Translation from Romanian

GOVERNMENT OF ROMANIA MINISTRY OF ENERGY No. 330252

28 March 2023

CLUJ COURT OF APPEAL
CASE FILE NO.: 114/ 33/ 2023

The Ministry of Energy, created by the Government Emergency Ordinance no. 212/2020 on setting some measures at the level of the central public administration and for the modification and completion of some regulatory instruments, seated in Bucharest, Str. Academiei no. 39-41, sector 1, postal code no. 010013, whose organisation and functioning was approved by the Government Decision no. 316/10.03.2021, as subsequently amended and supplemented, through its legal representative, Mr. Virgil-Daniel Popescu, the Minister for Energy, pursuant to Article 205 of the Code of Civil Procedure, hereby submit this

STATEMENT OF DEFENCE

requesting the court to grant the following exceptions:

1. the lack of standing and interest of the applicants;
2. the lack of capacity to stand trial for the natural persons sued (the heads of the defendant institutions);
3. the prematurity of the fine imposed on the heads of the defendant institutions

and, on the merits, dismiss as unfounded the application as brought against the Ministry of Energy, in view of the following

RATIONALE

In their statement of claim, the applicants requested the court that in its judgment:

- order the defendants to take all necessary measures to reduce greenhouse gases (GHG) by 55% until 2030 and to become climate neutral by 2050, to increase the share of renewables in final energy consumption to 45% and to increase energy efficiency by 13% until 2050;

- order the defendants to increase the share of renewables in the final energy consumption to 45% and to increase energy efficiency by 13% until 2030;

- order the defendants to implement concrete and coherent climate change mitigation and adaptation plans, including annual carbon budgets, within 30 days from the date the judgment becomes final, with a view to achieving the targets under claims 1 and

2, as well as annual reporting and monitoring mechanisms on progress towards achieving such targets;

- Order the second, fourth- and sixth-line defendants to pay a fine of 20% of the gross minimum wage per day of delay, to be paid to the State budget, from the expiry of the time-limit laid down in claim 3 until the effective adoption of the measures required to achieve the objectives laid down in claims 1 and 2;

- order them to pay the costs.

**** On the exception of lack of interest of the applicants:***

The applicants sought to bring the present action on the basis of an alleged failure to comply with the environmental conditions and to achieve the objectives set out in the statement of claim, without challenging an actual administrative act, and without specifying which administrative act is being challenged or which specific failure to act is being challenged.

In accordance with the provisions of Article 8(11) and (12) of Act no. 554/2004:

(1^1) Natural persons and legal persons governed by private law may bring actions for the defence of a legitimate public interest ***only in the alternative***, to the extent that the harm to the legitimate public interest is the logical consequence of the infringement of the subjective right or of the legitimate private interest.

(1^2) By way of derogation from paragraph (1), actions based on an infringement of a legitimate public interest may be brought only for the purpose of annulling the act or requiring the defendant authority to issue an act or other document or to carry out a specific administrative operation, subject to the penalties for delay or a fine provided for in Article 24(2).

We also bring to the attention of the court the **Decision of the Constitutional Court of Romania no. 66 of 15 January 2009,** concerning the exception of unconstitutionality of the provisions of Article 8(1^) of Law no. 554/2004, which ruled that such provisions "are intended to clarify and establish under what conditions and who may invoke the defence of the legitimate public interest". From the content of the law, it is clear that, by bringing an action before the administrative court, the natural and legal persons governed by the private law may not directly invoke the "legitimate public interest" for the cancellation of an administrative act, but only in the alternative, by way of separate heads of claim, to the extent that the harm to the legitimate public interest arises from the infringement of a subjective right or a legitimate private interest. Therefore, by bringing an action, natural and legal persons governed by private law must first prove that there has been an infringement of their right or legitimate private interest, and then they must also prove the harm to the public interest resulting from the administrative act under challenge. With the adoption of the contested text, the legislature sought to 'paralyse' the so-called 'popular actions' brought by certain natural persons or legal persons governed by private law who, lacking arguments to prove an infringement of a legitimate private right or interest of their own, resort to actions based solely on the ground of infringement of the public interest."

Therefore, the infringement of a legitimate public right must be subsidiary to the invocation of a subjective right or a legitimate private interest.

Furthermore, we bring to the attention of the court the Decision no. 8 of 2 March 2020 of the High Court of Cassation and Justice - Panel for Appeal in the interest of the law, which provides that *"in order to exercise the control of legality on administrative acts at the request of associations, as interested social bodies, the invocation of the public legitimate interest must be subsidiary to the invocation of a private legitimate interest, the latter arising from the direct link between the administrative act subject to control of legality and the direct purpose and objectives of the association, according to the statute", and therefore the court must perform a verification of the existence of a direct link between the administrative act and the direct purpose and objectives of the applicant association.*

With regard to the exception of lack of interest and lack of standing of the applicants, the natural persons: Pencea Brădățan Elena Roxana, Brădățan Tudor Iulian, Năstache-Hopârteanu Cătălina, Mirea Silvia, Dejeu Daniela Luminița, we state as follows:

According to the statement of claim, the applicants contend that: "the defendants' attitude infringes the individual fundamental rights of the second - sixth line applicants, as well as the collective rights detailed in subchapter 6.3, the Declic Association, acting both in the interest of present and future generations and in its own interest."

Please note that according to Article 2(a) of Law no. 554/2004, *an injured person is any person holding a right or a legitimate interest, injured by a public authority through an administrative act or through the failure to resolve an application within the legal deadline; for the purposes of this law, the injured person is also assimilated to the group of natural persons, without legal personality, holding subjective rights or private legitimate interests, as well as social bodies that invoke the injury through the contested administrative act either of a public legitimate interest or of the rights and legitimate interests of specific natural persons.*

Therefore, the harm to the interest is assessed in relation to the concept of private legitimate interest as part of the subjective litigation, because, according to Article 2(1)(p) of Law no. 554/2004, private legitimate interest means the possibility to require a certain conduct, in view of the realization of a future and foreseeable subjective right, prefigured [1].

Therefore, the applicants, "in their capacity as natural persons or group of natural persons without legal personality, may not act as such in subjective administrative litigation unless and provided that they prove that they are the holders of subjective rights or private legitimate interests [Article 2(1)(a) of Law No. 554/2004] and, as a result, they may not bring an action in an objective litigation, i.e. to apply for the cancellation of an administrative act, based on the premise of the violation of a

[1] THE DECISION OF THE HIGH COURT OF CASSATION AND JUSTICE no. 8 of 2 March 2020 on the interpretation and uniform application of the provisions of Article 1(1), Article 2(1)(a), (r) and (s) and Article 8(1^1) and (1^2) of the Law no. 554/2004 on Administrative Litigation, as amended and further supplemented.

legitimate public interest, unless and provided that they prove that such violation of a legitimate public interest logically derives (as a consequence, there must be a causal relationship) from the violation of a subjective right or legitimate private interest (Article 8, paragraph (1^1) of Law no. 554/2004).[2]

In the light of the foregoing, we take the view that the mere general allegations made by the applicants cannot support the conclusion that their rights and legitimate interests have been infringed. To that end, the applicants had to prove the concrete practical benefit materialised with reference to their own persons, in accordance with the purpose and objectives of the association set out in its articles of association. The consequences of the absence of interest, of personal harm to the applicant, also extend to another condition for bringing a civil action, namely that of standing.

In conclusion, we request that the claimed lack of interest be admitted, taking into account that the applicants have not proved their interest in the statement of claim, and that such statement of claim be dismissed as lacking interest and being brought by persons lacking standing.

**** On the exception of the lack of capacity to stand trial for the natural persons sued (the heads of the defendant institutions):***

In agreeing with the manner of establishing the procedural framework chosen by the applicant, we would accept that the Minister for Energy has a dual capacity as defendant in the same litigation, which is inadmissible from a procedural point of view.

According to the Administrative Code - Article 5(k) -, the public authority is the body of the state or of the territorial and administrative division acting as a public authority for the fulfilment of a public interest. According to the same normative act - Article 2(1) - the central public administration authorities are: the Government, the ministries, other specialised central bodies subordinated to the Government or ministries, the autonomous administrative authorities. According to Article 54 in conjunction with Article 55 of the Administrative Code, the Ministry is a legal person governed by public law and is headed by the Minister. The Minister is in charge of the Ministry and acts as its representative in dealings with other public authorities and in legal proceedings.

Therefore, the Minister is not a central public authority, but a dignitary (a person performing functions of public dignity on the basis of a mandate, according to the Constitution, the Administrative Code and other normative acts) and ensures the leadership and representation of the central public administration authority (Ministry).

Pursuant to Article 117 of the Constitution, Government Decision no. 316/2021 approved the organisation and functioning of the Ministry of Energy.

According to Article 10, the Minister of Energy who represents and commits the institution in court heads the Ministry. According to paragraph (5), the Ministry of Energy will be represented before the jurisdictional authorities by its specialised staff,

[2] The Decision of the Constitutional Court no. 66 of 15 January 2009, published in the Official Gazette of Romania, Part I, no. 135 of 4 March 2009.

based on the powers granted for each individual case, according to the competence laid down by order of the Minister of Energy.

Therefore, the party who deems himself / herself injured by an act issued by a public authority has the possibility to bring an action against the body issuing the administrative act as a defendant, and the legal person governed by public law which issued the administrative act has the passive capacity to stand trial, i.e., it has the authority to settle the applicant's claim in the preliminary administrative procedure.

The contested administrative act is considered to be an act of the authority which can be sued as a defendant (the applicants have submitted the statement of claim without challenging an actual administrative act, not specifying which administrative act is being challenged, or which specific action is being challenged).

Such a ruling is also in line with the observation of the principle of legal security (clarity and predictability of the law), especially as the legal person governed by public law itself is recognised as the issuing authority. It is also based on the provisions of the Civil Code which, having become applicable to administrative litigation by virtue of Article 28 of Law no. 554/2004, make relations between the legal person and its bodies subject to the rules of the mandate. The concept of administrative capacity became applicable according to Article 5(o) of Government Emergency Ordinance no. 57/2019 on the Administrative Code.

Consequently, there is consistency in the general regulation to the effect that acts are issued by public authorities and not by dignitaries, the heads of such authority. Thus, the exception concerning the lack of capacity to stand trial of the Minister for Energy is substantiated, given that the defendant is not the public authority which issued the challenged acts in the sense of Article 2(1)(b) of Law no. 554/2004.

According to the legal doctrine, the capacity to stand trial implies the identity between the defendant and the person who is obliged in the same legal relationship. The requirement of locus standi derives from the purpose of the civil lawsuit, which is to settle disputes arising in social life, and from the need for an optimal administration of justice; however, this implies that the procedure must be conducted with the participation of persons entitled to be parties to the civil lawsuit.

We deem that the Article 15 of the Civil Code, according to which no right may be exercised in order to injure or harm another, or in an excessive and unreasonable manner, contrary to the good faith, becomes applicable, because the triggering factor of such lawsuit that could represent the interest in justifying the bringing of the statement of claim, are the so-called *'popular actions' brought by certain persons governed by the private law who are not in a position to justify, in relation to their own person, an infringement of a legitimate private right or interest and, as such, base their application solely on the generic theory of infringement of the public interest.*[3]

[3] Antonie Iorgovan, Liliana Vișan, Alexandru Sorin Ciobanu, Diana Iuliana Pasăre, Administrative Litigation Law - commentary and case law, Universul Juridic Publishing House, Bucharest, 2008, page 64.

**** On the exception of the prematurity of the fine imposed on the heads of the defendant institutions:***

The applicants requested that the Court, in its judgment, impose on the head of the Ministry a fine of 20% of the gross minimum wage per day of delay.

In accordance with the provisions of Article 24(3) of Law no. 554/2004 on Administrative Litigation, as amended and further supplemented: *At the request of the creditor, within the limitation period of the right to obtain enforcement, which runs from the expiry of the time limits provided for in paragraph (1) and which have not been culpably complied with, the enforcement court will, by a judgment handed down after summoning the parties, impose on the head of the public authority or, as the case may be, on the person obliged, a fine of 20% of the gross minimum wage, in accordance with Article 906 of the Code of Civil Procedure.*

We deem that the fine imposed on the head of the institution can only be imposed after the judgment in the present litigation becomes final, as a measure to compel the head of the authority to proceed with the execution and performance of the obligation.

On the merits of the case, please note the following:

As far as renewable energy is concerned, the 2021-2030 target of 32% renewable energy consumption in 2030 represents the Renewable Energy Sources (RES) target agreed at European Union level. Member States range from 30.4% to 31%, and in the case of Romania, according to the National Integrated Energy and Climate Change Plan (NIECCP), the overall share of the renewable energy in the gross final energy consumption in 2030 is **30.7%.**

It should be noted that the targets proposed by Romania in the National Integrated Energy and Climate Change Plan (NIECCP) resulted from process modeling based on macroeconomic data, strategies and public policy documents in force at the time, taking into account the characteristics of the national economy and the impact and costs of such measures on the final consumer.

Several scenarios are currently being analysed at the Ministry of Energy for the revision of the NIECCP, which will be carried out in accordance with Regulation (EU) 2018/1999[4], including the climate neutrality scenario for 2050, which will be reviewed and updated by the responsible authorities.

Therefore, in view of the above, with regard to renewables, the new targets and objectives set out in the NIECCP and the funds available in the National Recovery and Resilience Plan (NRRP) and the Modernisation Fund (MF), the Ministry of Energy

[4] REGULATION (EU) 2018/1999 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2018, on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council.

currently envisages financing the development of new renewable power generation capacity through 2030 as follows:

- Investment Support (CAPEX) for 1,716 MW, out of which:
  - 766 MW through the Modernisation Fund (MF), broken down as follows:
    - 153 MW for wind energy;
    - 470 MW for solar energy;
    - 55 MW for hydroelectric power;
    - 59 MW for biomass, biogas;
    - 29 MW for geothermal energy.
  - 950 MW through the National Recovery and Resilience Plan (solar energy and wind energy) - the call was finalised in March 2022 and the winning projects are due to be implemented by the end of 2024.
- Operational Support (OPEX) for **10 GW (solar energy and wind energy)** through the Contracts for Difference (CfD) support mechanism, with tendering for:
  - Contracting 1.5 GW in the first round of tenders in 2023;
  - Contracting 2 GW in the second round of tenders in 2025;
  - Contracting 3 GW in the the third round of tenders in 2027;
  - Contracting 3 GW in the fourth round of tenders in 2030.

Among others, in addition to renewable power generation capacity, funding is foreseen for energy storage capacity, electricity grids and electrolysers respectively:

- 400 MW of electricity storage capacity through the Modernisation Fund (MF), broken down as follows:
  - 200 MW for batteries and other technologies;
  - 200 MW for pumped storage hydropower;
- 240 MW (or 480 MW) for batteries through the National Recovery and Resilience Plan;
- 400 MW in electrolysers for green hydrogen production through the Modernisation Fund (FM);
- 100 MW in electrolysers for green hydrogen production through the National Recovery and Resilience Plan.

In addition, prosumers (13,109 individual prosumers and 492 legal entity prosumers) with a total installed capacity of 15,811 kW will also contribute to increasing the share of renewable energy and reducing greenhouse gases, according to the latest data in the "Report on monitoring the activity of prosumers for 2021" of the National Authority for Energy Regulation (NAER).

In the national legislation, according to the Government Emergency Ordinance no. 163/2022[5], electricity from renewable sources self-produced by prosumers, which remains in their premises, will not be subject to discriminatory or disproportionate procedures and any tax or tariff, thus supporting their development.

[5] Emergency Ordinance no. 163 of 29 November 2022 on the completion of the legal framework for the promotion of the use of energy from renewable sources, as well as for the amendment and completion of certain regulatory acts.

At the same time, please also note the following:

- The European Union-wide energy efficiency target is currently set by Directive (EU) 2018/2002 of 11 December 2018 amending Directive 2012/27 EU on energy efficiency and is at least 32.5% until 2030 compared to the 2007 modelling projections for 2030.
- With the REPowerEU plan, the European Commission has proposed to increase the EU's energy efficiency target from 9% to 13% compared to the Reference Scenario 2020, given that negotiations are currently ongoing in the Council and the European Parliament on the proposed revision of the Energy Efficiency Directive. The target of increasing energy efficiency up to 13% compared to the Reference Scenario 2020 is only at the proposal stage and does not entail obligations for Member States.
- Given that the Energy Efficiency Directive is under review, before its publication in the Official Journal of the European Union and that its transposition must be completed within the deadline set at the time of its adoption.

We believe that the actions outlined above will increase the pace of development of additional low-carbon electricity generation capacity needed to meet Romania's 2030 and 2050 targets for decarbonisation and neutrality through accelerated green transition.

By right, we rely on the provisions put forward in this statement of defence.

As evidence, we plead with the Court to accept any kind of documentary evidence and any element of proof that may be deemed appropriate.

Pursuant to Article 223 of the Code of Civil Procedure, we request that the case be also adjudicated *in absentia*.

For the Minister of Energy
The Secretary of State
(As per Order no. 258 of 24 march 2022,
issued by the Minister of Energy)
[Illegible signature and stamp]

Directorate-General for Legal Affairs
and Institutional Relations (DGLAIR)
Director General,
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Registry of the Cluj Court of Appeal

From: alin.danila@energie.gov.ro
Sent: Friday, April 7, 2023 11:42 AM
To: Correspondence case-files Cluj Court of Appeal
Subject: Statement of defence case file no. 114 / 33 / 2023
Attachments: Statement of defence case file no. 114.33.2023.pdf

Hello!

Please find enclosed the Ministry of Energy's statement of defence in case-file no. 114/33/2023, noting that the documents were sent by post.

Thank you in advance!

With utmost consideration,

Alin Dănilă – Legal adviser
DIRECTORATE-GENERAL FOR LEGAL AFFAIRS AND INSTITUTIONAL RELATIONS
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GOVERNMENT OF ROMANIA MINISTRY OF ENERGY

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THIS IS TO CERTIFY

That the foregoing is a true and accurate translation of the Romanian language document produced to me and attached hereto.

In witness whereof I have hereunto set my hand and affixed my stamp of office this 16th day of May 2023.

Mircea-Sergiu Deatcu
Digitally signed by Mircea-Sergiu Deatcu
Date: 2023.05.18 08:42:25 +03'00'