

**ROMANIA**  
**COURT OF APPEALS**  
**SECTION VIII - ADMINISTRATIVE AND FISCAL COURT**

**File no 23774/3/2010**  
**Civil Decisiom No 972**  
**Public meetin , 13.02.2014**

**The court consists of:**

**President: Canacheu Claudia Marcela**

**Judge: Vişoiu Emilia Claudia**

**Judge: Şuţu Alina**

**Registrar: Trotea Mariana**

Pending is the verdict upon the appeal formulated by the recurrent – accused, the National Agency for Mineral Resources, against the civil sentence no. 914/07.03.2011 pronounced by the Legal Court of Bucharest, Section IX, Administrative and Fiscal Court in file no 23774/3/2010 against the respondent – litigants CENTER OF JURIDICAL RESOURCES and GREENPEACE CEE ROMANIA, which has as object “the communication of public interest information (Law no 544/2001)”.

The debates took place in public meeting on 06.02 2014 when they were written down in the closing of the meeting on the respective date, and they represent constituent part of the present decision, and at that time the Court, demanding more time in order to reach a decision and to give the parts the possibilities to submit the written conclusions postponed the verdict for today, 13.02.2014 when it ruled the following decision:

**THE COURT,**

In the *civil ruling* no 914/07.03.2011, the Law Court of Bucharest - Section IX of Administrative and Fiscal Court, partly admitted the action formulated by the litigants i.e. CENTER OF JURIDICAL RESOURCES and GREENPEACE CEE ROMANIA in disagreement with the accused, the NATIONAL AGENCY FOR MINERAL RESOURCES and consequently obliged the accused to communicate the public information required in the petition no 984/16.04.2010.

The court overruled as unfounded the request which has as an object the obligation for the accused to pay moral damages.

In order to pronounce this verdict, the first court took note of the fact that on 16.04.2010, the accused registered the petition no 143/14.04.2010 (CJR) and no 196/14.04.2010 (Green Peace) in which information about the exploitation/exploration licences of non-ferrous ores in force in Romania was requested, as well as who the titleholders of the above-mentioned licences were, which the corresponding areas for those licenses were, and the period which they were valid for, the amount of non-ferrous ore corresponding to each license, the current situation of the exploitation in Baia Mare where an ecologic accident occurred in 2000, the environment rehabilitation measures after the occurrence of the accident and the current stage for the implementation of such measures.

Therefore, it results from the petition addressed to the accused that the litigants request the communication of certain information that belong to the category of environment information or to the information related to the transparency of decision in relation to the acts issued by the regulating authority.

The provisions of the Convention about the access to information, the participation of the public in the decision – making process and the access to justice in environmental matters, signed in Aarhus 25 June 1998, ratified by Romania through Law no 86/2000 are relevant in this respect; in accordance to the Convention, the environment information is information of public-interest, and it relates to any written, visual, audio or electronic information or in any another material form about factors such as: substances, energy, noise and radiation, and the activities or measures, including the administrative measures, environment authorisations, strategies, legislation, plans and programmes which affect or can affect environmental elements.

In accordance with article 4 paragraph 3 in the Convention a request for the disclosure of a piece of environment information can be refused if:

- a) the public authority to which the request is addressed does not have the respective information;
- b) the request is clearly unreasonable or it is formulated in a too general manner;
- c) the request refers to documents under preparation or it concerns the internal communication system of the public authority when such an exception is stipulated in the national law or in the regular practice, taking into account the public interest in case of such disclosure.

In accordance with article 4 paragraph 4 in the Convention a request for environmental information can be refused if its disclosure would negatively affect:

- a) the confidentiality of the procedures of the public authority, when such confidentiality is stipulated in the national legislation.
- b) international relations, national security or public defence;
- c) the course of justice, the right of a person to benefit from a right trial or the right of a public authority to conduct a criminal or disciplinary case;
- d) the confidentiality of commercial and industrial information, when this is stipulated in the law in order to protect a legitimate economic interest. In this respect, the information about emissions that are significant for the environment protection will be made public;
- e) the rights for intellectual property;
- f) the confidentiality of personal data and/or files which belong to physical persons when such persons did not agree to the dissemination of the information, when such confidentiality is stipulated in the national legislation;
- g) the interests of a third party which offered the information requested without being part therein, and/or if it is possible for this third party to go under a legal duty to do so, when this third party did not agree to the disclosure of the material;
- h) the environment to which the information refers to, such as hatching of rare species;

The above-mentioned reasons of refusal should be interpreted restrictively, taking into account both that the public interest should be contented with the disclosure of such information and the requested information should be related to the environment emissions.

With respect to such dispositions it is obvious that the information requested by the litigants represent public-interest information and the refusal to disclose such information is unjustified.

In the defence of the accused, namely that the requested information is excepted from dissemination in accordance to Law no 182/2002, it is to be noticed that the accused did not mention the classification degree of the requested information.

Having in view the dispositions stated, the court ruled as unjustified the refusal of the accused to communicate the requested information.

The court rejected as unfounded one closing point of the petition which has as purpose the obligation of the accused to pay moral damage in the amount of 1 (one) leu, appreciating, on one hand that the refusal in itself of a favourable solution to a petition does not immediately involve the obligation of the authority to pay moral damages, and on the other hand, it is necessary to offer arguments of any type in order to show that the this refusal caused or it is liable to cause prejudice of moral nature,

identified in most of the cases as a state of suffering, frustration upon the litigant as a result of the abusive conduct of the accused.

It is noticed from the motivation of this closing that the litigants require the accused should pay a symbolic amount, aiming thus to obtain an approval, however this aim is considered to be fulfilled, as the court considers, by the ruling of the decision which found the accused responsible.

The same solution was adopted by the court with reference to another closing point of the petition which has as object the obligation of the accused to pay comminatory damages, the court persevering that, in the current conditions and after the irrevocable ruling of the present decision, the accused has the obligation to comply with the ruling, in accordance with article 24 in Law no 554/2004, against a penalty sanction amounting to 20% of the economy minimum salary, per each day of delay, and thus the means to guarantee the effecting of the ruling is stipulated in the law, without being necessary to establish that the obligation is to be executed under the sanction of comminatory damages.

An appeal was formulated by the accused against this ruling, with lawful reference to the dispositions of article 304, paragraph 9 and paragraph 204 in the Civil Procedure Code.

In the motivation of the appeal, the accused defended that, in accordance with article 12 paragraph 1 letter b and c in Law no 544/2001, certain information is excepted from the free access of all citizens, if this information refers to the Romania's economic and political interests, and if this information is classified in accordance with the law, or if this information refers to commercial or financial activities whose disclosure would affect the right of intellectual or industrial property or the loyal competitiveness principle, in accordance with the law.

The information requested at article 4 in the petition of the litigants, namely the concession licences granted by the National Agency for Mineral Resources on behalf of the Romanian State and signed with various Romanian or foreign companies/entities, which have as object the concession of mining activities, as well as the information requested at paragraph 2 in the petition of the litigants, namely the amount of non-ferrous resources/reserves is information that belong both to the category of information that refer to Romania's economic interests but also to the category of information that refer to economic activities whose disclosure can negatively impact the loyal competitiveness.

Moreover, this information is classified as a whole in accordance with the law, either as secret of state of special importance, strictly secret, secret of state, or

classified as restricted information, being thus exempted from the free access to information of the citizens.

The recurrent ask the court to take act of the fact that the information requested by the litigant, namely the information about the amount of non-ferrous ores and the corresponding concession acts fall under one of the following categories of information:

Information classified as state secret of special importance in accordance with art I 1. in the List that identifies the information classified as secret of state, on levels of security, drafted or owned by the National Agency for Mineral Resources approved by the Government Decision no S-921/2004; the information classified as strict secret of state in accordance with art II.1-3, 5, 10-11 in the List that identifies the information classified as secret of state, on levels of security, drafted or owned by the National Agency for Mineral Resources, approved by Government Decision no S-921/2004; information classified as secret of state, on levels of security, drafted or owned d by the National Agency for Mineral Resources approved by the Government Decision no S - 921/2004; information classified as secret of state in accordance with art. I.1, 3,5,8,9 and 24 in the List of information, data and documentations which indentifies restricted information within the National Agency for Mineral Resources approved by the Order of the president of National Agency for Mineral Resources no 202/2003, with the subsequent revisions and changes.

The recurrent appreciated that the decision of the first court strictly founded on Law no 186/2000 about the Romania's adherence to the international Convention for the protection of the new varieties of plants on December 2<sup>nd</sup> 1961, revised in Geneva on November 10<sup>th</sup> 1972 at 23<sup>rd</sup> October 1978, and March 19<sup>th</sup> 1991, without taking note of the provisions of Law no 182/2002 and the provisions of article 12, paragraph 1 letter b and c in Law no 544/2001 has no legal grounds, and thus it was ruled with noncompliance and wrongful application of the law.

Furthermore, Law no 86/2000 in article 4 paragraph 4 letter d offers the possibility to refuse disclosure of information if this would negatively affect the confidentiality of the commercial and industrial information when this is stipulated in the law in order to protect a legitimate economic interest.

Therefore, it is to be noticed that all normative acts mentioned establish guarantees in order to protect data and information, when it comes to the protection of the information is classified as restricted information and the non-disclosure of such information, and also the protection of a legitimate economic interest because such information is linked both to Romania's economic interest and also to commercial activities whose disclosure would affect the loyal competitiveness.

The dispositions of article 5 paragraph 4 in Law no 85/2003, article 2 – article 15 in the Norms for the enforcement of Law no 85/2003 approved by Government decision were referred to in this respect.

The recurrent states that the ruling goes against the dispositions of article 2 paragraph 2 in Law no 182/2002, article 26, article 33 of the National Standards for the protection of the classified information in Romania, approved by Government Decision no 585 /2002, since the litigant did not state neither proved the fulfilment of the general requirement imposed by article 2 paragraph 2 in Law no 182/2002 nor the requirements imposed by article 26 and article 33 in the Standards, since the classification of these documents is legal, having being carried out through an administrative act in force, namely the Order no 202/2003 of National Agency for Mineral Resources.

Moreover, the first court, having taken note, on one hand, that the accused did not file for defence, and having assessed in the reasoning of the decision, on the other hand, that “as regards the defence of the accused, namely that the the information requested is excepted from dissemination in accordance with Law no 182/2002, it is to be noticed that the accused did not mention which the classification degree of the information was” plainly estimated the situation about the type of this information without further of any minimum substantiation.

Proceeding in this manner, the first court disobeyed both the principle of the minimum active role of the judge and also that of a verdict, based on the testimonials, of the existing situation to be tried.

The first instance court, without administering testimonials that referred to the classified or the public character of the information unlawfully appreciated that the type of the information requested was not classified, thus being aimed to public dissemination.

It was also sustained that the refusal to communicate information is justified and based on legal provisions which allow disclosure of such information only in restricted exception cases and conditions stipulated in the law and it is necessary that the titleholder of the mining concession act should be introduced in the ruling on the basis of at least two reasons: the decision to be pronounced is susceptible to affect the legal right of the titleholder to maintain confidential the data and information established in the concession acts signed with the Romanian state through the National Agency for Mineral Resources; the right granted through the concession acts is a real right, and the legal obligation of confidentiality is mutual, as well as the circumstances in which these acts/information represent classified information and from the perspective of the other contracting party, the titleholder of the concession, the call to court of both parties is an objective juridical necessity because it cannot to be admitted that the same act, which is

expression of one and the same agreement, is classified and confidential for one contracting party and non-confidential and public for the other contracting party which was not part of the court case.

In the interpretation of the first court sentence it is also stated that the litigants took legal action against the Ministry of Environment and Forests but the sentencing is pronounced against the National Agency for Mineral Resources.

The repondent litigants appealed for the plea of illegality both in case of the Government Decision S-921/2004 and of NAMR Order no 202 /2003, and within the court legal term, 03.11.2011, the Court suspended the trial of the appeal until the irrevocable solution for the plea of illegality was reached and disposed the submittal of the trial to the Registering service for random distribution to a first instance court in order to solve the plea of illegality.

Thus, the file no 9623/2/2011 was produced and it was ruled thpught the Civil Sentence no 1350/17.04.2013 in which the Court of Appeal of Bucharest – Section VIII of Administrative and Fiscal Court rejected as unsubstantiated the above-mentioned plea to illegality, and the sentence remained irrevocable through not having gone through trial.

After the ruling of the plea of illegality, it was disposed the re-submittal to trial of the cause which has as object the appeal formulated against the Civil Sentence no 914/2011 of the Legal Court in Bucharest – Section IX of Administrative and Fiscal Court and on the legal term of 06.02.2014 the defender of the litigants mentioned that the recurrent accused communicated the information requested at article 1 and 2 in the application no 984/2010,

*Analysing the retried sentence through the appeal reasons formulated and through the dispositions of article 304 in the Code of Civil Conduct, the Court appreciated that the appeal is founded based on the following grounds:*

In the petition registered within NAMR at no 984/16.04.2010 the respondent litigants requested the communication of the following information 1. Which he exploitation/exploration licenses of non-ferrous ores in force in Romania at this moment are, the areas they cover and the concession period of these licenses. 2. The amount of non-ferrous ore granted in the exploration/exploitation licenses for each license 3. The current situation of the exploitation in Baia Mare where in 2000 an environmental accident occurred. The rehabilitation measures after the accident which NAMR is aware of and which the stage of their implementation. 4. Paper/legally multiplied copies of the originals exploration /exploitation licenses.

The solution of making compulsory the communication of the information requested at article 2 and 4 in the petition no 984/2010 was criticised in the appeal, the recurrent accused demanding the partly modification of the decision and the dismissal of the action referring to the communication of the information requested at article 2 and 4.

Taking note that the information requested at article 1 and 2 was communicated, it is noticed that the request to communicate the information at point 2 remained without object.

With regards to the solution of the court to impose on the recurrent accused to communicate the information requested at article 4 in the petition, the Court rules that this enforcement was given with the unlawful application of the law, the appeal reason stipulated in article 304 paragraph 9 CPC being applicable since the information is excepted from the free access of the citizens based on article 12 paragraph 1 letter b in Law no 544/2001, since it is information relating to Romania's economic interests which is included in the category of classified information according to the law.

In this respect, the Court has in view the Order no 202/14.11.2003 issued by the president of NAMR about the approval of the List that identifies restricted information within NAMR, the addendum to this Order having been modified by Order no 2/08.01.2013 of the same issuer, and the Order was submitted to the file no 9623/2/2011 of the Appeal Court of Bucharest – Section VIII of the Administrative and Fiscal Court.

The addendum to the Order no 2/08.01.2013 represents the list of the information, data and documentations that represent restricted information within the NAMR and paragraph 7 in the list mentions the administration or concession exploration licenses, the documentation associated to the respective licenses (proposed exploration programmes), as well as the annual/final reports corresponding to the administration or concession licenses.

The plea to illegality having as object the Order no 202/14.11.2003 of the NAMR was rejected as being unfounded through an irrevocable judge decision in whose reasoning it was ruled that the order was issued with the observance of the provisions of Law no 182/2002 and the Government Decision no 585/2002, however in the interpretation of the dispositions of Law no 182/2002 the access to information is not an unrestricted right, but a limited right, in the cases and conditions stipulated by the law, with the aim to provide the confidentiality of certain categories of data and information, and the means to protect it is to attribute the information the character of classified information.

This administrative act establishes, within the purpose and in the limits of the law, the categories of information in the field of mineral resources, drafted or managed by

the NAMR, whose confidentiality has to be obeyed, and stipulated that the protection of the confidentiality of such information is performed by granting it the character of restricted information.

If the information requested at article 4 in the petition no 984/2010 represent classified information, on the basis of an administrative act whose legality was settled by an irrevocable judge decision it can be ascertained that the refusal of the recurrent accused to communicate this information is justified in accordance with the dispositions of article 12 paragraph 1 letter b in Law 544/2001.

Moreover, the dispositions of article 11 and article 12 paragraph 2 in the Norms for enforcing Law no 85/2003 according to which the access to data and information is performed with (...) the observance of the conditions imposed by the legislation referring to the classified information (...) and of the confidentiality agreement . The companies or the public authorities/institutions which keep, own or require the access to classified data and information will obtain also the approval of the competent authority in the field of classified information.

With respect to the criticism of the recurrent which refer to the non-inclusion, by the primary court, of the titleholder of the mining concession acts, it is to be retained that this is unfounded versus the object of the trial.

The unjustified refusal of the recurrent accused to communicate the information requested in a written petition is also mentioned in the cause, so that it is the recurrent accused which posses passive procession legitimacy and not the titleholders of the exploration licenses whose licenses were requested to be multiplied.

As refers to the assertion that in the reasoning of the retried sentence is mentioned that the litigants asked to court the Ministry of Environment and Forests, it is ruled that this was a material error, being obvious that the accused is NAMR, as long as in the practical ruling and in the disposition NAMR mentioned.

To all this reasoning, on the basis of article 312 paragraph 1 and 3 the CPC, the Court shall admit the appeal, shall change partly the ruling, namely it shall overrule the request to communicate of the information stipulated at article 2 in the written petition 984/2010 as being without purpose and it shall overrule as unfounded the request to communicate the information stipulated at article 4 in the petition and will maintain the remaining rulings as it is.

**For all the above mentioned**

**In the name of the law**

**It is decided:**

**The appeal** formulated by the recurrent accused, the National Agency for Mineral Resources, against the Civil Ruling no 9124/07.03.2011 pronounced by the Law Court of Bucharest, Section IX of Administrative and Fiscal Court in file no 23774/3/2010 against the respondent litigants the CENTER OF JURIDICAL STUDIES AND GREENPEACE CEE ROMANIA is admitted.

**It changes partly the ruling, namely it overrules the request to communicate the information stipulated at article 2 in the petition no 984/2010 as remaining without object, and it denies the request to communicate the information stipulated at article 4 in the petition as unfounded.**

**It maintains the rulings in the other remaining parts.**

Irrevocable.

Pronounced in public meeting today, 13.02.2014

**President**

**Judge**

**Judge**

**Canacheu Claudia Marcela**

**Vişoiu Emilia Claudia**

**Şuţu Alina**

**Registrar**

**Trotea Mariana**