CIVIL JUDGMENT No. 4190 of 17.09.2013

- BUCHAREST COURT

- Second Section - Administrative and Fiscal Litigation (Case No. 17631/3/2013)

Pages 4 to 6:

In law, they invoked Law 554/2004, H.G. No 445/2009, Order No 1284/2010, O.U.G. No 57/2007, Order No 19/2010, Order No 183/2002, Habitats Directive No 92/43/EEC and Birds Directive 2009/147/EC.

Attached to the application are documents (f. 5 - 13 of the file).

By their statements of defense filed on 28.05.2013 and 31.05.2013, the defendants Gorj Environmental Protection Agency and S.C. Complexul Energetic Oltenia S.A. - SDM Târgu Jiu - Exploatarea Miniera de Cariera Rovinari requested the rejection of the request for suspension as unfounded for the reasons set out in the defenses, since all the relevant legal provisions were complied with when issuing the environmental consent and the provisions of Article 14 of Law no. 544/2004 were not met, to which the plaintiffs replied to the statement of defense on 14 June 2014.

The administrative file was submitted, namely the environmental agreement and the documentation on which its issuance was based, the proof of having gone through the preliminary procedure and the judicial practice of the case (f. 63 - 404 and 422 - 529 of the file).

Analysing the documents and the file, the court finds and holds that:

On 19.11.2012, the Gorj Environmental Protection Agency issued environmental permit no. Gj-16 for the project to permanently remove 62.50 ha of land with forest vegetation from the forest fund, of which 59 ha were cleared. 1866 ha located in the area of the Târgu-Jiu Forestry School, UP I Strâmba, for the continuation of lignite extraction works within the Tismana II mining perimeter", published on 30.10.2012 on the website of the Gorj Environmental Protection Agency.

According to Article 14 para. 1 of the Law no. 544/2004 on administrative litigation, "in well-justified cases and for the prevention of imminent damage, after having referred the matter to the public authority that issued the act or to the hierarchically superior authority, in accordance with Article 7, the injured party may request the competent court to order the suspension of the execution of the unilateral administrative act until the court has ruled. If the injured party does not bring an action for annulment of the act within 60 days, the suspension ceases automatically and without any formality". At the same time, the request for suspension can also be made by means of a main action, as stated in Article 15(1). 1 of the law, according to which "the suspension of the execution of the unilateral administrative act may be requested by the plaintiff, for the reasons provided for in art. 14, and by a request addressed to the competent court for the annulment, in whole or in part, of the contested act. In this case, the court may order the suspension of the contested administrative act until the final and irrevocable settlement of the case".

The suspension of the execution of the administrative act may be ordered only if the two conditions laid down in Article 14 para. 1 of Law 554/2004: the existence of a well-justified case and the need to avoid imminent irreparable or difficult to repair damage.

The concept of a well-founded case has been defined in Art. 2 para. 1 lit. t) of Law 554/2004, as those circumstances related to the state of facts and law that are likely to create a serious doubt as to the legality of the administrative act.

In its settled case-law, the Administrative and Fiscal Jurisdiction Division of the High Court has held that, in order to establish a well-founded case requiring the suspension of an administrative act, the court must not proceed to analyse the criticisms of illegality on which the application for annulment of the administrative act itself is based, but must limit its examination only to those manifest circumstances of fact and/or of law which are capable of giving rise to a serious doubt as to the presumption of legality enjoyed by an administrative act (Decision No. 442/30 January 2013 of the High Court of Cassation and Justice - Administrative and Fiscal Litigation Section).

However, in the present case, the pleas relied on by the two applicants in the application are, in essence, pleas alleging the illegality of the administrative act represented by the environmental agreement whose execution is sought to be suspended. Thus, the criticisms levelled at the agreement to the effect that: the environmental impact assessment report does not comply with the requirements of Order No. 863/2002 on the approval of the methodological guidelines applicable to the stages of the environmental impact assessment framework procedure, that the provisions of the Aarhus Convention were infringed in that the technical memorandum was not published on the website, the public notices relating to that procedure were published in local newspapers to which the applicants did not have access or the applicants' right to participate in the decision was infringed because of the defective organisation of the website cannot be analysed or verified in the context of such an application before the court.

The other aspects of illegality raised in the application for suspension of operation may be examined by the competent court once the merits of the case have been decided. It is not possible to analyse aspects of the illegality of the environmental agreement, as the applicants are in fact seeking to do, since that would lead to the resolution of the substance of the right at issue, in breach of Article 14 of Law No 554/2004.

The applicants have not adduced either sufficient evidence or legal arguments to justify those manifest circumstances of fact and/or law which are capable of giving rise to serious doubt as to the presumption of legality enjoyed by the contested environmental agreement.

Such manifest factual and/or legal circumstances which are capable of giving rise to serious doubt as to the legality of an administrative act have been held by the High Court to be: the issue of an administrative act by a body which is not competent or which exceeds its competence, an administrative act issued on the basis of legal provisions which have been declared unconstitutional, failure to state reasons for the administrative act, significant amendment of the administrative act on administrative appeal.

The proof of the fulfilment of the condition of the well-justified case is not limited to the allegation of the illegality of the contested administrative act, but requires concrete arguments

questioning the legality, such as, for example, documents that create a serious doubt on the legality.

However, the documents submitted in order to obtain the contested environmental consent cannot be analysed in an application for suspension, but only in the course of the resolution of the merits.

Merely contesting the method of environmental impact assessment is not sufficient, and evidence must be provided.

The environmental agreement is the administrative act issued by the competent authority for environmental protection, which sets out the conditions and, where appropriate, measures for environmental protection, which must be complied with in the case of the implementation of a project, as defined by Article 2, paragraph 3 of the Government Emergency Ordinance No 195/2005 on Environmental Protection approved with amendments by Law No 265/2006 with subsequent amendments and additions.

The regulatory procedure and the powers to issue the environmental consent are set out in GD 445/2009 and OM 135/2010 on the approval of the Methodology for the application of environmental impact assessment for public and private projects.

The issuing procedure includes the submission by the designer of the documentation consisting of: extract from the technical investment documentation, impact study, endorsements, acceptances and the issuance of consent, as appropriate, by the environmental monitoring and protection agency or by the Department of Environment of the relevant ministry.

The documentation on the basis of which the environmental consent was issued, filed in the case file, includes checks and environmental impact studies, analysing the effects on water, air, soil, protected species or human communities, the project being subject to public consultation, so there can be no appearance of a lack of transparency. A detailed description of the project, the documents on which it was based, the stages it has gone through and the measures required to maintain it were presented.

Also, from the provisions of Article 2 para. 1 lit. (s) of Law 554/2004, it follows that the concept of imminent damage refers to the occurrence of a future and foreseeable material damage, difficult or impossible to repair, a condition that does not exist in the present case.

În conformitate cu articolul 11 din Ordonanța de urgență a Guvernului nr. 195/2005, "(1) Autorizația de mediu trebuie solicitată și obținută pentru proiectele publice sau private sau pentru modificarea sau extinderea activităților existente care pot avea un impact semnificativ asupra mediului".

Acordul de mediu este doar una dintre etapele premergătoare implementării unui proiect, înainte de emiterea altor acte administrative susceptibile de a fi efectiv executate, acte care asigură implementarea efectivă a proiectului vizat de acordul de mediu.

Riscul invocat de reclamanți, potrivit căruia din conținutul raportului de evaluare a impactului asupra mediului rezultă că proiectul nu se referă doar la defrișări, ci și la extinderea carierei de lignit, nu poate fi justificat prin efectele dăunătoare care ar fi produse de alte acte care implementează efectiv proiectul vizat de acordul de mediu.

Iminența unui prejudiciu nu se prezumă, ci trebuie dovedită de partea vătămată. Îndeplinirea condiției referitoare la iminența prejudiciului necesită prezentarea de probe care să dovedească iminența prejudiciului pretins, în acest sens simplele afirmații fiind irelevante.

Consequently, for the reasons stated above, as the cumulative conditions stipulated in Article 14 of Law 554/2004 are not met, the court finds that the applicants' request for suspension is unfounded and will reject it as such.

ON THOSE GROUNDS

IN THE NAME OF THE LAW

DECIDES:

Dismisses as unfounded the application for "suspension of execution of an administrative act" made by the applicants GREENPEACE CEE ROMÂNIA, established in sector 2, Bucharest, str. Ing. Vasile Cristescu nr. 18 and ASOCIAȚIA BANKWATCH ROMÂNIA, with registered office in sector 1, Bucharest, B-dul Dinicu Golescu nr. 41, bl. 6, sc. 1, et. 1, ap. 5, in contradiction with the defendants AGENȚIA DE PROTECȚIE A MEDIULUI GORJ, established in Târgu Jiu, str. Unirii nr. 76, county of Gorj and S.C. COMPLEXUL ENERGETIC OLTENIA S.A. - SDM Târgu Jiu - Exploatarea Minieră de Carieră Rovinari, established in Târgu-Jiu, str. Alexandru Ioan Cuza nr. 5, county of Gorj.

With appeal, within 5 days of notification.

Delivered in public sitting, today, 17 September 2013.

PRESIDENT,

LILIANA CĂTĂLINA DUȚU

REGISTRER,

GINA MOCANU

Red./Tehnored. L.C.D.

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