

**Case C-510/22****Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

28 July 2022

**Referring court:**

Înalta Curte de Casație și Justiție (Romania)

**Date of the decision to refer:**

14 June 2022

**Appellant:**

Romaqua Group SA

**Respondents:**

Societatea Națională a Apelor Minerale

Agenția Națională pentru Resurse Minerale

**Subject matter of the main proceedings**

Appeal brought by the appellant, Romaqua Group SA, against the respondents, Societatea Națională a Apelor Minerale SA (National Company Responsible for Mineral Waters) (SNAM) and the Agenția Națională pentru Resurse Minerale (National Agency for Mineral Resources) (ANRM), challenging the civil judgment of 11 June 2019 of the Curtea de Apel București – Secția a VIII-a de contencios administrativ și fiscal (Court of Appeal, Bucharest, Romania – Eighth Chamber, dealing with administrative and tax matters)

**Subject matter and legal basis of the request**

In accordance with Article 267 TFEU, interpretation is sought of Article 106(1) TFEU, Articles 49 and 119 TFEU, and Article 3 of Directive 2009/54/EC

### **Questions referred for a preliminary ruling**

Is Article 106(1) TFEU to be interpreted as precluding provisions of national legislation, such as those at issue in the main proceedings, which maintain the direct, original and non-competitive award, to a company whose capital is wholly owned by the State, of licences for the exploitation of mineral water springs by means of successive and unlimited extensions of exclusive licences (available to the state-owned company)?

Are Article 16 of the Charter of Fundamental Rights of the European Union, Articles 49 and 119 TFEU, and Article 3 of Directive 2009/54/EC on the exploitation and marketing of natural mineral waters to be interpreted as precluding provisions of national legislation, such as those at issue in the main proceedings and mentioned above, which introduce an unjustified restriction on the freedom to conduct a business, including the freedom of establishment?

### **Provisions of European Union law and case-law relied on**

Treaty on the Functioning of the European Union: Articles 49 and 102, Article 106(1), and Article 119(1)

Charter of Fundamental Rights of the European Union: Article 16

Directive 2009/54/EC of the European Parliament and of the Council of 18 June 2009 on the exploitation and marketing of natural mineral waters: recital 5 and Article 3

Judgment of 17 July 2014, *Commission v DEI* (C-553/12 P), paragraphs 41 to 47

### **Provisions of national law relied on**

*Legea minelor nr. 61/1998 (Mining Law No 61/1998)*

Article 46: ‘(1) Public institutions, national mining companies and commercial companies shall continue their activities only at those sites which are under their management and at which, on the date of publication of this Law, they are carrying out authorised exploration, development or exploitation works.

(2) Within 90 days of the date of the entry into force of this Law, public institutions, national mining companies and commercial companies which carry on mining activities shall complete the act of demarcating the exploration, development and exploitation perimeters of the sites referred to in paragraph 1 and shall apply to the competent authority for these to be assigned to them by way of management or concession, in accordance with this Law.’

*Legea minelor nr. 85/2003 (Mining Law No 85/2003)*, repealing [Mining] Law No 61/1998

Article 20(2): ‘Exploitation licences shall be granted for a maximum period of 20 years, with a right of extension for successive periods of 5 years.’

Article 60(1): ‘The provisions of licences in force shall remain valid, for their entire duration, under the conditions in which they were concluded.’

*Decision No 136/2001 of the Curtea Constituțională* (Constitutional Court, Romania) declaring the first sentence of Article 40(1) of Legea nr. 219/1998 privind regimul concesiunilor (Law No 219/1998 on the rules governing concessions) to be unconstitutional in so far as local public authorities are required to assign directly to specific legal persons, by means of concession contracts: (i) public property; (ii) public activities and services of local interest.

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 Government Decision [(GD)] No 786/1997 established SNAM, a public limited company and Romanian legal person whose capital is wholly owned by the State. That company was created in the context of the reorganisation of the Regia Autonomă a Apelor Minerale din România (Autonomous Company Responsible for the Mineral Waters of Romania), whose purpose was ‘the exploitation and recovery of useful mineral substances in the deposits entrusted to its management, by means of commercial measures, geological and hydrogeological research, and recovery by way of bottling or tourism and spa activities using its own products, transport, storage, distribution and marketing’.
- 2 By successive government decisions adopted in 1999 (GD No 489/1999, GD No 568/1999, GD No 695/1999 [and] GD No 1020/1999), approval was given for the grant by the ANRM (in its capacity as manager of the licences), by direct award to SNAM, of licences for the exploitation of all the mineral water resources that were being exploited in Romania at that time (30 aquifers) for a period of 20 years.
- 3 On 19 July 2016, Romaqua Group SA submitted a request to the ANRM for the immediate transfer of the exploitation licences for the Borsec and Stânceni perimeters, informing the ANRM that, when the licences previously awarded directly to SNAM expired in 2018, it should not renew them, but should organise a public tendering procedure for the grant of new licences, in accordance with the legal provisions in force.
- 4 The ANRM refused to grant that request, stating that only SNAM could transfer the licences, with the ANRM’s prior consent, and that a public tendering procedure could be organised only if SNAM did not request the extension of the current licences. Extensions could be requested every five years and the ANRM could not oppose any such request.
- 5 For its part, SNAM indicated that it was not interested in transferring the rights and obligations assumed under the two exploitation licences concerned.

- 6 On 2 November 2016, by application registered with the Court of Appeal, Bucharest, Romaqua Group SA brought an action against the defendant, the ANRM, seeking a declaration that the ANRM's refusal to grant its request was unjustified and an order requiring the ANRM, upon the expiry, at the end of 2018, of the period for which Licences Nos 331/1999 (Borsec perimeter) and 585/1999 (Stânceni perimeter) for the exploitation of mineral waters had been awarded to SNAM, to organise a public tendering procedure for the concession of exploitation activities for the following period, in accordance with the legal provisions in force.
- 7 In support of its application, Romaqua Group SA stated that, although the legislation in force required that a tendering procedure be organised, the ANRM had awarded the licences referred to in paragraph 2 above directly to SNAM, pursuant to Article 40(1) of Law No 219/1998 on the rules governing concessions.
- 8 Following Decision No 136/2001 of the Constitutional Court declaring Article 40(1) of Law No 219/1998 to be unconstitutional, and the entry into force of Mining Law No 85/2003, Article 18 of which provides that exploitation licences are to be granted to the successful tenderer in a public tendering procedure, the ANRM has also granted licences for the exploitation of mineral waters to companies other than SNAM, which nevertheless continues to hold an unjustified dominant position on the market for the exploitation of mineral waters.
- 9 The ANRM stated in its defence that the licences had been awarded to SNAM in accordance with Article 46 of Mining Law No 61/1998, because SNAM had been carrying on mining activities within the Borsec and Sâncrăeni perimeters.
- 10 The Court of Appeal, Bucharest, granted SNAM leave to intervene in the case and, on 11 June 2019, dismissed the action brought by Romaqua Group SA, finding, in essence, that Article 46 of [Mining] Law No 61/1998 applied, along with Article 20(2) of Mining Law No 85/2003 and Article 32(1) of GD No 1208/2003 approving the detailed rules for the application of Mining Law No 85/2003.
- 11 Romaqua Group SA brought an appeal against the judgment of 11 June 2019 before the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania), the referring court, claiming, among other things, that the judgment under appeal is in breach of the principle of the primacy of EU law and requesting the referring court to submit a request for a preliminary ruling to the Court of Justice.

### **The essential arguments of the parties in the main proceedings**

- 12 Romaqua Group SA maintains that the position taken by the ANRM and validated by the Court of Appeal, Bucharest, – according to which SNAM is entitled, under Article 20(1) and (2) of [Mining] Law No 85/2003, to request successive five-year extensions of licences and thus to retain, *sine die*, by extension, a right of

exploitation resulting from a direct award – must be examined also in the light of EU law.

- 13 SNAM in fact enjoys a dominant position in that it retains a special, exclusive right of access to resources that were being exploited in 1998. According to the appellant, however, the provisions of national law which enable that situation to exist are incompatible with the provisions of Article 106(1) TFEU and Article 102 TFEU. The provisions of national law at issue have not only maintained special, exclusive rights, but also resulted in an abuse of a dominant position.
- 14 Moreover, in light of Article 16 of the Charter and Articles 49 and 119 TFEU, read in conjunction with Article 3 of Directive 2009/54/EC, the national legislation at issue creates barriers to the market entry of other companies and constitutes a restriction on the freedom of establishment that does not appear to be justified.

#### **Succinct presentation of the reasoning in the request for a preliminary ruling**

- 15 According to the referring court, the issues in the present case are the possibility of maintaining, by extension (in fact, without any limitation in time), licences that have been awarded directly (without any tendering procedure) and consequently the distortion of competition on the market in question (inasmuch as SNAM holds a dominant position by retaining a special, exclusive right of access to resources that were being exploited in 1998).
- 16 Analysing successively the concepts of ‘public undertaking’ and ‘exclusive rights’, the High Court of Cassation and Justice observes that the provisions of Article 106 TFEU are applicable in the present case.
- 17 As regards the first of those concepts, the referring court emphasises that SNAM is a public limited company and Romanian legal person whose capital is wholly owned by the State, such that it may be regarded as a ‘public undertaking’.
- 18 As regards the second concept referred to above, although Article 10 of [Mining] Law No 61/1998 and, subsequently, [Mining] Law No 85/2003, in theory, leave open the possibility of access to mineral water resources, in reality that possibility is limited by the perpetuation of the licences awarded preferentially to SNAM in accordance with Article 46 of [Mining] Law No 61/1998. The unlimited, successive extension every five years of a privilege granted to SNAM creates a special, exclusive right in its favour and, at the same time, creates barriers to the market entry of other companies, that being an aspect emphasised also by the Consiliul Concurenței (Competition Council) in a report prepared following a sectoral investigation into the market for the exploitation of natural mineral water resources in Romania.
- 19 Having regard also to paragraphs 41 to 47 of the judgment of 17 July 2014, *Commission v DEI*, (C-553/12 P), the referring court states that there are serious

doubts regarding the consistency of the provisions of national legislation relating to the extension of the licences at issue with the provisions of EU law relating to competition, freedom of establishment and the freedom to conduct a business on equal terms.

WORKING DOCUMENT