- Translation from Romanian -

Case file no. 18773/3/2009

ROMANIA
COURT OF APPEAL BUCHAREST
VIII.th DEPARTMENT FOR ADMINISTRATIVE AND FISCAL CONTENTIOUS MATTERS

RULING IN CIVIL MATTERS NO. 1932
Public session from September 20th, 2010

The Court composed of:
CHAIRMAN: HORTOLOMEI VICTOR
JUDGE: DAVIDOIU GEORGIAN
JUDGE: GRECU GHEORGHE
CLERK: IANUS CERASELA DANIELA

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Pending the adjudication of the appeal formulated by the petitioner-defendant **MINISTRY OF ECONOMY, COMMERCE AND BUSINESS ENVIRONMENT** against the judgment in civil matters no. 2722/October 14th, 2009, delivered by the Bucharest Tribunal – IX.th Department of Administrative and Fiscal Contentious Matters in the case file no. 18773/3/2009 contradictory to the respondent-plaintiff **GREENPEACE CEE ROMANIA 87 THROUGH THE LEGAL RESOURCE CENTRE.**

The subpoena procedure is lawfully fulfilled.

The debates took place in the public session held on September 13th, 2010, being recorded by the session conclusion from that date, which forms an integral part of this ruling, when the Court, in need of time to deliberate, had postponed the delivery on September 20th, 2010, when it ordered the following:

THE COURT

Deliberating on the case it ascertains the following:

Through the action registered on the roll of the Bucharest Tribunal – IXth Department of the Administrative and Fiscal Court under no. 18773/3/2009 on May 5th, 2008 the plaintiff GREENPEACE CEE ROMANIA 87 has requested contradictory to the defendant MINISTRY OF ECONOMY the latter's coercion to communicate to the plaintiff the public interest information requested through the application dated March 24th, 2009 under the sanction of delay penalties in amount of 100 lei/day of delay and the defendant to be coerced to pay moral damages in amount of 1 lei to the plaintiff.

Within the in fact reasoning of the action exempted from stamp tax according to the provisions of the Law no. 544/2001, the plaintiff has evidenced that on the date of March 24th, 2009 it had requested to the defendant to communicate to it the list of places that had been assessed for the building of new nuclear power plants in Romania, the exact location of the 10 possible sites, the exact location of the two sites mentioned to be preferred, a copy of the official decision that stipulates this choice, all legal documents on the choice of these two sites, public interest information on the grounds of the Law no. 544/2001. It has been pointed out that the defendant did

not provide the requested public interest information, in which case it has violated the obligation stipulated by article 7 under the Law no. 544/2001, for which reason it has caused a prejudice to the plaintiff through the psychological sufferings, because the defendant has brought about a feeling of frustration, of inferiority to the plaintiff, the latter being humiliated by the defendant who has disregarded and ignored it.

By law, the action was grounded on the provisions of the Law no. 544/2001.

In proving the plaintiff has submitted to the file the application for the public information communication registered under no. 10198/March 30th, 2008.

The defendant MINISTRY OF ECONOMY, through the statement of defense, invoked the objection of the preliminary procedure lack and the tardiness objection. On the merits of the case it pointed out that the study regarding the nuclear locations had not been finalized, it having to be fulfilled also in agreement with the International Atomic Energy Agency and at present the locations for the emplacement of new nuclear power plants in Romania have not been established.

The proof by documents has been permitted in the case according to art. 167 paragraph 1 under the Civil procedure code and it has been produced.

Through the judgment in civil matters no. 2722/October 14th, 2009 the objection of the preliminary procedure lack and the tardiness objection have been rejected, admitting the action by coercing the defendant to communicate to the plaintiff the information requested via the application dated March 24th, 2009 under the sanction of paying comminatory damages in amount of 100 RON/day of delay, the defendant being coerced at the same time to pay to the plaintiff the amount of 1 RON moral damages.

In the reasoning, the court of first instance has apprehended the following considerations:

On the grounds of art. 137 paragraph 1 under the Civil procedure code, the court has prevalently analyzed the procedure objections and the ones on the merits.

Deliberating on the objection of the preliminary procedure lack, the court considers that it is groundless because, according to art. 22 under the Law no. 544/2001, for the refusal to communicate information a court action can be formulated directly, thus this article stipulates „In case that a person considers itself damaged in its rights, stipulated by this law, it can file a complaint to the administrative court department within the tribunal in which territorial range it resides or in whose territorial range the public authority or institution has its headquarters. The complaint will be made within a term of 30 days from the expiration date of the term stipulated under art. 7". Thereby, the special law prevalently applies towards the general law and the law 544 does not stipulate the compulsoriness of formulating a preliminary complaint, as it is defined in art.7 under the law 554/2004. On the other hand, there is no administrative document against which a preliminary complaint can be formulated, but a notification for a disciplinary action against the person designated with a view to the issuance of the answer (art. 21 under the law 544/2001), so that the defendant confuses the preliminary complaint – graceful appeal – with the disciplinary notification procedure stipulated by the law 544.

That being the case, the court has rejected the objection of the preliminary procedure lack as ill-founded.

Towards the action's tardiness objection, the court apprehends that this objection is also groundless for the following considerations:

Art. 22 stipulates that a complaint is being formulated in 30 days from the expiration of the legal term of 30 days stipulated by art. 7. Thus, from the application's submission date the defendant had a term of 30 days to communicate the answer to the application or to communicate the reasoned refusal of non-communication within 5 days. In this case, the defendant didn't communicate any answer within 5 days, so that the plaintiff has waited the legal term of 30 days to receive the answer. From the expiration of this 30 day term, the plaintiff has the 30 day term stipulated by art. 22 under the law 544. Therefore, the court apprehends that from the application

formulation date March 24th, 2009 and until the action formulation date May 5th, 2009 the 60 legal days for the prescription of the material right to action did not pass, for which reason it rejects this objection as groundless, too.

Analyzing the file's documents and works, on the merits, the tribunal apprehends the following:

According to the Law no. 544/2001 on the free access to public interest information, any person has the right to request and to obtain public interest information from the public authorities and institutions, and the public authorities and institutions are obliged to ensure to the persons, upon their request, the public interest information requested in writing or orally.

In the light of the principle established by art. 31 under the Constitution of Romania, the person's right to have access to any public interest information cannot be restricted and the public authorities, according to their competences, are obliged to ensure the accurate information of the citizens on the public activities and on their problems of personal interest.

Likewise, according to art. 52 under the Constitution of Romania, the person damaged in one of its rights by a public authority through an administrative act or through the non-resolution of an application within the legal term is entitled to obtain the acknowledgement of the alleged right or of the legitimate right, the annulment of the act and the damage recovery.

In accordance with art. 2 under the Law no. 544/2001, by public interest information it is understood any information that regards the activities and/or that results from the activities of a public authority or institution, regardless of the support, the form or the expression manner of the information.

The information requested by the plaintiff through the application dated March 24th, 2009, as well as the communication of a copy of the official decision that stipulates this choice, all legal documents for the selection of these two places concern acts resulted from and/or produced in the defendant's activity and are being framed in the category of public interest information, meant to be disclosed to the citizens, not being part of the information category listed in art. 12 under the Law no. 544/2001, information to which citizens cannot have an unrestricted access.

The court ascertains that the plaintiff's application meets all conditions stipulated by art. 6, paragraph 3 under the Law no. 544/2001, that the information requested by it is of public interest in the meaning of art. 2, letter b under the Law no. 544/2001, it results from the defendant's activities of public authority, not being framed in any of the objections stipulated by art. 12 under the same law, that the given answer is an unjustified refusal of communicating the information and documents, for which reason, based on articles 1, 7 and 22, paragraph 1 and 2 under the Law no. 544/2001 related to articles 1, 10 and 18 under the law 554/2004, to art. 31 under the Constitution of Romania and to art. 10 under the European Convention on Human Rights (ECHR), is going to oblige the defendant to communicate the requested information in writing to the plaintiff.

Moreover, the tribunal appraises that there are no arguments for concluding the claim regarding the moral damage as groundless. Thereby, the tribunal also takes into consideration the praxis of the High Court of Cassation and Justice, this court establishing that "Even if the request has been solved positively, the guilty non-communication of the answer within a reasonable term to the requesting person, through the direct prejudice caused to it, entitles the granting of reparations under the form of moral damages, on the grounds of the provisions of art. 998 Civil Code" (the decision no. 4282/September 14th, 2005). Thus, the court appraises that towards the defendant's attitude of disregarding the plaintiff's right to the communication of the requested information, the non-communication of the public interest information, in regard to its obligation stipulated by art. 7 under the Law no. 544/2001, represents the manifestation of disrespect against the citizen and its disregarding, following to be checked if the material and moral damage invoked by the plaintiff have been caused by this. Or, the moral damage can be retained as a just repair measure for the fact that a prejudice to the plaintiff's image has been caused, with the mention that

it cannot be determined in the requested amount and subjectively quantified by the plaintiff. According to art. 998 Civil Code: "any deed of man that causes a prejudice to another man obliges the one out of whose guilt it occurred to redress it". In the specialty literature the moral damage is appraised as representing a harm brought to the person's physical existence, to the corporal integrity and health, to the honesty, dignity and honor, to the professional prestige and so on. According to the provisions of art. 1169 under the Civil code, the burden of proof in the claim regarding the granting of moral damage devolves upon the plaintiff. According to the ordinary law rules, the plaintiff must evidence the existence of the experienced moral damage of the illicit nature of the defendant's deed, committed by the latter with guilt and the causality condition between the respective prejudice and the defendant's deed. In the administrative law and administrative contentious matters, the right to the granting of the moral damage is stipulated by art. 18 under the law no. 554/2004 related to art. 22 under the Law no. 544/2001. In this case, through its abusive and illegal behavior – as result of the non-communication of the requested public interest information – the defendant has damaged a fundamental right to the plaintiff, the one of free and unrestricted access to public interest information, causing prejudices of moral nature to it, by affecting its image and credibility.

As regards the determination of the moral damage amount, the court considered for it to have compensatory effects, not being able to constitute excessive fines for the authors of the prejudice nor unjustified income for their victims. Unlike the other civil compensations, which imply a probative support, with relation to the moral damage one cannot appeal to material proof, the judge being the only one who, in proportion to the consequences suffered by the damaged party, will assess a certain lump sum that would compensate the caused moral damage. Towards the foregoing ones, the court coerced the defendant to the payment to the plaintiff of the amount of 1 RON with the title of moral damages.

Taking into consideration that the comminatory damages are a method of constraint in the fulfillment of an obligation to make it personally, obligation that only the defendant can fulfill, and distinguishing that the main claim, on the way of consequence, is also grounded, it also admitted the subsequent claim and coerced the defendant to the fulfillment of the obligation to communicate the information and documents requested through the application dated March 24th, 2009 under the sanction of comminatory damages in amount of 100 lei per day of delay.

On October 27th, 2009 the defendant formulated an appeal within the legal term against this judgment, in accordance with the provisions of art. 299, art. 304 point 8, art. $312^{3)}$ point (1), point (2), point (3) Civil procedure code, corroborated with the provisions of art. 20 under the Law 554/2004 on the Administrative contentious matters, with its subsequent amendments, by means of which it requested the admission of the appeal, the modification in all matters of the judgment in civil matters no. 2722/October 14th, 2009 and by retrying the case the rejection of the application in the main as premature, respectively tardily formulated and on the side as ill-founded.

It considers that the court has erroneously interpreted the judicial document deducted for judgment and has obviously changed its nature and meaning and further more that it had refused to transmit the information on the location *of new nuclear power plants in Romania, although they weren't subjected to art. 12 under the Law 182/2002.*

Or, precisely because of the fact that the requested information is subjected to the Law no. 182/2002 on the protection of classified information, with its subsequent amendments, they cannot be transmitted in this moment.

Besides, it has pointed out this aspect through the statement of defense, but the court, by easily riding over the ones invoked, admitted the plaintiff's application on the ground that *«the requested information belongs to the public interest category and by not being a part of the category of information listed in art. 12 under the Law no. 544/2001, the citizens may have unrestricted access to it»*,

It mentions that the study on the locations of new nuclear power plants in Romania hasn't been finalized yet; it has to be performed in agreement with the International Atomic Energy Agency (IAEA), too.

Consequently, the sites with a view to the emplacement of new nuclear power plants in Romania not being established yet, the information requested by the plaintiff cannot be transmitted at this moment because it has a classified nature and is subjected to art. 12 under the Law no. 182/2002 on the protection of classified information with its subsequent amendments.

I. With regard to the prematurity objection rejected by the court as ill-founded.

Although the Law no. 544/2001 doesn't explicitly provide for the compulsoriness of the administrative complaint procedure, in accordance with art. 15 point (2) under the H.G. (Government Decree) no. 123 of February 7th, 2002 for the approval of the Enforcement guidelines for the Law no. 544/2001 on the free access to public interest information, this procedure is compulsory in the meaning that, if a person considers that its right to free access to public interest information has been violated, it can address to the head of the institution with an administrative complaint within a term of 30 days since it has been acquainted with the refusal to provide the requested public interest information, following that the analysis of the administrative complaint to be performed within the "Committee for the analysis regarding the violation of the right to access public interest information" set up within the institution according to the provisions of the Law no. 544/2001 and of the H.G. (Government Decree) no. 123/2002.

Out of the documents submitted on the case file it doesn't result that the plaintiff has passed through the procedure stipulated by the legislator, for which reason we demand you to reject the application as prematurely formulated.

II. With regard to the action tardiness objection, rejected as ill-founded, it mentions that:

According to art. 16 under the Enforcement guidelines for the Law no. 544/2001 on the free access to public interest information «The terms for the written communication of an answer to the petitioners of public interest information are the ones stipulated by the Law no. 544/2001, namely:

a) 10 working days for the communication of the requested public interest information, if it hasn't been identified within this term;

b) 10 working days for announcing the petitioner that the initial term stipulated at letter a) hasn't been sufficient for identifying the requested information;

c) 30 working days for the communication of the public interest information identified past the term stipulated at letter a);

d) 5 working days for the transmission of the refusal to communicate the requested information and the refusal motivation.

In accordance with the legal provisions, it considers that the legal term within which the plaintiff should have brought a complaint against the lack of response at the request formulated on the grounds of the Law no. 544/2001 is of 40 days (10 days during which our institution should have formulated the answer + 30 days – the term within which a complaint can be formulated starting with the moment of the response term expiration).

As one can observe and as the plaintiff specifies, too, it has addressed the Ministry of Economy with a request regarding the communication of some public interest information on the date of March 24th, 2009.

Calculating on days, the last day for the bringing of the complaint was the date of May 4th, 2009 and not May 5th, 2009.

Taking into consideration the fact that the complaint has been submitted to the Bucharest Tribunal by exceeding the legal term, it requests the rejection of the application as tardily formulated.

III. With regard to the admissibility of the count of claim regarding the granting of moral damages to the plaintiff, respectively of delay penalties.

The provisions of the Law no. 544/2001 aren't explicit on this line, but they only provide for the possibility of their granting.

It considers that the plaintiff should have evidenced the generation of the prejudice, and the court should have analyzed, before delivering on this aspect, if a real prejudice has been generated to the petitioner by the non-communication of the requested data, since the damage quantification is a quite complex process that has establishment criteria which depend on the facts, on the violated rights, as well as on the severity of the violation.

Or, in the given situation and taking the plaintiff's application into consideration, it requests the rejection of these counts of claim as ill-founded.

Conclusively, it requests the admission of the appeal, the modification in all matters of the judgment in civil matters no. 2722/October 14th, 2009 and by retrying the case the rejection of the application in the main as premature, respectively tardily formulated and on the side as ill-founded.

By right, the provisions of art. 299, art. 304 point 8, art. $312^{3)}$ point (1), point (2), point (3) under the Civil procedure code, corroborated with the provisions of art. 20 under the Law 554/2004 on the Administrative contentious matters, with its subsequent amendments; the Law no. 544/2001 on the free access to public interest information have been invoked.

A photocopy of the order no. 743/April 22nd, 2010 issued by the Minister of Economy, Commerce and Business Environment has been attached, by means of which the declassification of the list on the 102 locations preliminary assessed with a view to the designation of the candidate-emplacements and of the data afferent to these, within the Study for the establishment of the location of a new Nuclear power plant, approved by the Order no. 2253/2008.

Deliberating on this appeal, in terms of the formulated criticisms, of the provisions in art. 304 point 8 and in art. 304 index 1 under the Civil procedure code, the proofs produced in both procedural stages, as well as the appealed judgment, the Court apprehends that it is grounded and it is going to be admitted for the following considerations:

Thus, the criticisms regarding the erroneous rejection of the objections of the preliminary procedure lack and of the action tardiness are not grounded, following for them to be discarded as such, taking into consideration that, according to art. 22 under the Law no. 544/2001, in case that a person considers itself injured in its rights, stipulated in this law, it can make a complaint at the department of administrative contentious matters of the tribunal in whose territorial range it resides or in whose territorial range the headquarters of the public authority or institution is located. The complaint will be made within a term of 30 days from the expiration date of the term stipulated under art. 7".

Thereby, the special law prevalently applies towards the general law and the law 544 does not stipulate the compulsoriness of formulating a preliminary complaint, as it is defined in art.7 under the law 554/2004.

On the other hand, there is no administrative document, against which a preliminary complaint is being formulated, one doesn't formulate a preliminary complaint against the refusal to solve an application, but a notification for a disciplinary action against the person designated with a view to the issuing of the answer (art. 21 under the law 544/2001), so that the defendant mistakes the preliminary complaint – the graceful appeal – for the disciplinary notification procedure stipulated by the law 544.

This being the case it is being ascertained that the first instance has judiciously rejected the objection of the preliminary procedure lack as ill-founded.

With regard to the objection to the action tardiness, the Court apprehends that this objection was also correctly rejected as ill-founded for the following considerations:

Art. 22 stipulates that a complaint will be formulated upon 30 days from the expiration of the legal 30-day term stipulated by art.7.

Thus, from the application's submission date the defendant had a term of 30 days to communicate the answer to the application or to communicate the reasoned refusal of non-communication within 5 days.

In this case, the defendant didn't communicate any answer within 5 days, so that the plaintiff has waited the legal term of 30 days to receive the answer. From the expiration of this 30-day term, the plaintiff has the 30-day term stipulated by art. 22 under the law 544, therefore, from the application formulation date of March 24th, 2009 and until the action formulation date of May 5th, 2009 the 60 legal days for the prescription of the material right to action did not pass.

With regard to the case merits, the Court apprehends that the object of the application addressed by the respondent-plaintiff to the petitioner-defendant was to communicate to it the list of the places that were assessed for the building of new nuclear power plants in Romania, the exact emplacement of the 10 possible locations, the exact emplacement of the two locations mentioned to be preferred, a copy of the official decision that stipulates this choice, all legal documents for the election of these two places, public interest information on the grounds of the Law no. 544/2001.

On the other hand, the order no. 743/April 22nd, 2010 issued by the Minister of Economy, Commerce and Business Environment the declassification of the list on the 102 locations preliminary assessed with a view to the designation of the candidate-emplacements and of the data related to these, within the Study for the establishment of the location of a new Nuclear power plant, approved by the Order no. 2253/2008, has been ordered.

By the allegations of the petitioner-defendant, it has shown that the information that make the object of the application addressed in writing by the respondent-plaintiff have the nature of classified information and are consequently subjected to the provisions of art. 12 under the Law no. 544/2001, because they don't have the nature of public information.

On the other hand, according to the provisions of art. 20 under the Law no. 182/2002 on the protection of classified information, any Romanian natural or legal person can submit an appeal to the authorities that have classified the respective information, against the information classification, the duration for which they have been classified, as well as against the way in which one level of classification or another has been attributed. The appeal will be solved under the terms of the law on administrative contentious matters.

These case facts results from the order no. 743/2010 attached to the appeal file, by which the declassification of the list on the 102 locations preliminary assessed with a view to the designation of the candidate-emplacements and of the data related to these, within the Study for the establishment of the location of a new Nuclear power plant, approved by the Order no. 2253/2008, has been ordered.

Through the written conclusions, the petitioner-defendant has evidenced that it doesn't hold the rest of the information which made the object of the applications addressed by the plaintiff, taking into consideration the fact that the previously mentioned study hasn't been finalized yet, thus, the candidate-emplacements and the data afferent to these, including the rest of the information mentioned in the application registered by the petitioner-defendant on the date of March 24th, 2009 aren't designated.

With regard to the circumstance that the respondent-plaintiff didn't produce the proof that the information requested can make the object of the law no. 544/2001, meaning that they aren't excepted from the communication by not having the nature of classified information, according to

the previously mentioned provisions and procedural ways. The Court apprehends that the action formulated by the plaintiff is ill-grounded.

On the other hand, it is being apprehended that the respondent-plaintiff didn't prove the circumstance that the petitioner-defendant might presently hold all information that made the object of the application dated March 24th, 2009 so that it can be communicated, resulting in this case that the refusal of the petitioner-defendant to communicate these information do not have an unjustified nature in the meaning of art. 22 under the Law no. 544/2001 and, respectively, of art. 2 letters i and n under the law no. 544/2004, republished, the petitioner did not commit an action ultra vires in this case, the refusal being justified.

At the same time, the Court ascertains that the allegations of the respondent-plaintiff regarding the application in the case of the provisions and principles stipulated by the Aarhus Convention and by H.G. no. 1076/2004 cannot be apprehended, taking into consideration the ones previously mentioned.

With regard to these rightful and factual circumstances, on the grounds of art. 20 under the Law no. 554/2004, art. 304 index 1 and art. 312 paragraphs 1-3 under the Civil procedure code, the appeal will be admitted, the appealed judgment will be modified and the action will be fully rejected as ill-founded, including the counts of claim regarding the obligation of the petitioner-defendant to the payment of comminatory damages and of moral damages, secondary counts of claim that follow in this case the solution regarding the action's main count of claim.

FOR THESE REASONS,
IN THE NAME OF THE LAW
DECIDES:

Admits the appeal formulated by the petitioner **MINISTRY OF ECONOMY, COMMERCE AND BUSINESS ENVIRONMENT** against the judgment in civil matters no. 2722/October 14th, 2009, delivered by the Bucharest Tribunal – IX.th Department for Administrative and Fiscal Contentious Matters in the case file no. 18773/3/2009, contradictory to the respondent-plaintiff **GREENPEACE CEE ROMANIA 87 BY THE LEGAL RESOURCE CENTRE.**

It modifies the judgment in civil matters in the meaning that:

It rejects the action as ill-founded.

Final.

Delivered in public session today, September 20th, 2010.

CHAIRMAN,	JUDGE,	JUDGE,
HORTOLOMEI VICTOR	**DAVIDOIU GEORGIAN**	**GRECU GHEORGHE**
illegible signature	*illegible signature*	*illegible signature*

CLERK,
IANUS CERASELA DANIELA
illegible signature

TRANSLATOR

The undersigned TĂNASE MIHAELA, sworn translator authorized by the Ministry of Justice in Romania with License No. 16576/2006, with the registered office in 10 Plt. Petre Ionescu Street, block X18, entrance 1, 4th floor, apt. 17, 3rd District, 32396 Bucharest, Romania, I certify the accuracy of this translation with the document presented to me in ROMANIAN, seen by me, which photocopy I attached hereto.

Translator TĂNASE MIHAELA, authorized with License No. 16576/2006

TRADUCĂTOR

Subsemnata TĂNASE MIHAELA, traducător autorizat de Ministerul Justiției cu nr. 16576/2006, cu sediul social în Str. Plt. Petre Ionescu nr. 10, bloc X18, scara 1, etaj 4, ap. 17, sector 3, 32396 București, România, certific exactitatea traducerii în limba ENGLEZĂ cu textul înscrisului prezentat în limba ROMÂNĂ, văzut de mine, a cărui fotocopie am anexat-o.

Traducător TĂNASE MIHAELA, autorizat cu nr. 16576/2006

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Authentication Conclusion of the Signature of the Translator No. ....113.....
from the year 2011 month June day 06

Tanase Daniela Ortansa, Notary Public, on the grounds of art. 8 letter e and j of the Law no. 36/1995, I authenticate the above signature of Mrs TĂNASE MIHAELA, authorized translator, on the basis of the signature specimen laid down, on the 2 copy of the document.
The fee of 37,20 lei was collected, with receipt no. 0008843/2011

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Încheiere de Legalizare a Semnăturii Traducătorului
Nr.....113.....
din anul: 2011 luna: iunie ziua: 06

Tanase Daniela Ortansa, Notar Public, în temeiul art. 8 lit.e și j din Legea nr. 36/1995, legalizez semnătura de mai sus a dnei TĂNASE MIHAELA, traducător autorizat, în baza specimenului de semnătură depus, de pe 2 exemplare ale înscrisului.
S-a perceput onorariul de 37,20 lei, cu chitanța nr.0008843/2011

NOTAR PUBLIC,