

CASE NO. 10543/2/2010

ROMANIA

COURT OF APPEAL BUCHAREST

The VIII SECTION OF ADMINISTRATIVE AND FISCAL DISPUTED CLAIMS OFFICE

**COURT DECISION NO. 3688**

**PUBLIC MEETING SINCE 24.05.2011**

**THE COURT COMPOSED OF:**

**PRESIDENT**

**HORATIU PATRASCU**

**REGISTRAR**

**MARGA PADUREANU**

Pending the administrative action settlement formulated by the plaintiffs: **CENTRE OF JURIDIC RESOURCES and GREENPEACE CEE ROMANIA** in contradiction with the defendant **THE GOVERNMENT OF ROMANIA** and the intervener **MINISTRY OF ECONOMY, COMMERCE AND BUSINESS ENVIROMENT**, having as object "cancellation administrative act".

The parties' discussions took place during the public meeting since 10.05.2011 which were mentioned in the conclusion of the meeting since that date, when the court being in need of time to debate and give the parties the possibility to file written submissions, postponed the sentencing on 17.05.2011 and 24.05.2011 when these were decided:

#### **COURT**

By application of summons registered on 02.11.2011, the plaintiffs: **CENTRE OF JURIDIC RESOURCES and GREENPEACE CEE ROMANIA**, under Art. 1 and 11 from Law 554/2004 regarding the administrative, sued Government of Romania because the decision that you will pronounce, to order cancellation of GD 1069/2007 regarding Romania's approval of the energy strategy for 2007 – 2020, as well as the suspension of the appealed administrative act.

In motivating the application of summons, the plaintiffs showed the fact that the energy strategy of Romania was adopted in violation of GD 1076/2004 for establishing an achieving procedure of the environment evaluation for planning and programs, implementing the EU Directive no. 2001/42/EC (SEA Directive). Also, this decision was adopted in violation of the Convention of Aarhus, ratified by Romania through Law 86/2000 (Convention to which the European Union is itself part, the Convention of Aarhus being implemented in UE through 2003/4/EC Directives regarding access to information and 2003/35/EC regarding the public participation at the environmental decision making, as well as through SEA Directive, above-mentioned) and the Convention of Espoo ratified by Romania through Law 22/2001. According to the alleged acts, Romania had the obligation to issue an environmental opinion before adopting Romania's energy strategy, environmental opinion whose issuance supposed an evaluation of the impact over the environment at which the public from Romania and the neighbors should have participated in accordance with the procedure regulated by the laws mentioned, namely GD 1076/2004 for establishing an achieving procedure of the environment evaluation for planning and programs and 564/2006 regarding the public's achieving framework at the making of certain plans and programs in accordance with the environment.

Directive SEA settles in art. 4, in accordance with the provisions of art. 7, in conjunction with art. 6.4 from Convention of Aarhus, that the environment evaluation together with the public consultation must be made before adoption of the program which presents potential impact over the environment. This thing has not happened, being initiated environmental assessment procedures in 2010, at almost 3 years after entry into force of GD 1069/2007.

Taking into account the content of the energy strategy regarding the development of the nuclear structures (nuclear reactors, landfills, doubling the capacity of the nuclear fuel plant, doubling the capacity of uranium mining, uranium transport and nuclear fuel), as well as arrangement of the Danube River for ensuring the cooling system of the nuclear reactors from Ceranvoda, this program should be subject to environmental assessment – transboundary, according the Convention of Espoo.

The Government of Romania ignored all these international conventions to which Romania is part and the Community Law, namely EU Directives and the decisions of the European Court of Justice regarding the application of these directives, which are obligatory for the member States and for the national courts.

Regarding the suspension of the contested act, it required to be stated that there is a well-documented case, the damage of this strategy appliance is obvious taking into account that the public money is spent under an illegal adopted strategy.

Proving action, the plaintiff requested documentary evidence and examination administration and ordered the defendant to submit documents which led to the adoption of GD 1069/2007 regarding the adoption of Romania's energy strategy.



In Law, the action was founded on the provisions of GD 1076/2004 for establishing an achieving procedure of the environment evaluation for planning and programs, the Convention of Aarhus, ratified by Romania through Law 86/2000, the Convention of Espoo ratified by Romania through Law 22/2001, EU Directive no. 2001/42/EC, DG 564/2006 regarding the public's achieving framework at the making of certain plans and programs in accordance with the environment.

In support of the application of summons, the plaintiffs filed proof of the prior proceedings (page 3 – file) and the appealed decision.

On 28.03.2011, the defendant, Government of Romania, filed a petition through requested dismiss of the action brought by the plaintiffs.

On the petition for suspension of GD no. 1069/2007 regarding Romania's energy strategy for 2007 – 2020, requested by the plaintiffs, discloses that the plaintiffs do not motivate under any aspect this petition. According to the doctrine and the jurisprudence, presumption of legality and reliability enjoyed by the administrative act determines the principle of its execution of office, the unilateral administrative act is itself enforceable. Not to execute the administrative acts, which are issued under the law, means not to execute the law, as a rule of law is inconceivable.

Moreover, in the particular case of the Government decisions, from art. 108 paragraph (2) Constitution of Romania, republished, results that those are issued for the application of laws and ordinances, enjoying the presumption of legality until their cancellation by Court.

The suspension of the administrative acts is an exception which comes out when the law provides it, in the certain regulated limitations and conditions, having the character of a facultative procedural measure without being obligatory for the Court, the suspension can be ordered only after the checking of the conditions provided by art. 14 and proving that it is more appropriate the temporary and provisionally non-application of the administrative act than its application.

Art. 14 from law no. 554/2004 provides that "in duly justified cases and for preventing imminent damage, after notification, under art. 7, of the public authority which issued the act, the injured person may request the competent court to order the suspension of the unilateral administrative act until instance pending, namely in the situation provided by art. 15, until the sentence becomes final and irrevocable.

Therefore, out of the quoted text results that, for a favorable settlement, through the suspension request must be justified the fulfillment of two conditions: the case must be well justified and the damage imminent.

But, in this case to trial, although the plaintiffs had the obligation to motivate the suspension request strictly to the conditions of eligibility prescribed by law, though not proof the cumulative fulfillment of these conditions, the entire argument regarding, in fact, the contents of the litigation.



Also, required to see that, through provisions of art. 14 and 15 from Law no. 554/2004, with subsequent additions, the legislature has established protections for private against damages which hardly could be covered, even if the administrative acts would be cancelled.

In this case, required to note that the plaintiffs are not damaged in any way, and the reasons they invoked are not able to sustain that the Government Decision no. 1069/2007 is not timely, reason for requesting rejection of the suspension petition of the administrative act as unfounded.

About the suspension request of GD no. 1069/2007, it shows that this decision was adopted on the basis of art. 108 from Constitution of Romania, republished and art. 4 paragraph (1) from Energy Law no. 13/2007, with subsequent additions, being adopted by the Executive, as it is shown out of the Explanatory Memorandum which was attached at the project of the administrative act, through taking the project initiated by the Ministry of Economy and Finances, specialized body of the central public administration with attributions and competencies within the regulated field.

In drawing up the act, there have been observed the provisions of Law no. 24/2000 regarding rules of legislative techniques for drafting laws, republished, as well as the ones from the Regulation regarding procedures, at the Government level, for development, approval and submission of the projects of public policies documents, of normative acts and other documents for adoption/approval, regulation approved through GD no. 50/2005, now repealed. The project of the administrative act was approved by the public authorities interested in its application, and also by the Ministry of Justice which according to art. 8 par. (6) from the above-mentioned Regulation, "approves projects of normative acts in terms of legality, closing the sequence of operations from the approval stage".

Also, it is mentioned that the project was endorsed by the Legislative Council with Notice no. 178/07.08.2007.

The energy strategy of Romania between 2007-2020, adopted through GD no. 1069/2007 was developed in a large group of working in which famous institutes in the Romanian energy sector took part: ISPE, ICEMENRG; as well as companies from this field as: (SC Transelectrica SA), National Regulatory Agency in the Energy Field or NGOs.

The project was subject to the public consultation by posting on the site of the Ministry, starting with 12 May 2007, the relevant observations being taken in the final document.

According to art. 2, the necessity of the environment evaluation for "The energy strategy of Romania between 2007-2020" is part of GD no. 1069/2007.

Taking into account that, Ministry of Environment and Sustainable Development, which now is Ministry of Environment and Forests requested the environment evaluation



for "The energy strategy of Romania between 2007-2020", placing the document in the category of those which need the achievement of the Strategy Evaluation of the Environment and this evaluation was decided at the Government level, the management of Ministry of Economy, Commerce and Business Environment has put into practice the decision.

Currently underway the procedure of environment evaluation for plans and programs, for the energy strategy of Romania approved through GD no. 1069/2007.

According to art. 2 par. (1) from GD no. 1069/2007, Ministry of Economy and Finances together with Ministry of Environment and Sustainable Development needed to ensure the environment evaluation regarding the Energy Strategy of Romania for 2007-2020, in accordance with the provisions of GD no. 1076/2004 for establishing the procedure of the environment evaluation for plans and programs.

The consultant selection for the environment evaluation has received some reference terms and an auction procedure. The lack of funds for the environment consultant which must achieve this evaluation according to GD no. 1076/2004 and the deadlines imposed by the legislation for public procurements, as well as the steps taken for starting the environment evaluation (notification to Ministry of Environment and Forests and the making of a inter working group) has made that the deadline specified at art. 2 par. (1) from GD no. 1076/2004 will not be respected.

It is mentioned that SC EPC Environment Consulting won the procurement procedure and the contract for the environment report regarding energy strategy and mine industry finished on 21.09.2009.

As a result of this contract, there has been made an inter working group for completion of the environment evaluation procedure, according to provisions of GD no. 1076/2004 regarding the setting of the environment evaluation achievement procedure for plans and programs – "The energy strategy of Romania between 2007-2020" from which the representatives of Ministry of Environment and Forests are part of.

In accordance with the provisions of GD no. 1076/2004, stage of completion is made by consulting the holder's strategy, the competent authorities for environmental protection and health, the authorities interested in the effects of the strategy implementation, as well as the representatives of the accredited company which won the auction for the development of the Environment report.

The holder's strategy is Ministry of Economy, Commerce and Business Environment. The completion of the process depends on the decisions of the working group and the arising problems, the present final deadline of this contract is June 2011, being extended from the initial one through addendum, this has been made to meet all requirements arising during the working group meetings and the requests of the Ministry of Environment and Forests.



At the meantime, Ministry of Economy, Commerce and Business Environment started the review process of the Energy Strategy taking into account mainly the new legislative packages of EU, namely the review of the prognosis for the evolution of the national energy consume.

To this project, it will be taken into account the conclusions from the Environment Report which could take the working group's observations and it will be approved by Ministry of Environment and Forests. Also, it shows that at the same time with the strategy review will be made a new Strategy Evaluation for the new project.

With the petition, it was submitted the Explanatory Memorandum and the Note of the Legislative Council no. 1178/07.08.2007.

On 28.03.2011 Ministry of Economy, Commerce and Business Environment in accordance with the provisions of art. 49 par. (3) and the next provisions from Code of Civil Procedure, formulated a request for intervention in the interest of the defendant Government of Romania.

Motivating the petition, shows that the interest of Ministry of Economy to require the admission of the request for intervention in the interest of the defendant Government of Romania is a legitimate one, because the strategy's holder is Ministry of Economy, Commerce and Business Environment and in accordance with the provisions of art. 2 par. (1) from GD no. 1069/2007, Ministry with Ministry of Environment and Sustainable Development, now Ministry of Environment and Forests started making the documentation regarding the environment evaluation of the Energy Strategy of Romania for 2007-2020 in accordance with the provisions of GD no. 1076/2004 regarding the setting of achieving of the environment evaluation procedure for plans and programs, but, the final deadline is June 2011.

Also, it is mentioned that, totally sustains the opinions formulated by the defendant Government of Romania through petition, that the complaint is unfounded, as for we require to reject the plaintiffs' petition as unfounded.

In law, the petition was based on the provisions of art. 49 par. (3), art. 51 and the next from Code of Civil Procedure.

By the end of session since 29.03.2011, Court admitted in principle the request for intervention of Ministry of Economy, Commerce and Business Environment in the interest of the defendant Government of Romania.

*Reviewing the acts and the papers of the case, Court finds these:*

Through GD 1069/2007 regarding energy Strategy of Romania for 2007-2020, issued on the basis of art. 108 from Constitution of Romania, republished, and art. 4 par. (1) from Energy Law of Romania for 2007-2010, provided in the annex.



The plaintiff sustained that the Energy Strategy of Romania was adopted in violation of GD 1076/2004 regarding the setting of the environment achieving procedure for plans and programs, which implement EU Directive no. 2001/42/EC and in violation of Convention of Aarhus, ratified by Romania through Law 86/2000, as well as Convention of Espoo ratified by Romania through Law 22/2001, in that, on the one hand, the appealed GD was issued without consulting the public, and on the other hand, there was not made first an evaluation of the impact on the environment, Romania having the obligation to issue an environment notice.

According to art. 5 from GD no. 1076/2004 regarding the setting of the environment evaluation achievement procedure for plans and programs – “1) The environment evaluation is made for the plans and programs which can have significant effects on the environment, according to par. (2) – (4).

(2) Subject to the environmental evaluation are all the plans and programs which:

a) prepare for the next fields: agriculture, forestry, fishing and aquaculture, energy, industry, including extraction of mineral resources, transport, waste management, water management, telecommunications, tourism, regional development, planning and town planning and which set the frame for issuance of the next unique agreements for the projects which are presented in annex 1 and 2 to DG no. 918/2002 regarding the setting of the frame-procedure of impact evaluation on environment and for the approval of the private public projects list subject to this procedure; or which

b) thanks to the potential effects affect areas of special avifauna protection or the special areas of conservation regulated according to Government Emergency Ordinance no. 236/2000 regarding the regime of the protected natural areas, conservation of natural habitation, flora and fauna, approved with changes and completions through Law no. 462/2001.

(3) They are subject to environmental evaluation only if they can have significant effects on the environment: a) the plans and programs provided at par. (2), which determines the use of small surfaces at local level; b) minor changes at plans and programs provided at par. (2); c) the plans and programs, others than the ones provided at par. (2) which establish the frame for the issuance of the future unique agreements for projects.

(4) The decision on the existence of the potential significant effects on the environment of the plans and programs provided at par. (3) is made through an examination case by case, according to art. 11.

In this case, we are not in the situation of approving or adopting concrete plans and programs, in the sense of the mentioned dispositions, for an evaluation to be made, through the appealed GD, the plaintiff simply adopted an overall strategy for a period of time between 2007-2020, establishing strategic objectives and measures for achieving them, performing a review of the international context in the energy field.



According to art 2 from GD no. 1069/2007, "(1) In 90 days since entry into force of this decision, Ministry of Economy and Finances together with Ministry of Environment and Sustainable Development will assure the elaboration of the environment evaluation regarding Energy Strategy of Romania for 2007-2020, in accordance with GD no. 1076/2004 regarding setting of the environment evaluation procedure for plans and programs.

(2) The conclusions of the environment evaluation developed according with par. (1) will be part of the Energy Strategy of Romania for 2007-2020.

So, it results that the defendant took into account the development of an environment evaluation which forms an integral part from the Strategy Energy of Romania for 2007-2008, with respecting GD no. 1076/2004, each plan and program, each plan will be evaluated, according to the defenses from the petition, the environment consultant was selected as a result of a public auction, this one will make the environment reports.

According to art. 2 par. C from GD no. 1076/2004, by plans and programs means the plans and programs, including the ones co-financed by European Community, and all their changes which: (i) are developed and/or adopted by an authority at national, regional or local level or which are prepared by an authority for adopting, through a legislative procedure, by Parliament of Government and (ii) are required through legislative, regulation and administrative provisions.

Also, according to art.3 from the same normative administrative act, the Environment evaluation is performed during the plan or program's preparation and it is finished before being adopted or sending it in the legislative procedure, and the procedure is performed in stages, namely a) the stage of the plan and program's placing in the environment evaluation procedure; b) stage of plan or program's project completion and achievement of the environment report; c) stage of environment report quality review.

The procedural stages run according to the provisions of art. 9-11 from GD no. 1076/2004 and end with the competent authorities' issuance of a decision through which it will be settled if the plans and the programs provided at art.5 par.(3) can have significant effects on environment, through a review case by case, taking into account the relevant criteria provided in annex 1, considering the public's comments and proposals, according to art. 9 par. (4) and based on the consultations carried on within the Committee from art. 10 par. (2).

So, through the appealed GD, the defendant has not established plans and programs in the showed procedure but established a principle character for Energy Strategy of Romania for 2007-2010, followed as per plan and/or program to be performed the showed procedure which will be finished with the issuance of an establishment Decision of in the plans and programs can have significant effects on the environment.



The environment evaluation is necessary during the elaboration of the plans and programs, when browsing the three showed stages and the appealed GD provides this obligation in charge of the Ministry of Economy and Finances and Ministry of Environment and Development.

Regarding public consultation, according to Section 6 from Explanatory Memorandum, the project of the Strategy was posted on the site of Ministry of Environment and Development starting with 12.05.2007, there were organized consultation meetings to which took part representatives of the politics parties, representatives of other ministries, representatives of the energy sector, private companies and state, research and projection institutes, representatives of higher education institutes, representatives of audio-visual media, representatives of non-governmental organizations, receiving 53 written observations, being taken the ones regarding the texts' improvements, the statistics' completions.

The public consultations which the plaintiff referred to aim the public participation in the environment decisions' making, *but through this GD, as indicated, not made an Environment Decision, according to art. 9 par. 4 from GD no. 1076/2004*, during the placing stage, the public may submit comments and proposals in written regarding the first version of the proposed plan or program and its potential effects on the environment, according to art. 29 par. (2), which they return to the headquarters of the competent authority for environment protection.

Also, according to art. 11 par. 2 from Decision, in the frame achieving there are taken into account the comments and proposals received from the public, according to art. 9 par. (4) and according to art. 12, competent authorities for the environment protection inform the public about the motivated decision of the placing stage, by posting on their site, in 3 days since the decision making. The decision is published in media by the holder.

(2) The public may submit comments regarding the placing stage decision which are sent in written to the competent authority for the environment protection in 10 days since the announcement publishing.

(3) The competent authority for the environment protection may reconsider the decision regarding the replacing stage, based on the public justified proposals during the consultations from the special organized Committee, in 15 days by the deadline provided at par. (2). The final decision, motivated, shall be made public in 3 days by posting on own website. The final decision will be published in media by the holder.

This procedure will be covered later, during the procedure of preparation and adoption of each plan and/or program, regarding this GD, the defendant consulting the public as mentioned.

To these considerations, Court will reject the complaint regarding the cancellation of GD no. 1069/2007 as unfounded.



Regarding the request for suspension, Court notes that according to art. 14 par. 1 from Law no. 554/2004, of administrative, *in well justified cases and for the prevention of an imminent damage, after notification, in terms of art. 7, of the public authority which issued the act or the higher authority, the injured person may require to the competent Court to order the suspension of the unilateral administrative act execution until the Court of first instance pronouncement. If the injured person does not enter the action for annulment of the act in 60 days, suspension terminates of law and without any formality.*

On the substantive provided in art. 14, about the well justified case and the imminent damage, Court notes that according to art. 2 par. t from Law no. 554/2004, *justified case means – circumstance surrounding the facts or law, which may produce a serious doubt regarding the legality of administrative act, and in accordance with art. 2 par. 1 lit. s, imminent damage means – foreseeable future pecuniary or, as appropriate, foreseeable serious disruption of the functioning of a public authority or a public service.* The two background conditions must be fulfilled cumulative.

The suspension of the administrative acts is an efficient procedural instrument at the issuing authority or court's disposal in order to respect the principle of legality, as long as the public authority or the judge is in an evaluation process, legally, of the appealed decision, the solicited jurisdictional authority to make provisory protection measures which can be offered specially when the administrative act is likely to cause serious damage, difficult to be solved and if there is any juridical argument, apparently valuable regarding the legality of the administrative act."

As for the first condition, Court reviewed the background of the legality of the appealed normative administrative act, considering as unfounded the plaintiff's presentations, presentations which aimed at the complaint regarding the suspension.

In this case, not even the condition of the imminent damage is not fulfilled, in the context in which the appealed GD is not likely to cause damages by itself, it will be followed by administrative acts which will cause effects of administrative law regarding each project/plan.

To these considerations, Court will also reject the complaint regarding the suspension of execution of GD no. 1069/2007 till the action will become irrevocable, formulated on basis of art. 14-15 from Law no. 554/2004, as unfounded.

Consequential, Court will admit the accessory petition formulated by Ministry of Economy, Commerce and Business Environment.

**FOR THESE REASONS**

**IN THE NAME OF LAW**

**DECIDES:**



Rejects the petition formulated by the plaintiffs **CENTRE OF JURIDICAL RESOURCES** with headquarters in Bucharest, str. Arcului no. 19, District 2, and **GREENPEACE CEE ROMANIA** with headquarters in Bucharest , str. Major Ion Coravu no. 20, District 2, in contradiction with the defendant **GOVERNMENT OF ROMANIA** with headquarters in Bucharest Piata Victoriei no. 1, District 1 and the intervening **MINISTRY OF ECONOMY, COMMERCE AND BUSINESS ENVIRONMENT** with headquarters in Bucharest Calea Victoriei no. 152, District 1 as unfounded.

Admits the accessory intervening petition formulated by **MINISTRY OF ECONOMY COMMERCE AND BUSINESS ENVIRONMENT**.

The appeal within 15 days from notification.

Rendered in public hearing today, 24.05.2011.

**PRESIDENT,**

**REGISTRAR,**

**PATRASCU HORATIU**

**PADUREANU MARGA**

I, the undersigned, **Gavrilă Adriana**, authorized translator, holder of the licence no. 9259/2003, issued by Ministry of Justice, hereby do certify the accuracy of this translation with the text of document in the Romanian language which was endorsed in accordance with the art. 102 of law 35/1995.

Authorized translator,

