



Jeremy Wates  
Secretary  
Convention on Access to Information, Public Participation in Decision-making and  
Access to Justice in Environmental Matters  
United Nations Economic Commission for Europe  
Environment and Human Settlements Division  
Palais des Nations, Bureau 321  
CH-1211 Geneva 10  
Switzerland  
Tel: +41 22 9172650  
Fax: +41 22 9170107  
[www.unece.org/env/pp](http://www.unece.org/env/pp)

Rosia Montana, 15 May 2006

Dear Mr.Wates,

**Re: Communication concerning compliance with the Aarhus Convention by  
the Government of Romania (Ref. ACCC/C/2005/15)**

Thank you for your letter dated 12 April 2006. We have carefully analyzed the information provided by the Romanian Government in its response dated 22 March 2006.

We consider that the Aarhus Convention has been violated during the EIA procedure for the Rosia Montana mine proposal for the reasons listed in our communication ACCC/C/2005/15. In addition to them, we would like to submit the following comments and observations regarding the Ministry for the Environment's reply<sup>1</sup>:

*1. Information requested by the Compliance Committee*

**d) Whether national legislation provides for public participation in the scoping procedure in accordance with requirements of the Aarhus Convention, EC Directives and Espoo Convention;**

The Ministry's reply clearly shows that although the Aarhus Convention has been transposed into Romanian legislation, Romanian environmental legislation on the assessment of public and private projects with a significant environmental impact

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<sup>1</sup> We have taken the liberty of following the structure of the Ministry's reply, maintaining the name of the sections. At the beginning of each section, we summarize in bold the Ministry's claims on which we subsequently comment in normal font.

does not provide public participation in the scoping procedure in accordance with the requirements of the Aarhus Convention.

*II. Information on the documents submitted by Alburnus Maior as background information.*

A. Contestation addressed by Alburnus Maior to MEWM on 5<sup>th</sup> of January, 2005 and MEWM's reply to Alburnus Maior contestation – Ref no.60311/17.01.2005

**1. The Ministry's assertion that Alburnus Maior considered that the Project Presentation Report (PPR – technical memorandum) is equal to the environmental impact assessment report (EIA Report)** is misleading given that art 12 par. (2) of OM 860/2002 refers to annex II.2 on the '*Standard contents for the Technical Memorandum necessary for issuing the environmental agreement*'. Equally misleading therefore is the annex included by the Ministry in the last page of it's response.

Annex II. 2 of MO 860/2002 is clear on the standard contents for the technical memorandum. It is thus disappointing to read in the Ministry's reply that "PPR is a technical presentation of a project. It contains only basic information about the developer: name, address, tel and fax...."

**3. The Ministry asserts that "the main purpose of the Project Presentation Report is to help the environmental authorities to accomplish the screening stage of the EIA procedure for the respective project[...] the project presentation report submitted by Rosia Montana Gold Corporation leads to the conclusion that this project is one of the projects laid down in Annex 1 of GD no 918/2002".**

This is untrue and based on an erroneous interpretation of law. MO 860/2002 contains an annex of projects which automatically require a full EIA procedure and for which a full screening stage is not necessary - ANNEX I.1. List of activities and/or installations of significant environmental impact subject to environmental impact assessment. The Rosia Montana project falls within this annex, under section 4.5.a) Installations for the production of non-ferrous crude metals from ore, concentrates or secondary raw materials by metallurgical, chemical or electrolytic processes\* and under section 5.6.a) Other mining activities: mining activities with a production capacity of more than 5 mil. tones/year and the exploitation area exceeds 1000 ha.

The activities/installations mentioned in Annex I.1 of MO 860/2002 are also included in Annex no 1 of the Convention regarding the evaluation of an environmental impact in a transboundary context adopted at Espoo on 25 February 1991 ratified with Law no 22 of 22 February 2001.

According to Art. 13 of MO 860/2002 and subsequent modifications, "Within 20 days of receiving the application for projects relevant to activities of low or significant environmental impact, the environmental authority shall cover the following procedural stages:

- a) **check that the project is listed in Annex no. I.1 or no. I.1** to these procedures and its location in relation to areas included in the NATURE 2000 ecological site, and based on this establish the next procedural stage, as follows:
- for the projects provided under Annex no. I.1, or located in one of the areas of the NATURE 2000 ecological site, which are mandatorily subjected to an environmental impact assessment process, decide on the transition to the scoping stage;

This has relevance for two reasons:

1. There was no necessity for a screening stage for the Rosia Montana EIA;
2. The project presentation report served as the base and only information available to the Ministry for the scoping stage.

### **Conclusions:**

1. The Ministry has violated MO 860/2002 for not having asked the project owner to present a legal project presentation report, in accordance with Annex II.2;
2. The importance of public consultations during the scoping stage is even more evident, given that it is a project of significant environmental impact and given that there was incomplete information available on it (the project presentation report).

### *B. Contestation addressed by Alburnus Maior (no.1687/ 11.01.2005) and EPA Alba's reply to Alburnus Maior contestation – Ref no.191/28.01.2005*

#### **The Ministry claims that individual notifications with regards to the inception of the EIA procedure were unnecessary.**

1. In addition to the arguments we already formulated in the document called "Summaries of previous contestations addressed to the Romanian authorities with regards to the Rosia Montana environmental licensing procedure and their replies", we would like to stress the following points:

a) Art 6 (2) of the convention stipulates that "The public concerned shall be informed, either by public notice or individually as appropriate". In the case of Rosia Montana, approximately 100 legal and natural persons sent specific requests to the local authority as to be notified and consulted for the Rosia Montana EIA. Many of these persons are foreign organizations or citizens with little or no understanding of the Romanian language or access to the Romanian press. This explains why it would have been appropriate to individually notify and update those listed as consulted parties. It is worth mentioning that the list of registered interested parties<sup>2</sup> was drawn up precisely for the authority to be able to notify those listed about each step of the procedure.

**b) The Ministry claims that "Alburnus Maior was aware of the starting of the EIA procedure for Rosia Montana project and had access to the PPR and could draw up a contestation".**

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<sup>2</sup> It can be accessed on [http://www.apm-alba.ro/Rosia%20Montana/rmgc\\_lista.htm](http://www.apm-alba.ro/Rosia%20Montana/rmgc_lista.htm)

This does not legitimize APM Alba's administrative refusal to individually notify all consulted parties.

This administrative refusal clearly demonstrates the Romanian authorities' narrow interpretation of the public's procedural rights.

**c) The Ministry claims that both EPA Alba and the Ministry for the Environment displayed the announcement about the start of the Rosia Montana EIA procedure on their respective websites. "On the Ministry's website, the information was also in English".**

This is not true. EPA Alba<sup>3</sup> and the Ministry for the environment<sup>4</sup> published an announcement in Romanian language only. The only information available in English was the project presentation report. The link for it on the EPA Alba's website is written in Romanian.

Parties which were not notified individually and do not speak Romanian and do not know the Ministry's website are unable to understand the announcement. In light of the Aarhus convention, this is a clear act of discrimination.

*C. Alburnus Maior's administrative complaint (no.60/30.01.2005) and EPA – Alba's reply – Ref.no.817/25.02.2005*

**With regards to the announcement published in a local newspaper on 17<sup>th</sup> of December 2004.**

The announcement in the daily newspaper 'Unirea' on the 17<sup>th</sup> of December 2004 claiming that the EIA procedure for the Rosia Montana mine proposal had not commenced was not signed by a journalist. It was signed by Dimitrie Clepan, Director of EPA Alba.

Timeline:

14 December 2004<sup>5</sup> – the project owner releases a communiqué in which it announces the launch of the Rosia Montana EIA with the submission the PPR to the EPA at Alba Iulia.

15 December 2004 – the news are reported in the Romanian and Hungarian media.

17 December 2004 – 'Unirea' publishes an announcement signed by the Director of the Alba Iulia EPA that says that the Rosia Montana EIA procedure has not commenced.

22 December 2004 – announcements in 'Unirea' and 'Romania Libera' make known the launch of the EIA procedure for Rosia Montana.

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<sup>3</sup> [http://www.apm-alba.ro/Rosia%20Montana/solicitare%20a\\_c.htm](http://www.apm-alba.ro/Rosia%20Montana/solicitare%20a_c.htm)

<sup>4</sup> [http://www.mmediu.ro/dep\\_mediu/rosia\\_montana.htm](http://www.mmediu.ro/dep_mediu/rosia_montana.htm)

<sup>5</sup> [http://www.gabrielresources.com/s/PressReleases.asp?ReportID=131008&\\_Type=Press-Releases&\\_Title=ENVIRONMENTAL-PERMITTING-PROCESS-INITIATED-FOR-ROSIA-MONTANA](http://www.gabrielresources.com/s/PressReleases.asp?ReportID=131008&_Type=Press-Releases&_Title=ENVIRONMENTAL-PERMITTING-PROCESS-INITIATED-FOR-ROSIA-MONTANA)

The announcement dated 17 December 2004 created great confusion and shows ever more how important would have been to individually notify the interested parties of the official launch of the EIA procedure.

### *III. Information on the allegations made by Alburnus Maior*

#### **The Ministry claims that no public consultation was necessary during scoping.**

We would like to stress that it is the duty and obligation of the Ministry for the Environment to protect the public interest so that at the end of a decision-making process a good decision is reached. Along the way to the final decision, a multitude of stages and interim decisions take place; each having the role of informing and setting the base for the next stage. As such, it is of utmost importance to submit each one to public scrutiny because this makes each of them democratic and grounded. Recto verso, a good final decision is to an important extent, nothing other than an official conclusion of what was build up during the different phases ensuring wide public input.

Scoping is a phase of the environmental decision-making process. Scoping is the process of determining the content and extent of the matters which should be covered in the environmental information to be submitted to a competent authority for projects which are subject to EIA.

Scoping is a phase/stage of the environmental decision-making process regardless of whether the scoping list is an administrative act or an administrative operation. This becomes even more evident when one considers that the Romanian legislation on the environmental assessment of plans and programs contains explicit provisions for public participation during scoping. This means that the Romanian authorities' failure to include similar provisions for environmental assessment of private and public projects (MO 860/2002) is a failure to comply with the provisions of the Aarhus Convention.

Scoping is one of the means of strengthening the role of EIA in achieving environmental protection.

The aim of a good scoping stage is:

- that the best possible information is available for decision-making;
- that the authority and the interested parties best review and prepare for the EIA studies

In terms of the importance of involving public participation during scoping, DG Environment has published several guidelines and manuals on the subject. According to "*Guidance on EIA Scoping June 2001 – DG Environment*"<sup>6</sup>:

"The value of public participation in the scoping process is increasingly being recognized by competent authorities and other participants in the EIA process within Member States. Early consultation with interested parties can be very valuable in avoiding later delays if new issues emerge from consultation only after the EIS is submitted.

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<sup>6</sup> At <http://europa.eu.int/comm/environment/eia/eia-support.htm>

Effective scoping will involve the competent authority and the developer in a dialogue about the project and the issues it raises. This will be supplemented by consultations with relevant statutory and non-statutory organizations and the general public, and a visit to the site and its surroundings will always be invaluable.

In all forms of scoping, consultation with environmental authorities, other interested parties and the public forms an important part of the process. Consultations will help ensure that all the impacts, issues, concerns, alternatives and mitigation which interested parties believe should be considered in the EIA are addressed.

The importance of consultation at this and other stages in EIA has increased with EU signature of the Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters”.

The Ministry for the Environment clearly shows in its reply submitted on 22 March 2006 that there was no public participation during the scoping phase of the Rosia Montana EIA. The Ministry’s interpretation that public consultation was not necessary demonstrates once again a narrow interpretation of the public’s procedural rights.

The prejudice generated by the absence of public consultations during scoping is at least at the following levels:

- the quality of the terms of reference/ scoping list sent by MMGA to the project owner<sup>7</sup>; as such, all issues included in Alburnus Maior’s preliminary proposal are issues that were let aside from the authority’s scoping list and prove that the scoping list is incomplete and ungrounded;
- the right of the public to be informed and consulted on the scoping stage, as a stage/phase of the environmental decision-making for the Rosia Montana project;
- the quality of the Rosia Montana EIA study. The allegation made by MMGA that Alburnus Maior’s preliminary proposal was sent to the project owner and that it will reply to these points during the EIA study consultations is ungrounded, unrealistic and pointless. Given that the final scoping list submitted by MMGA to the project owner excludes proposals made by the public, the project owner has no obligation to include them in the EIA report.
- the procedural illegality of the Rosia Montana EIA procedure has repercussions on the substantial illegality of the environmental permit itself.

#### *IV. Information on the domestic remedies available*

We are delighted to read that the Ministry confirms that under paragraph 6 of art. 20 environmental NGOs have access to justice on environmental matters. In our communication to the Aarhus Compliance Committee we highlighted amongst others, that one of the reasons for approaching ACCC is that court cases tend to last

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<sup>7</sup> The Rosia Montana scoping list can be accessed on:  
[http://www.mmediu.ro/dep\\_mediu/rosia\\_montana/indrumar%20Rosia%20Montana%20-%20engleza.pdf](http://www.mmediu.ro/dep_mediu/rosia_montana/indrumar%20Rosia%20Montana%20-%20engleza.pdf)

for a long period and as such there is the great risk that the project commences before a final court decision has been reached. In all court cases initiated by Alburnus Maior against the Ministry for the Environment or the local EPA the defendants systematically denied the interest and procedural quality of Alburnus Maior to stand as a plaintiff. The courts eventually dismissed the defendant's argument, but in the meantime this still caused important delays and costs to Alburnus Maior.

We allow ourselves to annex a relevant and recent document submitted by the local EPA in a court case with Alburnus Maior. The document is part of a case brought by Alburnus Maior against the local EPA's permit granted to RMGC for drilling activities. Below you can find a translation of the relevant para.

#### **"1. Exceptions:**

##### **1. Exception regarding the lack of active procedural quality of the plaintiff.**

According to law 554/2004 on administrative litigation art. 1 para. 1 'one can be considered to have active procedural quality if law if he/she maintains an impairment of his/her right or of a legitimate interest by a public authority through an administrative act....'

The above show that in order to ask for the annulment of an administrative acts effects', it is mandatory that the plaintiff is the owner of a right or of a legitimate interest which were violated by that act. There is no legal provision which specifically recognizes an active procedural quality for the plaintiff as it is for example recognized for the National Agency for Public Servants, Public Ministry of the Ombudsman; as stipulated by art. 1 of law 554/2004.

In motivating its call into justice, the plaintiff does not show – not even in theory – which is its' right and legitimate interest that has been violated by our decision.

##### **...3. Exception regarding the lack of interest**

One of the legal conditions for a court action is the legitimate interest of the plaintiff; as defined by Law 554/2004 which was used as the legal base for this case. As such **interest** is the practical use followed by the person who has initiated the civil action. The interest needs to fulfill the following requirements: to be legitimate and legal; to be born and actual; to be personal and direct (G. Boroï, *Civil Procedural Law*, page 118; Prof. Univ. Dr. Viorel Mihai Ciobanu *Theoretical and Practical Treaty for Civil Procedural Law*, ed. 1996, Vol.I, page 270-272)

- the interest is legitimate unless it contravenes public order and good morals and it must be exercised in good faith
- the interest is born and actual if at the moment of starting the court action the plaintiff is exposed to a prejudice that can be avoided by promoting the action in justice
- the interest is personal and direct if it exclusively refers to the plaintiff and to its rights which are positively protected by the effect of the court action

The court is kindly asked to bear in mind that in light of the special law on which the plaintiff has based its action, **private legitimate interest** means the *possibility to claim certain behavior taking into consideration the fulfillment of an individual, future and predictable right (art. 2 para.1 lit. o from law 554/2004)*

Starting from the above mentioned theoretical presumptions it is clear that the interest – the practical use that the party can obtain by promoting the civil action - has to be mirrored in a material or legal advantage in the patrimony or the person of the plaintiff

As such the legal doctrine also showed the fact that the general interest of law enforcement can not justify a court action and it can not be identified with a personal interest, which is required by law. In this case the plaintiff does not show how exactly it is directly prejudiced by the decision under discussion; limiting itself to generically refer to environmental damages as well as damages to the cultural patrimony and social environment.”<sup>8</sup>

On a further note, we would like to submit a further annex. It is the reply given by the Ministry for the Environment to a call into justice formulated by Alburnus Maior. The relevant paragraph goes as follows.<sup>9</sup>

“We also raise the **exception of lack of interest** for the present court action. According to Law 554/2004, art.1: *Any person can bring an action before the competent court of law for the annulment of the administrative act, the acknowledgement of the asserted right or of a legitimate interest and the remedy of the suffered damaged, if he/she considers that maintains an impairment of his/her right or of legitimate interest by an administrative act or by a public authority which did not resolve his/her request within the legal term.*

As a consequence, the initiation of the court action is conditioned by the existence of impairment of his/her right or of a legitimate interest. In this specific case, the plaintiff does not justify a right or legitimate interest which is impaired, which would justify the interest of bringing this action before the court.”

I hope that the information is of interest and reaches you in time. Please do not hesitate to contact us in the event that you should have further queries.

Yours truly,

Eugen David  
President  
**Alburnus Maior**

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<sup>8</sup> Please find the entire document attached. The paragraphs we have taken the liberty to translate refer to page 1-3.

<sup>9</sup> Please find the entire document attached. The paragraph we have taken the liberty to translate refers to page 2.