File no. 49156/3/2009

ROMANIA
APPEAL COURT BUCHAREST
SECTION VIII ADMINISTRATIVE AND FISCAL CLAIMS OFFICE
DECISION NO. 725
Public meeting from 31.03.2011
The court formed of:
PRESIDENT: COSMA CARMEN VALERIA
JUDGE: PATRAS BIANCA LAURA
JUDGE: CIRJAN RALUCA MARIA
CLERK: SIMION ELENA

Pending - the verdict concerning the appeal formulated by the **recurrent-defendant Ministry of Economy, Commerce and Business environment** against the civil sentence no. 1040/29.03.2010 pronounced by the Bucharest Court Section IX Administrative and Fiscal claims office, in the file no. 49156/3/2009 in opposition with the **claimant Greenpeace CEE Romania 87 through mandatory - Juridical Resources Centre**.
The debates took place in the public meeting on 10.03.2011, being mentioned in the meeting final from that date which is included in the current civil sentence when, the Court, needing time to evaluate the file documents and decide, postponed the decision for 17.03.2011, 24.03.2011 and 31.03.2011 when it decided the following:

the COURT

On the current appeal,
Through the civil sentence no. 1040, the Bucharest Court Section IX Administrative and Fiscal claims office has admitted partly the complaint formulated by Greenpeace CEE Romania 87 by mandatory -CENTRE OF JURIDICAL RESOURCES, in opposition with the defendant- Ministry of Economy, Commerce and Business environment; has obliged the defendant to communicate to the claimant the demanded public information by demand no. 135/02.11.2009, with the sanction of penalties of 100 lei per day of delay, in favour of the claimant and has rejected the demand concerning the payment of moral prejudices as unfounded.
In order to pronounce this solution, the Court has understood the following:
Through the formulated action, the reclaiming institution-GREENPEACE CEE ROMANIA 87, through mandatory - Juridical Resources centre has demanded the court to oblige the defendant- Ministry of Economy, Commerce and Business environment to send it the information of public interest demanded through the formulated demand from 2.11.2009, the obligation to pay penalties of 100 lei for each day of delay, as well as the obligation for the defendant to pay 1 leu as moral prejudices.
In the motivation of the complaint, the claimant has shown that, on 2.11.2009 it demanded the defendant the data about the 4 locations being analysed for the building of the second nuclear plant in Romania, what is the water quantity in the Somes river that

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can be used as cooling agent as well as what capacity could have the new nuclear plant located on the Somes river.
The claimant has also shown that, on 17.11.2009, the defendant communicated an official document, claiming that such information would not be public, on the basis of the art. 12 par.(1) lit. b and c from the Law 544/2001, but, despite all these, the defendant recognises the obligation of having transparent procedures in such situations, but ignores the dispositions of the Aarhus Convention, ratified by Romania by Law 86/2000 and those of the Espoo Convention, ratified by Law 22/2001, meaning that, informing and consulting the public must be done before the project is finalised and the decision is taken. The claimant shows that the public must be informed about all the location studies of a new nuclear plant, pleading in this matter the SEA Directive of the EU, transposed through Government Decision no. 1076/2004.
Also the following fact has been criticized - by its answer, the defendant is contradicting itself as, on one hand, it shows that the technology used will be one of the IVth generation, which means that the technologies which could be used are already known and, on the other hand, shows that -depending on the used technology- the water quantity necessary for cooling will be set up, in the case a nuclear plant is built near a river or if the possible IVth generation technologies are already known, estimations concerning the water quantity necessary for a new nuclear plant can be done in conformity with that for which location studies are being done. More than that, it is shown on one hand that location studies cannot be done unless it is known what nuclear plant is to be built, the IVth generation technologies being completely known, they already existing.
In the justification for the delaying penalties, provided by art. 18 par.(5) of the Law 554/2004, the claimant has mentioned the mala fides of the defendant, who has passed over the term of 5 days of communicating its refuse and has proved the intended infringement of the Community and internal legislation.
Concerning the demanded moral prejudices, the claimant has shown that the illicit fact to refuse illegally the communication of information represents an infringement of art. 31 and 35 of the Romanian Constitution.
In fact, the claimant has pleaded the dispositions of Law 544/2001, the Romanian Constitution and Aarhus Convention.
To prove the demand, the proof with interrogatory and documents has been solicited. The demand addressed to the defendant (f. 3,7) and the defendant's answer for the document no. 135/02.11.2009 (f.4-5) have been handed in as copies in the file.
For its defence, the defendant has handed in a joinder of issue by which he has solicited the rejection of the demand for prosecution as being groundless, motivated by the fact that there was not a communication refusal but that the defendant answered the claimant very clearly, explaining that the solicited information did not exist and does not exist and that currently there are 103 analysed locations so no decision has been taken yet concerning the final location, no decision has been taken concerning the location of the nuclear plant on the Somes river and that the cooling water quantity depends on the used technology, that the capacity of the plant is not final yet and the list with the 103 locations analysed till now are service secrets.

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The defendant has said that when the location is known they will announce the public and the activities of informing and consulting provided by the legislation in force would be done and after that, they would start to build the plant.
Also, it has shown that the answer sent to the claimant is pretty clear, thus, the claimant's affirmations concerning the opposing arguments of the defendant are wrong.
The building of a second nuclear plant in Romania is the theme of alternative studies to develop the National Energetic system with studies concerning the implementation of clean technologies for coal and the evaluations done at several locations have concluded that – the technologies known by the generations III and III+ can be used- pretty diverse concerning the units and cooling water necessity but the IV generation technologies are not well known so the defendant cannot say that this technology would be used at the new plant.
Concerning the moral prejudices and comminatory prejudices solicited, the defendant has shown that the claimant has to prove the prejudices and the court has to analyse if the claimant has had real prejudices as the quantification of the data represents a complex process and with criteria linked to the intruded right and its gravity and, in report with the current situation, there is no refuse but an impossibility to answer as the defendant doesn't have this information.
On 26.03.2010, the defendant has put in the file a point of view through the Spokesman and public relations department (f.23-24).
Analysing the documents of the file, the court has understood that through the demand no. 135/02.11.2009 (f.4-5,7), the claimant has solicited the defendant the information about the four analysed locations for building the second nuclear plant in Romania, what is the water quantity in the Somes river which can be used as cooling agent as well as what capacity can have the new nuclear plant located on the Somes river.
From the defendant's official document, one can see that it has sent an answer to the claimant in which it shows that the information solicited is not included in the Law 544/2001 provisions, in conformity with art. 12 par.91, lit. b,c, the technical-economic data (social, politic of this country) referring to a new nuclear plant in Romania being secret and not complete yet till a certain decision is taken while the Economy ministry has made public the necessary data on its site.
In this answer, the defendant explains that the building of a second nuclear plant in Romania is the theme of alternative studies to develop the National Energetic system with studies concerning the implementation of clean technologies for coal as well as others, realised or not –through the sectoral plan of research-development of the energetic sector, that no decision has been taken concerning the new location, that such decision should be based on the market conditions and obligations of the EU integration, must be done using a strategy and action plan inside a long term economic development plan of Romania, that the EU and national legal background are very restrictive. Thus the defendant has presented the legal background linked to the solicitation concluding that the decision process must be completely transparent as both the Parliament and Government are involved in this process and the technology will involve a pre-analysis inside CSAT as well as of several locations and technology before the legal process begins so the identification/nomination of a certain location has no importance in this stage.

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The defendant has shown in the conclusions that the location study is not finalised, only the 103 locations being certain; this study is secret; the location will be set up depending on the important elements for the locations (technology, private investors' opinion); once the location is known, the information will be announced to the public and they will inform and consult the public in conformity with the laws and,concerning the source of the information demanded by the claimant, Mediafax, it shows that no decision about a nuclear plant located on the Somes river is taken, in such a situation, the water quantity for cooling will depend on the technology and the power and parameters have not been set yet.

The court has understood that the complaint is partly correct as the defendant has not answered the claimant in conformity with Law 544/2001 and has not communicated the public interest data solicited by the latter.

In conformity with art. 2 lit. b of Law 544/2001 regarding the free access to public interest information, public information is *any information concerning the activities resulting from the activities of a public authority or institution,* no matter what the form or basis of expression of the information is.

In conformity with art. 1 of Law 544/2001, the free access to public interest information cannot be restricted and art. 6 par.(1) mentions that anyone can solicit and obtain from authorities this type of information as the law mentions that the authorities and institutions are obliged to give this public information in written or orally - par. (2).

The court has seen that the defendant shows a contradictory behaviour inside its own defence. Thus, on the one hand it says that the information is excepted from the citizens' free access, in conformity with art. 12 lit.b,c of Law 544/2001 but, on the other hand, explains that the demanded information does not have a definitive status yet, a location for the new nuclear plant not being set up - but not denying that there are analyses and explorative studies, admitting that there is a 'short list' with 103 certain locations but mentioning that it will announce the information when the definitive location is set up while in the court it has said that it cannot offer these pieces of information as the ministry does not have them.

Thus, the claimant has shown that the defendant's attitude shows a clear refuse to communicate some public information.

Thus, the correctness of the claimant's demand is appreciated by the court by reporting to the law 544/2001 and not to the situation when the defendant has its own opinions about the relevance of the data, respectively the identification of a certain location, in the stage he showed to the claimant.

The information demanded by the claimant is public as it concerns the activity of the defendant.

Thus, in conformity with art. 2 pct. 3 of the Aarhus Convention from 25.06.1998, concerning the access to information, public's participation to taking the decisions and access to justice in environment problems, ratified by Romania through Law 86/2000, environment information means any written, visual, audio, electronic information or in any material form concerning the status of the environment elements, such as air and atmosphere, water, soil, land, landscape and natural areas, biological diversity and its components, including genetically modified organisms and the interaction between these; factors such as: substances, energy, noise and radiation activities or measures including administrative measures, environment agreements, policies, legislation, plans and

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programmes which affect negatively or could affect the environment elements, the cost-benefit analyses or other analyses and economic prognoses used in taking the environment decision, as well as the status of human health and safety, the human living conditions, the cultural areas and buildings as well as the way these are or can be affected by the status of the environment elements or factors, activities or measures included in the factor category.

In conformity with the provisions of art. 1 par.(3) of HG 1076/2004 concerning the setting up of the procedure to realise the environment evaluation for plans and programmes, which transposes Directive 2001/42/EC of the European Parliament and Council concerning the evaluation of some effects of some plans and programmes on the environment ("SEA Directive"), *the environment evaluation is an integrative part of the procedure to adopt plans and programmes*, defined in art. 2 lit. b, as *the drawing up of the environment report, consulting the public and public authorities interested by the effects of the implementation of plans and programmes, taking into consideration the environment report and the results of these consultations in the decision-taking process and ensuring the informing about the taken decision.*

Also, in conformity with art. 5 of the same normative act, the environment evaluation is done for the plans and programmes which can have important effects on the environment, which:

a) are prepared for the following fields: agriculture, forestry, fishing and aquaculture, energy, industry, including the activity of extracting mineral resources, transport, administering waste, administering waters, telecommunications, tourism, regional development, territory design and urbanism or using lands and which set up the background for issuing the future unique agreements for the projects which are provided in annexes no. 1 and 2 of HG 918/2002 concerning the setting up the procedure - background of evaluating the impact on the environment and for the approval of the list of the public or private projects which have undergone this procedure.

In Annex no. 1 of HG 918/2002, which includes the list of projects which have undergone the evaluation of the impact on the environment, at point 3.2, can be found "Nuclear plants and other nuclear reactors, including destroying and un-assembling of these or reactors (excepting the research machines to produce and converse fissionable and radioactive materials, whose maximum power does not pass over 1 kW continuous thermic power)"

Interpreting logically these dispositions, the court has understood that the plan and programmes respect the conditions mentioned in HG no.1076/2004 and HG 918/2002 so that the procedure for environment evaluation continues to be included in its task(duty) meaning that these plans have to undergo the procedure steps regulated by the normative act in the conditions of the law.

The court has understood that the procedure to realise the environment evaluation for plans with significant effects on the environment such as the plan to locate a nuclear plant, involves two different steps: the one for framing, finalising the project for plan or programme and realising the environment report, then the analysis of the report quality and taking the decision of implementing the plan – steps which devolve obligations upon the public authorities in view of informing and consulting the public.

The defendant, as titular of the plan or programme is obliged from the 'framing' stage to notify in writing the competent authority for the environment protection and inform the

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public about the initiation of the process to draw up the plan or programme and realisation of its first version, by repeated announcements in mass-media and by putting it on its own internet site (art. 9 of HG 1076/2004) and the public can formulate in written commentaries and proposals concerning the first version of the plan or programme proposed and the possible effects of this on the environment, which he sends to the headquarters of the competent authority for the environment protection.
In conformity with art. 29 of HG no.1076/2004, in the 'framing' stage the titular of the plan or programme publishes in mass-media twice, with a three day break and announces on its own internet site the drawing up of the first version of the plan or programme, its nature, the start of the 'framing' stage, the place and timetable for consulting the first version of the plan or programme and the possibility to send in writing commentaries and suggestions at the headquarters of the competent authority for the environment protection.
Also, in conformity with art. 30, the responsibility of involving the public in the stage which finalises the plan or programme project and the realisation of the environment report is the titular's who is obliged to publish in mass-media twice with a three day break and put it on its own internet site the availability of the plan or programme, the finalisation of the environment report, the place and timetable for consulting these at the titular's headquarters and the possibility to send in writing commentaries and suggestions at the headquarters of the competent authority for the environment protection in 45 days from the date of the publication of the last announcement.
In this sense, the court has stated that the argument of the defendant cannot be taken into consideration, concerning the idea that after the location study is finalised, it will be published as it is obvious that in such a moment the consultation of the public becomes formal and superficial, producing serious infringements to the right to environment protection and the objectives of the environment community policy the way they are provided in art. 6 - CE Treaty.
For these reasons, ascertaining the unjustified refusal of the defendant to communicate the solicited information, the court obliges him to communicate the information, under the sanction of delaying 100 lei/day penalties, in favour of the claimant in conformity with art. 18 par. (5) of Law 554/2004.
Referring to the moral prejudices solicited the Court considers that the conditions provided by art. 22 in Law 544/2001 are not met, while the claimant has estimated the prejudice as 01,00 lei but has not proved it or the connection between the defendant's refusal and the prejudices has not been proved. We appreciate that, in conformity with art. 1169 Civil Code, with report to art. 998-999 (the same code), the claimant had the obligation to prove, together with the guilt of the defendant, this fact as well as the connection between prejudice and the fact itself.
Not having in the file sufficient proof in this matter, the Court has rejected the demand concerning the moral prejudices as unfounded.
In the appeal argumentation, they have mentioned that the decision contested is not correct and legal as the primary court has misinterpreted the legal act and the documents in the file, which has led to a change in the nature and meaning of these.
Thus, the court has wrongly understood that the ministry had refused to communicate the claimant the solicited data and that, although they had the obligation to guide it, these aspects have been ignored.

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Consequently, they have solicited to take these aspects into consideration:

- the ministry did not refuse to answer the claimant but they couldn't offer the solicited data, because, like they mentioned before in their answer and lawsuits including the one on 17.11.2009, there were 103 localities which were being analysed and not just 4 as the claimant had mentioned and the court had understood;
- for the building of the new nuclear plant technologies known at present could be used, meaning technologies of III and III+ generation; that these technologies are pretty different concerning the power of units (MW) as well as concerning the cooling water necessity;
- currently, on the basis of these technologies, is developed a new generation of technologies, meaning the IV generation;
- as the technologies of IV generation are not completely known, one cannot state that the technologies of IV generation will be used in the new nuclear plant;
- a final decision has not been taken concerning the final location of the new nuclear plant, which will be built on the Romanian territory, issue about which no concrete answer cannot be given.

Consequently, it has been solicited to take into account that the solicited information on 17.11.2009 were included in the field of the Law 182/2002 concerning the protection of classified information with the subsequent modifications and completions; that later was un-securitised only the name of the 102 locations that had been analysed, that at the moment there is no final location where the new nuclear plant in Romania will be located.

The claimant has not formulated a joinder of issue.

The appeal is funded.

Examining the documents and papers of the cause in report with the presentations of parts and the legal provisions, the Court ascertains the incidence of the reason for appeal provided by the dispositions of art. 304 pct. 9 C.pr.civ. and is to admit the appeal formulated for the reasons that are mentioned:

It is true that the claimant has solicited the ministry on 2.11.2009 the following public interest information:

- which are the 4 locations being analysed in order to build the second nuclear plant in Romania;
- which is the water quantity in the river Somes which can be used as cooling agent;
- what capacity can have the new nuclear plant located on the Somes river;

Also, it is true that by the Official document sent by the public authority to the claimant on 17.11.2009, the following information was sent:

- there are currently 103 localities which are being analysed and not just 4 and no decision concerning the final location has been taken;
- referring to the water quantity, they have said that no decision of building the nuclear plant on the Somes river has been taken till present and the quantity of the cooling water will depend on the technology used, thing which has not been set up yet;

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- finally, referring to the data concerning the capacity, they have said that not all data are known concerning the location and technology which will be used, they cannot speak of a decision which has not been taken yet.

Consequently, the Court notices that the problem that has to be solved here has no connection with the *public or not public character* of the solicited information but, if at this moment, the ministry **has the final information** which can be published for the interested people.

Thus, the Court considers that the public authority has not done any research and analysis which would lead to the finalisation of the current project and a decision, materialised in information which, in conformity to legal provisions, must be communicated and discussed with the public.

Meaning that, the public authority is still in the intention period, of making plans for a project that has not been yet finalised and which must be discussed, analysed and finalised.

On the other hand, the term 'finalised project' must not be understood as that - from that moment on, the work will start and that the project will not be discussed with the public but as that at that moment the authority has not reached a fundamental conclusion for the project to be able to be discussed by the public.

To understand otherwise means to 'disturb' the authority decision act, which is not permitted by laws.

So, as long as the ministry is not capable to reach a conclusion on this project, one cannot demand or impose to make a public debate about 'something' that is not born yet.

Thus, for the arguments exposed, the conclusion of the first court is wrong which says that when the authority takes any final decision the public debate is useless and meaningless because people must make the difference between the elaboration stage and the finalisation of the project and only after the end of this stage the project will be made public.

The Court understands that concerning the owned information, the ministry has answered to the claimant's solicitations so that we cannot consider it has refused with no reason, reason for which on the basis of the art. 312 par. 1 C.pr.civ. it will approve the appeal; it will modify partially the sentence meaning that it will reject the main demand as being unfounded.

FOR THESE REASONS
IN THE NAME OF THE LAW
DECIDES

Approves the appeal of the defendant **Ministry of Economy, Commerce and business environment**, with the headquarters in Bucharest, sector 1, Calea Victoriei no. 152 against the civil sentence no. 1040/29.03.2010 pronounced by the Bucharest Court Section IX Administrative and fiscal claims office in the file no. 49156/3/2009 in contradictory with the **claimant – Greenpeace CEE Romania 87 by mandatory - Juridical Resources Centre**, with the headquarters in Bucharest, sector 2, str. Arcului nr. 19.

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It modifies partially the sentence meaning that it rejects the main demand as being unfounded.

It maintains the rest of the dispositions.

Irrevocable

Pronounced in public meeting, today, 31.03.2011.

PRESIDENT	JUDGE	JUDGE
Cosma Carmen Valeria	Patras Bianca Laura	Cirjan Raluca Maria
		CLERK
		Simion Elena

I, the undersigned, Adriana Trifan, sworn translator with the authorization number 14112, do certify the accuracy of this translation with the text of the original document in the Romanian language.

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