CIVIL DECISION No. 5838 of 1 September 2014

- BUCUREȘTI COURT OF APPEAL –

SECTION VIII-A ADMINISTRATIVE AND FISCAL DISPUTE (Case No. 17631/3/2013)

Pages 7 to 10:

The defendant Environmental Protection Agency Gorj requested the dismissal of the plaintiffs' appeal as unfounded and the maintenance of the first court's judgment no. 4190/17.09.2013 as being well-founded and legal.

The defendant SOCIETATEA COMPLEXUL ENERGETIC OLTENIA S.A. requested the dismissal of the appeal as unfounded and the upholding of the first court's judgment as well founded and legal.

Having analysed the appeal in the light of the grounds of appeal put forward, the Court holds that the appeal is unfounded and must be dismissed as such.

From the evidence, the Court finds that on 19.11.2012, the defendant Gorj Environmental Protection Agency issued environmental permit no. Gj-16 on the project for the permanent removal from the forest fund of the area of 62.50 ha of land with forest vegetation, of which by clearing the area of 59. 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 of Law 554/2004, in well-justified cases and for the prevention of imminent damage, after the referral to the public authority that issued the act or to the hierarchically superior authority, the injured party may ask the competent court to order the suspension of the execution of the unilateral administrative act until the court of first instance has given its decision.

It follows, therefore, that for the suspension of an administrative act, which is a measure ordered in exceptional cases, two conditions must be met cumulatively: the existence of a well-justified case and the need for suspension to prevent imminent damage.

According to Article 11 para. 1 of the O.U.G. no. 195/2005, it is mandatory to request and obtain environmental consent for public and private projects or for the modification or extension of existing activities that may have a significant impact on the environment.

According to art. 2, point 3 of the same normative act, "the environmental agreement is the administrative act issued by the competent authority for environmental protection, establishing the conditions and, where appropriate, the measures for environmental protection, which must be respected in the case of the implementation of a project".

The combination of these legal provisions shows that obtaining the environmental consent is a stage in the implementation of a project, being the act imposing on the proposed intervention conditions and measures arising from the need to protect the environment.

Therefore, the condition of imminent damage is not satisfied, since the existence of the environmental consent allows other administrative acts to be issued which may be directly enforceable.

The imminence of the actual clearing of the forest vegetation could not be invoked in this case, given that the clearing is not carried out on the basis of the environmental agreement, but on the basis of the decision and the authorisation for the exploitation of the timber issued by the Territorial Inspectorate of Forestry and Hunting, in accordance with the provisions of the Forestry Code Law No 46/2008.

However, the decision and the logging permit issued by the Territorial Forestry and Hunting Inspectorate, in accordance with the provisions of Forestry Code Law No 46/2008, are administrative acts which enjoy the presumption of authenticity and truthfulness and produce all the legal effects for which they were issued.

With regard to the condition of the existence of a well-founded case, the Court considers that it is not satisfied because the examination of that condition requires the examination of the appearance of law, that is to say, only of those cases which reveal a manifest unlawfulness of an administrative act. In an application for a stay of proceedings, the grounds of illegality which prejudice the merits cannot be examined.

Thus, the grounds relating to the lack of an environmental assessment for the lignite quarry, the absence of all the documents required to obtain environmental consent (including a town planning certificate), the incompleteness of the assessment report in relation to the requirements of Order 863/2002, the holding of public consultation, compliance with the precautionary principle in decision-making and the principle of integration of environmental policies into all the Union's policies and activities with a view to achieving sustainable development are matters relating to the substance of the law and not to manifest unlawfulness, so that they can be examined only in the application for annulment.

Well-founded cases are those circumstances relating to the factual and legal situation which are such as to create a serious doubt as to the legality of the administrative act and the imminent harm consists of foreseeable future material damage or, where appropriate, foreseeable serious disruption of the functioning of a public authority or a public service, as referred to in Article 2(t) and (s).

Thus, a well-founded case can be considered to exist if the circumstances of the case give rise to a strong and manifest doubt as to the presumption of legality, which is one of the foundations of the enforceability of the administrative act. Therefore, the suspension of the execution of the administrative act constitutes an exceptional situation, in which the court has only the possibility to carry out a summary investigation of the appearance of law, since in the procedure provided by law for the suspension of the execution of the administrative act the substance of the dispute cannot be prejudiced.

Therefore, circumstances likely to create a serious doubt on the legality of the administrative act are: lack of competence of the administrative authority to issue the act, lack of legal basis, declaration as unconstitutional of the G.O. on the basis of which the administrative act was issued, partial modification of the administrative act by the issuing authority or even partial annulment of the administrative act by the superior authority.

However, all the grounds of appeal put forward by the appellants do not fall within the limited factual and legal circumstances referred to above, so that the analysis of the grounds of appeal put forward by the appellants in support of their well-founded case presupposes an examination of the merits of the case and not an analysis of the apparent legality of the contested administrative act.

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 approving the methodological guidelines applicable to the stages of the framework environmental impact assessment procedure cannot be analysed in the context of the summary procedure for suspension of the operation of administrative acts, since their analysis is such as to prejudice the substance of the administrative acts whose suspension is sought in the present case.

The applicants claim that the provisions of the Arhus Convention were infringed in that the technical memorandum was not published on the website, the public notices relating to this 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.

However, if the court were to determine whether or not the provisions of the Arhus Convention had been complied with, that would be tantamount to prejudging the merits of the case, and that situation is incompatible with the specific nature of an application for suspension of the operation of an administrative act based on Articles 14 and 15 of Law No 554/2004 on administrative disputes.

Since the phrase well-founded case implies the investigation of indications of unlawfulness, apparent elements of unlawfulness, the court may not in an application for stay unravel the merits of the case by giving reasons for the stay by referring to the substantive law applicable to the case.

Therefore, the well-founded case cannot be argued by invoking aspects relating to the legality of the administrative act, since they concern the substance of the act, which is to be examined only in the action for annulment.

As regards the criticisms concerning the fulfilment of the condition of imminent damage, as defined in Article 1(1)(s) of Law No 554/2004, the Court also finds that the arguments set out in the judgment under appeal are well founded, since imminent damage is not presumed but must be proved by the person harmed by conclusive evidence.

The appellant-appellant has not adduced any evidence capable of convincing the court of the imminence of material damage which would be difficult or impossible to remove at a later date if the act were ultimately annulled, so as to fall within the exceptional nature of the suspension of the enforcement of the administrative act, in accordance with the nature which the law currently in force confers on that legal institution.

For these reasons, on the basis of Article 496 NCPC and Article 14 of Law 554/2004, the Court will dismiss the appeal as unfounded.

FOR THESE REASONS,

IN THE NAME OF THE LAW

DECIDES:

Dismisses the appeals lodged by the appellants-claimants GREENPEACE CEE ROMANIA, with registered office in sector 2, Bucharest, STR.ING. VASILE CRISTESCU, nr. 18 and ASOCIAȚIA BANKWATCH ROMÂNIA, established in sector 1, Bucharest, BD.DINICU GOLESCU, nr. 41, bl. 6, sc. 1, et. 1, ap. 5, against the civil judgment no. 4190/17.09.2013, pronounced by the Court of Bucharest, Section II of Administrative and Fiscal Litigation, in case no. 17631/3/2013, against the defendants AGENȚIA DE PROTECȚIE A MEDIULUI GORJ, established in TÂRGU JIU, STR. UNIRII, no. 76, County of Gorj and SC COMPLEXUL ENERGETIC OLTENIA SA-SDM TG.JIU-EXPLOATAREA MINIERĂ DE CARIERĂ ROVINARI, established in TÂRGUL JIU, STR.ALEXANDRU IOAN CUZA, no. 5, County of Gorj, as unfounded.

Definitive.

Delivered today, 01.09.2014, in open court.

PRESIDING	JUDGE	JUDGE
Raluca Ioana Carpen	Ovidiu Spînu	Victor Hortolomei

REGISTRAR

Petre Bogdan Bratosin

Red: OS / Tehnored: OS/