

# THE EUROPEAN COMMISSION – THE EXERCISE OF THE POWERS OF CONTROL AND MONITORING OF THE ENFORCEMENT OF THE LEGISLATION OF THE EUROPEAN UNION IN THE MOLDOVA NOUA CASE

Assistant Professor **Adriana DEAC**<sup>1</sup>

## **Abstract**

*One of the competencies that the EU Treaties confer to the European Commission is the control and supervision of the application of primary and secondary law and the enforcement of this legislation so it is observed by private persons, Member States and EU institutions<sup>2</sup>.*

*Further to an official communiqué in October 2014, the European Commission has announced that it sued Romania at the European Union Court of Justice concerning the failure to observe EU legislation on the treatment of extractive industry waste. Namely, it refers to the Moldova Noua case, in which toxic waste from the zinc and copper mines were discharged into the Bosneag pond.*

*This paper means to present the regulations in the field of extractive industry, the competence of the European Commission regarding the enforcement of EU legislation and the ability to sue a Member State at the EU Court of Justice, when the entity exploiting the zinc and copper deposits is not the Romanian state, but a private law legal person.*

**Keywords:** *European Commission, Moldova Noua case, control and supervision competencies, the European Union Court of Justice, Bosneag pond.*

**JEL Classification:** *K23, K33*

## **1. Introduction**

Under the legislation of the European Union<sup>3</sup>, the Member States are bound to make sure that the mining waste resulting from the exploitation of various deposits is handled without endangering the health and life of the people and without using processes or methods which endanger the environment, which are hazardous for the water, air, soil, flora and fauna. Moreover, the Member States must make all efforts to prevent any phonic or olfactory pollution and the deterioration or destruction of the landscape.

The competent authorities of the Member States must also take all the necessary measures so as to prohibit the disposal, abandonment or uncontrolled dumping of the mining waste, even after the closure of the specific waste treatment facilities, so as to mitigate the major risks that such waste poses for the public health and the environment.

According to the objectives of the community environmental policy, it is necessary to establish the minimum requirements for the prevention or mitigation, as much as possible, of the adverse effects on the environment or human health that would result from the management of the waste of the extractive industries, such as processing waste (e.g. solid waste or slurries that remain after the treatment of the mineral resources by various techniques), tailings and stripping material (e.g. material from the extraction operations that is moved during the operations of entry into a body of ore or mineral, including throughout the development period preceding the manufacturing process) and topsoil (i.e. the upper layer of soil), provided that they constitute waste.

---

<sup>1</sup> Adriana Deac - Bucharest University of Economic Studies, Department of Law, [adriana.deac@yahoo.com](mailto:adriana.deac@yahoo.com).

<sup>2</sup> Nelly Militaru, *European Union Law*, second edition, Bucharest, 2011, Universul Juridic Publishing House, p. 251.

<sup>3</sup> Directive 2006/21/EC on the management of waste from extractive industries, published in the Official Journal of the European Union no. 102/2006; Seveso II Directive 2003/105/EC on the control of major-accident hazards involving dangerous substances, published in the Official Journal of the European Union no. 345/2003; Directive 2006/12/EC – master directive on waste, published in the Official Journal of the European Union no.114/2006

Furthermore, the Member States must make sure that the operators of the extractive industry draw up appropriate waste management plans for the prevention or mitigation, treatment, capitalization and disposal of the extractive waste. Such plans must be structured so as to ensure the appropriate planning of the waste management options, having in view the minimization of the waste generation and its harmfulness as well as the encouragement of the waste capitalization process. Moreover, the waste of the extractive industries must be characterized in terms of their composition in order to make sure that such waste reacts, as much as possible, only in a predictable manner.

The Member States must request the operators of the extractive industries to implement control and management measures designed to prevent water and soil pollution and to identify any adverse effects that their waste management facilities may have on the environment or human health. Moreover, in order to minimize water pollution, the discharge of waste into any watercourse must comply with Directive 2000/60/EC of the European Parliament and of the Council of October 23<sup>rd</sup>, 2000 establishing a framework for the Community action in the field of water policy). Moreover, taking into account their harmful and toxic effects, the concentrations of cyanides and cyanide compounds in the tailings ponds, resulting from certain extractive industries, must be reduced to the lowest possible level, using the best available techniques. The maximum concentration thresholds should be set accordingly and, in any event, in accordance with the specific requirements of this Directive to prevent such effects.

The Member States must make sure that the competent authorities organize an effective inspection system or other equivalent control measures for the waste management facilities for the extractive industries waste. Notwithstanding the obligations the operator has under the permit, before the start of the dumping operations, an inspection should be carried out in order to check the compliance with the permit conditions. Furthermore, the Member States should ensure that the operators and their successors keep records to date on these waste management facilities and that the operators transmit to their successors information about the status of the waste management facility and the operations carried out within such facility.

## **2. European Commission – the exercise of the powers of control and monitoring of the enforcement of the legislation of the European Union in the Moldova Noua case**

In the monthly package concerning the measures taken against the infringement by the Member States of the undertaken obligations, on October 16<sup>th</sup>, 2014, the European Commission presented in Brussels a set of decisions covering several sectors, decisions meant to ensure the appropriate implementation of the European Union law. The European Commission took 140 decisions, including 39 reasoned opinions and 11 notifications of the European Court of Justice European Union<sup>4</sup>.

Regarding Romania, the European Commission adopted several decisions, the most severe one being that in the field of environmental protection, namely in the Moldova Noua case. According to the press release, the European Commission “filed a court action against Romania for its infringement of the EU legislation on the waste from extractive industries (i.e. the waste generated from the extraction, treatment and storage of the mineral resources and from the exploitation of the quarries). The case refers to the la Bosneag pond, a 102 hectares tailings pond where the waste generated by the exploitation of the copper and zinc mines of Moldova Noua, Romania was spilled and which is, currently, almost completely abandoned. The pond is a major source of pollution, spreading toxic dust that significantly endangers the human health and the environment. Romania agreed to take measures to solve the problem, but the progress has been insufficient. Given the seriousness of the risk in this case and on the recommendation of the Environment Commissioner, Mr. Janez Potočnik, the Commission filed an action against Romania

---

<sup>4</sup> MEMO/14/589, p. 3

before the European Court of Justice, in order to make sure that corrective measures are taken as quickly as possible”<sup>5</sup>.

The legal issues that we are going to analyze include the competence of the Commission to file action against the Member States before the European Court of Justice, the procedure to be followed and the obligations that the national authorities have in this case.

According to art. 258 of the Lisbon Treaty on the functioning of the European Union<sup>6</sup> and art. 106a of the EAEC Treaty<sup>7</sup>, the Commission, which acts as guardian of the Treaties, has the power to file legal action against a Member State that fails to comply with its obligations under the EU law following the procedure set out in the TFEU.

This procedure of acknowledgement of the violation of the obligations begins with a request for information (formal letter of default) sent to the Member State that has failed to comply with the legislation, the State in question being bound to submit its observations within two months. If not satisfied with the received information and if it concludes that the Member State in question has failed to fulfill its obligations under the EU law, the Commission may send a formal request called reasoned opinion requesting the respective Member State to comply with the EU law and to provide information concerning the measures taken in this regard within two months.

If the Member State fails to restore the compliance with the EU law, the Commission may decide to notify the Court of Justice. However, in approximately 95% of the cases of default, the Member States comply with the obligations they have under the EU law thus avoiding the notification of the Court. If the Court issues a judgment against a Member State, it has to take the necessary measures to comply with the judgment.

If the Member State in question fails to implement the directives within the deadline established by the EU Council and the European Parliament, the Commission may ask the Court to enforce financial sanctions against the Member State the moment the first judgment is given in the case. This possibility, introduced by the Lisbon Treaty, is set out in Article 260 para. (3) of the TFEU.

If, despite the first judgment, the Member State fails to take appropriate action, the Commission may initiate a new infringement procedure under Article 260 of the TFEU, sending just one written warning before referring the matter to the Court again. If it refers the case to the Court again, the Commission may propose to the Court to enforce financial sanctions against the Member State, depending on the duration and gravity of the infringement and on the size of the Member State. These financial sanctions may be established either as a lump sum, determined on the basis of the time passed from the first judgment, or as a daily fine, calculated as of the date of the second judgment, until the member state ceases the violation.

In the case of the Bosneag pond of Moldova Noua, Caras Severin County (a natural or artificial site for dumping fine-grained waste, usually processing tailings, together with variable quantities of free water, resulting from the treatment of the mineral resources, as well as from the recirculation and settling of the process water), the European Commission went through the entire aforementioned procedure. In October 2012, the European Commission initiated infringement proceedings against Romania by means of a letter of default sent to the Government, then followed by a reasoned opinion communicated in February 2014 during the infringement proceedings.

The Romanian Government defended itself arguing that Moldomin, the economic operator exploiting the copper and zinc deposits of Moldova Noua was no longer under the control of the state, the company being subject to winding up. The set up of an irrigation system was proposed, measure that was carried out.

In this situation, and given the seriousness of the risk, upon the proposal of the former European Commissioner for Environment, the European Commission decided to file action against Romania in order to make sure that corrective measures are taken more quickly. The representative of the Romanian Government with the European Court of Justice stated that the Romanian

---

<sup>5</sup> MEMO/14/589, p. 6

<sup>6</sup> Lisbon Treaty on the functioning of the European Union

<sup>7</sup> Treaty on the set up of the Euratom Community

authorities will propose an action plan and that it tries to find solutions to comply until the actual notification of the Court of Justice.

According to national legislation on the mining industry<sup>8</sup>, the authorities authorized to approve, authorize, check and sanction the economic operators that are guilty of the breach or failure to comply with legal provisions on the dumping of the mineral waste are the National Agency for Mineral Resources (ANRM), the Environment Protection Agency (APM), the National Environmental Police (GNM) and the Ministry of Environment and Climate Change (MMSC). These state authorities are bound to inspect the including the sanctioning of the economic operator guilty of violating the environmental protection law, more specifically the mining waste law.

### 3. Conclusions

The case is quite sensitive because Moldomin SA is a company in liquidation. Its shareholders, Minero AG, a Swiss company which obtained the exploitation license after registering a mortgage on the property Moldomin, announced its withdrawal from the agreement negotiated 3 years before. The liquidator requested the court to order the shareholder to conclude the agreement, the action being in progress. In these circumstances, the Romanian state was sanctioned for failing to fulfill obligations that were incumbent on an operator subject to liquidation. Even so, we believe that the aforementioned authorities, responsible for the inspection and sanctioning of the entities doing business in the mining industry, should have and must enforce appropriate sanctions in such cases, the operators having obligations concerning environmental protection not only during the exploitation of the deposits, but also after the cease of such activities.

### Bibliography

1. Nelly Militaru – European Union Law, ediția a II-a, Bucharest, 2011, Universul Juridic Publishing House.
2. Lisbon Treaty on the functioning of the European Union;
3. CEEA Treaty on the set up of the Euratom Community.
4. Directive 2006/21/EC on the management of waste from extractive industries, published in the Official Journal of the European Union no. 102/2006;
5. Seveso II Directive 2003/105/EC on the control of major-accident hazards involving dangerous substances, published in the Official Journal of the European Union no. 345/2003
6. Directive 2006/12/EC – master directive on waste, published in the Official Journal of the European Union no.114/2006.
7. MEMO/14/589
8. MEMO/12/12
9. Mining Law no. 85/2003 published in the Official Journal of Romania no. 197/2003,
10. Government Emergency Ordinance no. 195/2005 on environmental protection published in the Official Journal of Romania no. 1196/2005,
11. Government Resolution no. 856/2008 on the extractive industries waste management published in the Official Journal of Romania no. 624/2008,
12. Order no. 202/2881/2348/2013 on the approval of the technical instructions for the enforcement and monitoring of the measures established in the environmental restoration plan, in the extractive waste management plan and in the technical environmental restoration project, as well as the manner of operation with the financial guarantee for the restoration of the environment affected by mining activities, published in the Official Journal of Romania no. 1/2014.

---

<sup>8</sup> Mining Law no. 85/2003 published in the Official Journal of Romania no. 197/2003, Government Emergency Ordinance no. 195/2005 on environmental protection published in the Official Journal of Romania no.1196/2005, Government Resolution no. 856/2008 on extractive industries waste management published in the Official Journal of Romania no. 624/2008, Order no. 202/2881/2348/2013 on the approval of the technical instructions for the enforcement and monitoring of the measures established in the environmental restoration plan, in the extractive waste management plan and in the technical environmental restoration project, as well as the manner of operation with the financial guarantee for the restoration of the environment affected by mining activities, published in the Official Journal of Romania no. 1/2014.