 1600/2002/EC of the European Parliament and Council of July 22<sup>nd</sup>, 2002, on the 6<sup>th</sup> community environmental programme. According to this programme, priority should be given to waste recycling, so as to reduce the quantity of disposable waste.</i></p>	<p><b>Government Decision no. 856/2008 on mining waste management</b></p>
<b>Environmental liability</b>	
<p><b>Directive 2004/35/EC of April 21<sup>st</sup>, 2004, on environmental liability related to the prevention and remediation of environmental damages – <i>amended following several accidents, including the one from Baia Mare</i></b></p> <p><i>Amended by:</i></p> <ul style="list-style-type: none"> <li>• <i>Directive no. 2006/21/EC of March 15<sup>th</sup>, 2006, on mining waste management, amending Directive 2004/35/EC</i></li> <li>• <i>Directive no. 2009/31/EC of April 23<sup>rd</sup>, 2009 on geological</i></li> </ul>	<p><b>Government Emergency Ordinance no. 68/2007 on environmental liability with regard to the prevention and remediation of environmental damages, as subsequently amended</b></p>

COMMUNITY LAWS	NATIONAL TRANSPOSITION ACTS
<p><i>storage of carbon dioxide, amending Council Directive 85/337/EEC, as well as Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and (EC) Regulation no. 1013/2006 of the European Parliament and Council</i></p>	
<b>Water protection legislation</b>	
<p><b>Directive 2000/60/EC of October 23<sup>rd</sup>, 2000, establishing a community policy framework on water</b></p> <p><i>Amended by:</i></p> <ul style="list-style-type: none"> <li>• <i>Decision no. 2455/2001/EC of November 20<sup>th</sup>, 2001, establishing a list of priority substances in the water field, amending Directive 2000/60/EC</i></li> <li>• <i>Directive no. 2008/32/EC of March 11<sup>th</sup>, 2008, amending Directive 2000/60/EC, establishing a policy framework on water, as regards the execution competences of the Commission</i></li> <li>• <i>Directive no. 2008/105/EC of December 16<sup>th</sup>, 2008 on water quality standards, amending and abrogating Directives 82/176/EEC, 83/513/EEC, 84/156/EEC, 84/491/EEC, 86/280/EEC of the Council, and amending Directive 2000/60/EC</i></li> <li>• <i>Directive no. 2009/31/EC of April 23<sup>rd</sup>, 2009, on geological storage of carbon dioxide, amending Council Directive 85/337/EEC, as well as Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) no. 1013/2006 of the European Parliament and Council</i></li> </ul>	<p><b>Water law no. 107 of September 25<sup>th</sup>, 1996, as subsequently amended</b></p> <p><i>Secondary legislation:</i></p> <ul style="list-style-type: none"> <li>• <i>Government Decision no. 930 of September 2<sup>nd</sup>, 2005, approving the Special Regulations on the character and size of sanitary and hydrological protection areas</i></li> <li>• <i>Government Decision no. 351 of May 20<sup>th</sup>, 2005, approving the programme regarding the gradual elimination of discharges, emissions and spills of hazardous substances</i></li> <li>• <i>Government Decision no. 210 of February 28<sup>th</sup>, 2007 amending and supplementing the legislation transposing the community acquis on environmental protection</i></li> <li>• <i>Procedure of June 28<sup>th</sup>, 2006 and competences for the issuance of water management approvals and authorisations, approved by Order 662/2006</i></li> </ul>
<p><b>Directive 80/68/EEC of December 17<sup>th</sup>, 1979 on underground water protection against pollution caused by certain hazardous substances</b></p> <p><i>Amended by:</i></p> <ul style="list-style-type: none"> <li>• <i>Directive no. 91/692/EEC of December 23<sup>rd</sup>, 1991 on the standardisation and rationalisation of reports concerning the enforcement of certain environmental directives</i></li> </ul>	<p><b>Government Decision no. 351 of April 21<sup>st</sup>, 2005, approving the programme regarding the gradual elimination of discharges, emissions and spills of hazardous substances, as subsequently amended</b></p>
<p><b>Council Directive no. 91/271/EEC of May 21<sup>st</sup>, 1991 on urban wastewater treatment</b></p> <p><i>Amended by:</i></p> <ul style="list-style-type: none"> <li>• <i>Directive no. 98/15/EC of February 27<sup>th</sup>, 1998, amending Council Directive 91/271/EEC on certain requirements established in the annex</i></li> <li>• <i>EC Regulation no. 1882/2003 of September 29<sup>th</sup>, 2003, adapting to Council Decision 1999/468/EC the various provisions on the committees assisting the Commission in the exercise of its execution competences, as provided by the regulations subject to the procedure referred to under Art. 251 of the EC Treaty</i></li> <li>• <i>EC Regulation no. 1137/2008 of October 22<sup>nd</sup>, 2008, adapting to Council Decision 1999/468/EC certain acts subject to the procedure under Art. 251 of the treaty, as regards the control regulatory procedure</i></li> </ul>	<p><b>Government Decision no. 188 of February 28<sup>th</sup>, 2002, approving certain requirements on the discharge of wastewater in the water system, including Standard NTPA-001 of February 28<sup>th</sup>, 2002, establishing the limits of pollutant loads of industrial and municipal wastewaters, for discharge in the natural environment, as subsequently amended</b></p>
<b>Regulations concerning the approval of projects from an environmental protection viewpoint</b>	

COMMUNITY LAWS	NATIONAL TRANSPOSITION ACTS
<b>and public participation</b>	
<p><b>Directive 2001/42/EC of June 27<sup>th</sup> 2001 on the assessment of the environmental effects of certain plans and programmes</b></p>	<p><b>Government Decision no. 1076/2004 establishing the procedure for the environmental assessment of various plans and programmes</b></p> <p><u>Secondary legislation and other relevant legislation:</u></p> <ul style="list-style-type: none"> <li>• Order no. 995/2006 approving the list of plans and programmes falling under Government Decision 1.076/2004 establishing the procedure for the environmental assessment of plans and programmes (O.J. 812 of 03-Oct-2006)</li> <li>• Order no. 1026/2009 approving the conditions for the drafting of the environmental report, environmental impact report, environmental check, location report, security report and proper assessment report</li> <li>• Government Decision no. 564/2006 on the framework for public participation in the development of certain plans and programmes in relation to the environment</li> <li>• Order no. 1325/2000 on public participation, through representatives, in the drafting of plans, programmes, policies and legislation on environmental issues</li> <li>• Order no. 117/2006 approving the Handbook for the implementation of the environmental assessment for plans and programmes</li> </ul>
<p><b>Directive 85/337/EEC on environmental impact assessment of public and private projects</b></p> <p><i>Amended by:</i></p> <ul style="list-style-type: none"> <li>• Directive no. 97/11/EC of March 3<sup>rd</sup>, 1997, amending Directive 85/337/EEC on the environmental assessment of public and private projects</li> <li>• Directive no. 2003/35/EC of May 26<sup>th</sup>, 2003, establishing public participation in the development of environmental plans and programmes, and amending Directives no. 85/337/EEC and 96/61/EC of the Council with regard to public participation and access to justice</li> <li>• Directive no. 2009/31/EC of April 23<sup>rd</sup>, 2009, on geological storage of carbon dioxide, and amending Council Directive 85/337/EEC, as well as Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and (EC) Regulation no. 1013/2006 of the European Parliament and Council</li> </ul>	<p><b>Government Decision no. 445/2009 on environmental impact assessment of public and private projects</b></p> <p><u>Secondary legislation:</u></p> <ul style="list-style-type: none"> <li>• Order no. 860/2002 approving the procedure for the environmental impact assessment and issuance of the environmental permit</li> <li>• Order no. 863/2002 approving the guidelines applicable to the framework procedure for environmental impact assessment</li> <li>• Order no. 864/2002 approving the procedure for the environmental impact assessment in a cross-border context, and public participation in decision-making in the case of projects with cross-border impacts</li> <li>• Order no. 1026/2009 approving the conditions for the drafting of the environmental report, the environmental impact report, the environmental check, the location report, the security report and the proper assessment study</li> <li>• Order no. 171/2005 on the establishment and functioning of the technical review committee at</li> </ul>

COMMUNITY LAWS	NATIONAL TRANSPOSITION ACTS
<p><b>Directive 96/61/EC of September 24<sup>th</sup>, 1996 on integrated pollution prevention and control (IPPC)</b></p> <p><i>Amended by:</i></p> <ul style="list-style-type: none"> <li>• Directive no. 2003/35/EC of May 26<sup>th</sup>, 2003, establishing public participation in the development of environmental plans and programmes, and amending Directives no. 85/337/EEC and 96/61/EC of the Council with regard to public participation and access to justice</li> <li>• Directive no. 2003/87/EC of October 13<sup>th</sup>, 2003, establishing a community emission trading scheme (ETS), and amending Council Directive 96/61/EC</li> <li>• EC Regulation no. 1882/2003 of September 29<sup>th</sup>, 2003, adapting to Council Decision 1999/468/EC the various provisions on the committees assisting the Commission in the exercise of its execution competences, as provided by the regulations subject to the procedure referred to under Art. 251 of the EC Treaty</li> <li>• EC Regulation no. 166/2006 of January 18<sup>th</sup>, 2006 establishing a European emission and pollutant transfer register, and amending Council Directives 91/689/EEC and 96/61/EC</li> </ul> <p><i>NOTE: Directive 96/61/EC has been abrogated and replaced by Directive 2008/1/EC of the European Parliament and Council of January 15<sup>th</sup>, 2008, on integrated pollution prevention and control (coded version).</i></p>	<p><i>the central level</i></p> <p><b>Government Emergency Ordinance no. 52/2005 on integrated pollution prevention and control, as subsequently amended.</b></p> <p><u>Secondary legislation:</u></p> <ul style="list-style-type: none"> <li>• Government Decision no. 780 of June 14<sup>th</sup>, 2006, establishing the emission trading scheme</li> <li>• Procedure of December 25<sup>th</sup>, 2006 on the issuance and review of the greenhouse gas emission authorisation</li> <li>• Programme of December 21<sup>st</sup>, 2006 on the progressive reduction of sulphur dioxide, nitrogen oxides, volatile organic compounds and ammonium emissions</li> <li>• Procedure of November 29<sup>th</sup>, 2007 on the issuance of the greenhouse gas emission authorisation for the period 2008-2012</li> <li>• National Plan of January 16<sup>th</sup>, 2008 on the allocation of emission certificates, for the periods 2007 and 2008-2012</li> </ul>
<p><b>Directive 2003/4/EC of January 28<sup>th</sup>, 2003, on public access to environmental information, abrogating Council Directive 90/313/EEC</b></p>	<p><b>Government Decision no. 878/2005 on public access to environmental information, as subsequently amended</b></p> <p><u>Other relevant legislation:</u></p> <ul style="list-style-type: none"> <li>• Law no. 86/2000 ratifying the Convention on the access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus, on June 25<sup>th</sup>, 1998</li> </ul>

Therefore, after Baia Mare, community law and Romanian law equipped themselves with the proper mechanisms, with better rules and competences in the field.

**The Romanian State** has had a double benefit:

- First because it has **implemented an overall coherent, multi-factor vision**, which went through the hardships of community negotiations and
- Secondly, because it **was thus able to coordinate the competence areas of the various central and local public authorities**, so that they all know what they have to do in their respective areas.



It can be noticed at the moment that the Romanian State truly has a strategy to prevent ecological disasters, which is also reflected in the mining sector, as well as an administrative system that is better calibrated and, more importantly, better informed and more mindful about environmental concerns.

**II. Appreciation of the real capacity of the Romanian State to prevent such ecological disasters, to watch over the implementation of the technical standards in force, and to allow for the implementation of important mining projects, subject to all community safeguards.**

It is only natural for us to highlight that **mining projects cannot be rejected bluntly, *de plano***, by the Romanian administration.

It is not by rejecting all mining projects that the Romanian State is proving its good pollution risk management capacity.

**This would mean denying its right to exert permanent sovereignty over the natural resources and national riches to the interest of its own development**, and voiding Art. 135 let. d) of the Constitution from any consequences (this article regulating the state's obligation to exploit natural resources in accordance with the national interest).

It is equally natural for us to specify that, in **correlation** with this right, there is the obligation to **act preventively**, and when it comes to decision-making, the administration should adopt the **precautionary principle**.

Between the abstract principles and the reality of the project, there is also the fact that the administration is no longer alone in its legal relation with a potential investor, because the public opinion has internalised, for some time now, the topics which rightfully give rise to ecological and ecologist sensitivities. **The stakeholders** are more than a presence, they are **active partners** in decision-making by the authorities, and, **when they exercise their rights in good faith, they are decisive**.

**It is important to know:** in Romania today, in order to actually start the mining exploitation of a site, **dozens/hundreds** of administrative papers and **hundreds/thousands of signatures** are needed from the administration bodies. They all know that they are to be held responsible and could be sanctioned in relation to the opportunity/legality of the issued act. Of course, this is both good and bad.

**A) What is the legislative framework in Romania – what are the technical mechanism and standards in force?**

**- Transposition of Directive 2004/35/EC – adoption of effective mechanisms**

Whereas in 2005 the legal framework did not offer the necessary guarantees for the safe performance of the mining operations, the situation is different at the moment.

By now, **Romania has transposed all the relevant directives in the field**, including amendments to the community acquis in order to ensure a coherent regulatory framework to prevent the negative consequences of mining operations (*see table 1 above*).

**Important:** In certain cases, the Romanian legislation has even gone beyond the community framework and has chosen to include additional requirements or measures. A relevant example in this respect is the way in which the Romanian legislation has regulated the operators' obligation to pay the costs related to the prevention and remediation of environmental damages.

Thus, in addition to the general rules concerning the operator's responsibility to cover these costs, Government Emergency Ordinance no. 68/2007 (transposing Directive 2004/35/EC) provides that the operator who is part of a consortium or multinational company and has caused an environmental damage or an imminent threat with such a damage **shall be held liable jointly and indivisibly with that consortium or multinational company, with a view to covering prevention and remediation costs.**

By establishing this joint and indivisible responsibility of the operator and the consortium or multinational company to which it belongs, the Romanian legislator has found an effective way to co-interest that company in ensuring that the operator takes all necessary measures to prevent the occurrence of accidents.

This legal framework is supplemented by the general rules on environmental liability, which provide for the objective responsibility of the polluters towards third parties.

#### **1. Transposition of the Directive on mining waste – adoption of clear protective technical standards**

**Romania has transposed Directive 2006/21/EC by Government Decision no. 856/2008 on mining waste management.**

***Similarly to the usual approach of the Romanian legislator, this transposition is largely a translation of the corresponding European Directive.***

The purpose of national regulation is to establish guidelines, measures and procedures in order to prevent or mitigate the negative environmental effects, as well as any risks for human health, resulting from the management of mining waste.

In order to fulfil this objective, the decision provides for the operators' obligation to develop a waste management plan to minimise, treat, reuse and eliminate mining waste, under observance of the objectives and minimum content established by law.

**NOTE:** The objectives of the management plan include:

- (a) Preventing or reducing waste production and the harmful effects of waste;
- (b) Encouraging the reuse, recycling or valorisation of mining waste, to the extent possible from an environmental viewpoint, in keeping with the community environmental standards and the community and national requirements;
- (c) Ensuring the safe disposal of mining waste, on the short and long term, in particular by taking into consideration, in the design phase, the management of waste during the exploitation and after the closure of the waste management installation, and by implementing a project which:

- (i) Requires minimum waste monitoring, control and management conditions or, eventually, does not require any conditions;
- (ii) Prevents or at least minimises the long-term negative effects caused, for example, by the migration of water or atmospheric pollutants generated by waste management installations;
- (iii) Ensures the long-term geotechnical stability of any dams or stockpiles built above the ground level.

Other measures established by Government Decision no. 856/2008 refer to:

- Information and prevention of major accidents
- Application for and issuance of the mining authorisations
- Public participation in decision-making in this field
- Construction and management of waste installations and
- Establishment of financial guarantees (for example, in the form of a financial deposit, including a mutual guarantee fund sponsored by the industry or an equivalent form)

Pursuant to Government Decision no. 856/2008, the measures meant to prevent accidents or mitigate their effects shall be taken using the **best available techniques**; thus, the decision establishes minimal technical requirements to be met by any project in order to be acceptable under the mining waste management legislation.

Regarding the tailings dams which imply the use of cyanide, **similarly to the directive**, Government Decision no. 856/2008 provides that the operator must minimise the concentration of cyanides dissolvable in a weak acid environment in the TMF, by using the best available techniques.

In the waste installations which previously obtained an authorisation or are in operation as of May 1<sup>st</sup>, 2008, the concentration of cyanide soluble in a weak acid environment at the tailings discharge point from the process plant into the tailings management facility shall not exceed 50 ppm<sup>1</sup> as of May 1<sup>st</sup>, 2008, 25 ppm as of May 1<sup>st</sup>, 2013, and 10 ppm as of May 1<sup>st</sup>, 2018.

For waste installations obtaining an authorisation after May 1<sup>st</sup>, 2008, the maximum accepted concentration is 10 ppm.

**NOTE:** In the Roşia Montană Project, cyanide concentration will be half the limit accepted in the EU, i.e. 5-7 ppm (according to the technical project described in the Environmental Impact Assessment Report submitted to the Ministry of Environment for review and approval, in May 2006).

**NOTE:** Roşia Montană Project is the first major mining project in Romania which will be implemented following the adoption and enforcement of the new legal framework, in particular as set out by Directive 2006/21/EC and Government Decision no. 856/2008.

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<sup>1</sup> Parts per million

The special legal framework on mining waste management supplements the existing regulations applicable to certain mining projects, including rules on the protection of underground waters against the pollution caused by certain hazardous substances, and more general rules on water protection.

This includes also rules on the environmental assessment of certain plans and programmes, the environmental impact assessment of certain public and private projects, rules on the authorisation of activities having a significant environmental impact and rules on environmental liability (*see table 1 above*).

**B) The institutional framework is adequate and able to provide all necessary safeguards for the good supervision of a mining project**

**1. Architecture of the Romanian administrative system with competences in the field of environmental protection and mining operations**

Thus, the administrative architecture is of particular interest, but only if we look at it **in movement**, and **not statically** in the organization charts.

At the national level, the institutional framework ensuring the implementation and supervision of the enforcement of the community acquis consists of several public authorities organized both centrally and locally.

For mining projects, particularly those which, by nature and scope, may have economic and social implications at a national and regional level, the main competent public authorities are:

- (i) At the central level:
  - a. **The Romanian Government**, which has an overall competence to adopt the regulations in terms of transposition, approve the mineral resource mining fees and approve the mining operation licenses by means of Government decisions, to ensure the cohesion of the national strategy in the field of environmental protection, by taking into account public interest in the exploitation of mineral resources.
  - b. **The Ministry of Economy, Trade and Business Environment**, the line ministry responsible for the administration of public property in the field of mineral resources.
  - c. **The Ministry of Environment and Forestry**, which (i) issues regulations in its field of activity according to the legal provisions; (ii) authorizes natural resource mining programmes, taking into account the capacity to sustain ecosystems, in relation to sustainability objectives; (iii) proposes and recommends to the competent authorities and establishes measures to ensure compliance with the community and environmental legislation; (iv) coordinates and facilitates consultations with other states affected by projects which may have a significant negative effect on the environment of other states.

- d. **The Ministry of Agriculture**, which coordinates the drafting of documents related to technical matters, approvals, programming, promotion, achievement and monitoring of specific investment objectives;
  - e. **The National Agency for Mineral Resources**, the central specialized authority subordinated to the Government and coordinated by the Prime-Minister, representing the state's interests in the field of mineral resources, whose competences are, among others, to approve technical regulations applicable in the mining field, to issue mining licenses and permits and to negotiate and establish their requirements, to approve the enforcement rules in the mining sector and to control compliance with the norms established by law and by mining licenses/permits.
- (ii) At the regional and local level:
- a. **local and/or regional environmental agencies**, which are mainly responsible for the enforcement of the legislation in the field of environmental protection, whose competences are, among others, (i) to coordinate and authorize activities with environmental impact, (ii) to find non-compliances with the permitting documents issued and to inform the inspection and control authorities in the field of environmental protection about such non-compliance, and (iv) to adopt legal measures in case of non-compliance with the permitting documents.
  - b. **regional and county commissaries of the National Environmental Guard**, which are inspection and control bodies specialized in the field of environmental protection, whose competences are, among others, (i) to find non-compliances in the field of environmental protection and to apply sanctions, (ii) to notify the competent prosecution bodies with regard to infringements of the environmental legislation, (iii) to control the compliance with the legal requirements and provisions in the regulation documents (approvals, agreements, authorizations, integrated environment authorizations), and (iv) to propose the annulment of those regulation documents issued in disagreement with the legal provisions.
  - c. **local councils of competent jurisdiction, where the exploited area is located** whose competences are, among others, to approve the land planning and urbanism documentations necessary for project development, as well as to issue the urbanism certificate and, as the case may be, construction authorizations for the start of the project implementation works;
  - d. **county council**, with competences to approve the land planning and urbanism documentations for investment works of county interest, to issue construction authorizations for projects going beyond the limit of one single administrative-territorial unit.

## 2. The changing image of the administrative system – possible excesses

The current institutional framework may ensure the assessment of the projects in the mining field in a coordinated manner, by balancing all the interests represented by the

competent authorities with a view to establishing the requirements necessary to achieve environmental and economic objectives.

In the field of **environmental protection**, the distribution of regulatory and control attributions between two distinct authorities (**National Environmental Agency**, through its regional and local agencies, respectively **National Environmental Guard**, through its regional and county commissaries) is such so as to ensure enhanced efficiency in the implementation of the legal regulations in the field, the two authorities ensuring a correlated enforcement of legal provisions for mining projects.

**The authorities** responsible for environmental protection **benefited** even during the period prior to Romania's accession to the European Union **from assistance to ensure the effective implementation of the community acquis**, including by developing projects in collaboration with the competent authorities of other Member States, **with a view to rapidly assimilating the practical experience in applying the relevant legal provisions**.

**NOTE:** For instance, pursuant to RO/2002/IB/EN/02 (PHARE) agreement in February 2004, a twinning project was implemented in collaboration with representatives of the German competent authorities, regarding the implementation, among other things, of the Seveso II Directive. Within this project, the amendments brought to Seveso II Directive by 2003/105/EC Directive adopted following the accidents from Aznalcóllar (Spain) in 1998 and Baia Mare (Romania) in 2000, have also been taken into account.

As we have seen, Romania currently has an integrated framework aimed to assess, regulate and supervise the projects' environmental impact, clear rules on the operators' obligations regarding accident prevention and mitigation of their consequences, as well as a complex institutional framework meant to ensure the efficient implementation of the regulatory framework.

**In addition to the guarantees provided by the administrative system responsible for the mining of underground resources, a series of additional guarantees are also to be pointed out – measures established at the industry level.**

The **additional regulations** established by the very players of the mining industry complete the picture of the current legal and institutional framework. For instance, operators from the mining field have initiated the drafting and signing of an *International Cyanide Management Code*<sup>2</sup>, which establishes best practices regarding the handling and use of cyanide in full safety conditions. The code recommends a rigorous cyanide management throughout the lifecycle of the project (transport, storage, handling, use and neutralization).

Furthermore, the Code sets out periodical monitoring and reporting requirements, a responsible management of the related risks, the obligation to develop emergency intervention plans and effective communication with the stakeholders.

**NOTE:** Gabriel Resources<sup>3</sup>, the majority shareholder of Roşia Montană Gold Corporation (RMGC), is among the signatories of the International Cyanide Management Code.

Other initiatives, such as the establishment of a Cyanide Management Institute, are meant to ensure the effective implementation of the rules voluntarily assumed by the operators involved in mining operations requiring the use of cyanide.

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<sup>2</sup> <http://www.cyanidecode.org/pdf/thecode.pdf>

<sup>3</sup> <http://www.cyanidecode.org/signatorycompanies.php>

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**Conclusion** regarding the possible practical consequences of institutional competences.

**1. Romania has rapidly and substantially made up for the lost time and seems to have activated its affective memory and history, thus returning among the countries blessed with natural riches and protected by a coherent system common to several countries in a new political, social and economic order.**

**Looking ahead, we should remind that we have had a mining law ever since 1895 and this sector has been permanently regulated by 96 pieces of legislation.**

**We remind that we have had a positive law ever since 1533 which regulated „the forbiddances (ban) to damage nature“. In 1868 and 1874, we had the laws requiring industrial owners to respect the environment. In 1885, a new law was adopted with the same purpose, followed in 1894 by the regulation on unhealthy industries. The First Naturalists' Congress in Romania took place in 1928 at the proposal of naturalist Emil Racovita. The regulations mentioned above are presented only as an example, supporting the idea that the national legislation went through many changes until the World War II, while being coherent.**

**During 1945-1989 the protection of nature became a state issue.**

**After 1989, we went through a period of adaptation to freedom and normal life.**

**2. However, beyond the legal tradition and subjective relevance, we believe that present Romania has objectively all the premises to ensure the development of mining activities in safe conditions for the environment and human health:**

- **the existing legislative and institutional framework at the national level allows for the creation and implementation of mining projects taking into account both the economic interests and needs of the Romanian state, as well as the enhanced requirements regarding the protection of human health and of the environment,**
- **community institutions are responsible for watching over the observance of the community acquis, where the guarantees negotiated at the community level are also included as of now, which the Romanian state has to achieve just like any other state, and not following its own appreciation. So the bar has been set very high, and, last, but not least,**
- **the civil society, the public opinion is wise, just like the mass-media, so that an issue not fully complying with the requirements in the field may not be overlooked.**

**As these are concrete elements, undeniable pieces of evidence, the rhetorical question of the excessive fear of chance, hazard, calamity may arise.**

**Multiplying the levels of administrative decision-making, approval of a mining operations project, one can go to the other extreme of an excessive inflexibility, of a “no” on principle for any economic proposal.**

*Planning a response, it is undeniable that the regulatory, institutional mechanism is not geared to reject, but to properly analyze and act accordingly.*

*The dynamics of an administrative system should not lead to excesses, when the mechanism is too "tight", or a side slip, when the mechanism is too "loose".*

*To avoid such a denouement, the development of the present and future projects implies, without a doubt, a permanent collaboration of the developers with the competent public authorities with a view to effectively implement the measures established by the community and national legislation.*

*Then, it should be noted that the Governmental Programmes includes a dedicated objective related to mineral resources which focuses on the leveraging of mining products on a free market, the promotion of public-private partnerships to ensure the necessary financing sources, as well as the promotion of a management oriented towards the market and economic efficiency.*

*It is a context pioneered by the Rosia Montana project. I hope it will be a success for both parties.*

**Av. Ana Diclescu-Şova**