**RULING**

**No. 10998**

**Sofia, 08.09.2012**

**The Supreme Administrative Court of the Republic of Bulgaria – Five member panel - Second Division,** in a closed meeting on third of August two thousand and twelve with:

 **CHAIRPERSON:** GIUSEPPE ROGGERI

 **MEMBERS:** IVAN RADENKOV

 SONYA YANKULOVA

 LOZAN PANOV

 GEORGI CHOLAKOV

and secretary and with the participation of the prosecutor heard the report

of thejudge SONYA YANKULOVA

on administrative case No.9447/2012.

The proceeding is under Art 229, Para.1, item 2 of the Administrative Procedure Code (APC).

It is instituted by interlocutory appeal of the WWF – Word Wild Fund for Nature, Danubian-Carpathian Program, Bulgaria, with registered address of management Sofia, 38, Ivan Vazov St., apt.3-4 against rulingNo.7516 dated 29.05.2012 of the Supreme Administrative Court, pronounced on administrative case No. 6182/2012.

With the contested decision the court has reversed the appeal of the company against order of the Minister of the Environment and Water by which pursuant to Art.60, Para.1 of the Administrative Procedure Code (APC) has admitted the anticipatory execution of decision No. 4-2/2012 on the environment impact assessment.

The appellant considers the contested decision for unlawful. The court did not discuss the arguments put forward by the appellant. It did not take into account that there is not any evidence about the alleged by the authority “danger to thwart an investment proposal of national importance, financed under Operational Programme ‘Transport’. It did not comment on the fact of available public interests against the implementation of the investment proposal. It did not comment grounds of Art. 18, Para.2 of the Protected Areas Act (PAA) and Art.5 and 6 of the Biological Diversity Act (BDA) priority to the protection and maintenance of the biological diversity of the wildlife at the expense of the economic development, as well as the fact that “protected areas and zones are of particular significance and importance to the society and state”. The court did not consider the need to conduct comparative balance of the state interest in the realization of the investment project and the preventive protection of the protected area. Possibility, in the case of the realization of the project with preliminary execution, of destruction of priority for the European Union biological species or habitats, which the state was able to avoid by awaiting of the entry into legal force of the decision on the environmental impact assessment, would lead to criminal procedure against the country as a result of which not only the EU funds will not be used, but financial penalties of evident detriment of the public and national interest would be imposed. The court did not comment stated in the appeal data about the investment project impact on the protected areas, including the requested by the company alternative decision. The appellant indicates that there is a violation of Art. 9 of the Aarhus Convention. Suspension of the appealed environmental permits must ensure that the judgement of the court on the main case still can have an impact on the real situation and is not limited to a finding. It asked the court to repeal the contested ruling and to reverse the admitted preliminary execution of Decision No. 4-2/2012 on the environmental impact assessment.

The defendant in the interlocutory appeal – the Minister of Environment and Water considers the said to be unfounded. The court has correctly and reasonably accepted that the investment project implementation is of national importance, financed by Operational Programme ‘Transport’, and its frustration will affect important state interests. It reasonably has accepted that the preliminary execution ensures the project implementation and satisfies the public interests for safe and convenient road infrastructure. It points that the delay of the project will frustrate the use of the planned resources and will result in loss of funding provided. It points that the claims of the appellant are general and unproven without taking into account the assessment that excludes the negative impact on the object and purposes of preservation of the affected protected areas. It considers that the main part of the objections of the appellant refer the dispute upon the merits. It claims that the cited in the interlocutory appeal circumstances do not justify the conclusion that the admitted preliminary execution would cause the contestant significant or irreparable detriment, i.e.except those provided in Art. 60, Para.1 of the APC and should consider those under Art.166, Para.2 of the APC. The appellant has not motivated its request with new evidence, establishing significant or irreparable detriment. It requests the court to leave the interlocutory appeal without any respect. The defendant is represented by the director of Directorate “Law Regulatory Services and Public Procurement” Ms Valeriya Gerova.

The Supreme Administrative Court considers the interlocutory appeal as procedurally admissible – it is lodged by a proper party within the period specified under Art. 230 of the APC and against an appealable by interlocutory appeal judicial act.

Examined upon its merits the interlocutory appeal is unfounded.

In order to give judgement of the contested appeal the court has accepted that the preliminary execution was admitted as the investment project realization is of national importance and its frustration, financed under Operational Programme ‘Transport’, will affect important state and public interests. It has accepted that the project meets the public interests in safe and convenient road infrastructure. It has accepted that the proposal complies with the natural characteristics of the territory as measures to protect the environment are provided. The court has compared the detriments from the execution and non-execution and has accepted that the delay in the project implementation will lead to significant detriments due to which the interests of the investor and the public should be protected. On the basis of that the court has made a conclusion on the groundlessness of the request for the repeal of the admitted preliminary execution.

This conclusion of the court is correct.

From the evidence on the case it is indisputable that with decision No.325 dated 19.05.2011 The Council of Ministers has defined “bypass road of Gabrovo from km 0+000 to km 31+000” as area of national importance and for national site. It is indisputable too, that on the grounds of Art. 99, Para.2 of the Environmental Protection Act (EPA), Art.19, Para.1 of the Ordinance on the conditions and procedures for environmental impact assessment (the Ordinance) with reference to Art.31 of the BDA and Art.39, Para. 12 of the Ordinance on the compatibility of plans, programs, projects and investment proposals with the object and purposes of the preservation of the protected areas (Ordinance on CA/compatibility assessment) the defendant has approved the investment proposal implementation for “Road I-5 “Bypass of Gabrovo from km 0+000 to km 30+673.48 with tunnel under Shipka peak, stage connection at km 20+120 with length 3130 (from km 0+000 to km 3+130) with supporting infrastructure (overhead power lines, other lines and hydro facilities) – for the I-st and II-nd stage – rehabilitation of the existing route; for the III-rd stage (from km 10+939 to km 16+010) under “blue“ option; for IV-th stage (from km 16+010 to km 201+120) and the stage of connection (from km 0+000 to km 3+130) under the “red“ option; for V-th stage with tunnel under Shipka peak with length of 3220 km ( from which 20+120 to 24+400 and from km 27+620 to km 30+673,48) under the “red“ option.It is undisputable that the contracting authority has requested due to risk of obstructing the investment proposal implementation, financed under Operational Programme ‘Transport’, admission of preliminary execution, and the Minister, on the grounds of Art. 60, Para.1 of the APC, with the purpose to protect particularly important state and public interest has admitted the preliminary execution of the decision.

The court considers it necessary to point that the judgement on the legal conformity of any administrative act is based on the specified in it factual and legal grounds. In the contested order the administrative authority has not specified any factual grounds for the admitted preliminary execution. Such certainly more grounded are specified by the administrative authority in the submitted on the case statements on the appeals of the appellant. It is true that the court generally adopts in practice the possibility the motives to be further presented, i.e. subsequent statement of motives is not always and not automatically material breach of the requirement for form leading to repeal of the act. But timely statement of motives is a guarantee of the rights of the parties in the administrative proceeding. In this case, it is clear from the appeal, the right of defence of the appellant is not adversely affected to such an extent that makes the infringement material and in view of that to impose only on this ground repeal of the act, but it should be pointed out with regard to the general obligation of the administrative authority to exercise its powers in a reasonable manner and in good faith as required by Art. 6, Para.1 of the APC.

Considering the foregoing the appellate court considers that the court of first instance correctly has made its determination on the legal conformity of the contested order based on the specified in decision No. 2-4/2012, on the legal basis of the order and the motives of the administrative authority set out in the statement on the appeal of the company.

As the court correctly has accepted, in order to be in legal conformity the admitted pursuant to Art. 60, Para.1 of the APC preliminary execution, it is necessary in the specified in the act hypothesis the administrative authority to have proved, first, that there is state and public interest, and second, that this interest is of particular importance and needs to be protected.

Jurisdiction to determine the need and importance of the site, i.e. interest of the state and public, has the Council of Ministers with a view to its power under Art.105, Para. 1 of the Constitution. By a decision under protocol No. 13 dated 07.04.2010 and following public discussion the Council of Ministers has adopted a Strategy for the development of the transport system of the Republic of Bulgaria till 2020.

(<http://www.mtitc.government.bg/upload/docs/Transport_Strategy_2020_last_r.pdf>).In the document in pursuance of the common European transport policy as a priority direction on the territory of the country for the development of the Trans-European transport network is included common European transport corridor IX Helsinki-St.Petersburg-Moscow-Kiev-Lyubashevka-Chisinau-Bucharest-Ruse-Dimitrovgrad-Alexandroupolis. On Bulgarian territory Trans-European transport corridor passes through the route Ruse-VelikoTarnovo-Stara Zagora-Dimitrovgrad-Haskovo-Kardzhali-Podkova-Makaza passage as the investment proposal under the procedure is part of the route. Its construction at European Union level will lead to optimization of the connection between the Baltic and Mediterranean Sea and between Baltic and Black Sea, at national level will lead to more complete geographical unity of the country and at local level will solve the serious problem of Gabrovo related to the car traffic that passes through the central part of the city, which due to its geographic features of the terrain creates exceptional difficulties.

Assessment of the need and importance of the site the Council of Ministers has objectified in its decision No.325 dated 19.05.2011 where it has defined “Bypass road of Gabrovo from km 0+000 to km 31+000 as a site of national importance and including it in the projects implemented under Operational Programme ‘Transport’ 2007-2013. Therefore, the investment proposal under the procedure is of state and public interest. It is possible, as the appellant claims,to have citizens who do not share the assessment of the Council of Ministers on the state and public interest of the implementation of the site, but the appellant is not a representative of those citizens, and another’s rights can be exercised in court only by virtue of a statutory provision.

Assessing whether an interest is of particular importance the administrative authority makes within the social relations it has the power to regulate and by assessing the degree of importance of the state and public interest. Apparent from the motives of the administrative authority is the fact that has determined its judgement for the particular importance of the state and public interest is the binding of the possibility the project to be implemented by observation of certain time limits for its financing. Including of the project in the Operational Programme ‘Transport’ 2007-2013 as well as in the indicative annual program for 2012 means allocation of financial resources to it – national and European - where the possibility of their use is time limited. This time limit expires in 2013. Therefore, the conclusion of the particular importance is drawn on the basis of the impact assessment, where the delay in the obligatory instructions implementation given till the moment of the administrative act execution – decision No. 4-2/2012 - should have on this state and public interest namely construction of the site, and preservation of the protected area.

What does actually mean for the construction of the site the factual delay in the obligatory instructions implementation given by decision No.4-2/2012 till its entry into force? This means until decision No.4-2/2012 becomes a stable final administrative act no actions can be performed on the investment proposal including the phase of designing. In view of the existing under Art.99, Para. 6 of EPA possibilitythe decision on the environmental impact assessment to be challenged in court and taking into account the average duration of one two-instance court proceeding, till the time limit expiration of a possible funding there is, with extremely high probability, a possibility to have no final administrative act. This means irreversibly to lose the possibility the site to be implemented and therefore to realize the state and public interest. In contrast to that it is not established and the appellant does not give particular arguments and facts, only hypothetically states that if the admitted preliminary execution lead to destruction of priority for protection by the European Union biological species or habitats, which the country has had the possibility to avoid by awaiting the decision on the environmental impact assessment to come into force, could lead to criminal proceeding against the country.

Assessment of the possible real impact of the admitted preliminary execution on the realization of the state and public interest and on the protected area requires to be taken into consideration the statutory procedure for carrying out of construction of sites of the character of the one, subject to this case and with a view to the possibilities that the investor has at the different stages of the implementation. Environment impact assessment ensures non-admission of negative impact on the environment and the biological diversity as a result of the investment project implementation. In order to implement the investment project it is necessary to follow the stages of designing, coordination, approval, change of use of land, expropriation of the properties affected. Only then the issuance of the construction permit is possible and the start of the actual construction. Each stage is a condition and a prerequisite for the next one.The admitted preliminary execution of the environmental impact assessment does not automatically mean immediate factual construction on the site. It means that in the beginning of the process on the project implementation, at the stage of designing, requirements are set for the protection of the environment. I.e. the designing in this particular case will be performed upon taking into consideration the envisaged in the decision 14 requirements to the design phase as they will be obligatory for the project. Under these circumstances and considering the statutory scheduled duration of the coordination and approval of the investment proposal, which is notorious that requires substantial period of time, the court considers that at the present stage there is no evidence to create reasonable suspicion of irreversible impact of the admitted preliminary execution of the assessment for impact on the protected area.Furthermore, within the limits of the court proceeding on the contest of the assessment uponmerits, throughout this time period till decision No. 4-2/2012 enters into force the appellant has an effective way for protection by the possibility to request the court to stop the admitted preliminary execution on the grounds of Art. 166, Para 2.of the APC. At any moment till the entry into force of the assessment, when the appellant estimates that detriment is available for the protected territory, it may request the court to stop the preliminary execution.

As to the appellant’s claim about non discussed alternatives if, during the verification of the legal conformity of the decision the alleged illegality is establishedthe only result of this will be the repeal of the assessment, preparation of a new one, as a result of this, preparation of a new project that will have to comply with the provisions of the new environmental assessment. No direct effect on the protected areas will be reached as the investment proposal is at a stage of design.

Unjustifiable is the claim of the appellant that with the admitted preliminary execution of the assessment it is deprived of the last opportunity to indicate omissions not only in the legal conformity but also of the expediency of the act. This possibility is precluded not by the preliminary execution but by the pronouncement of the act. By pronouncement of the act, discussions on its expediency end as the authority has chosen expedient decision legal conformity of which is not subject to judicial control.

The court fully agrees with the specified by the appellant principal concepts about the purpose of the measures under Art.9,para.4 of the Convention on the Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). Undoubtedly, the international treaty requires national legislation to allow application of adequate and effective measures, including such as the imposition of appropriate restraints (prohibitions). But exactly this possibility is provided by the national legislation, both the ability to contest the preliminary execution and the possibility to contest the act upon its merits, as well as the ability to request suspension of the preliminary execution at any time before the impact assessment entry into force. Furthermore, exactly the assessment of the real impact of the admitted preliminary execution on the protected territory and for the objective possibility in view of the phase of the investment proposal at the moment, if there is any insufficient degree of protection of given biological species or habitat to actually prevent the irreversible detriment justify at this stage the legal conformity of the admitted preliminary execution.

Ungrounded is the claim of the defender under the interlocutory appeal that in the proceeding on the admitted preliminary execution contestation, the appellant must prove inflicting of significant or irreparable detriment. Proceedings under Art.60, Para.2 and Art. 166, Para.2 of the APC are two different and independent proceedings. In the proceeding under Art. 60 of the APC the legal conformity of the writ of the authority for preliminary execution that has not entered into force are verified. In view of that the burden of proof is of the administrative authority. It is this authority that should, in view of Art.170, Para. 1 of the APC, establish the facts and circumstances on which it has based its act. The proceeding under Art.166, Para. 2 of the APC is in connection with request of the interested party to stop the execution of already entered into force writ for preliminary execution by reason of possibility of occurrence of significant or irreparable detriments. Then the burden of proof is on the party drawing rights from the alleged fact.

In view of the foresaid, the court considers that alleged by the appellant violations were not admitted in the contested ruling. The court has correctly determined the relevant to the subject of the case facts and has applied them to the correct legal standard, which resultedincorrect conclusion on the legal conformity of the admitted preliminary execution of decision No. 4-2/2012. Due to which the contested ruling should remain in force.

Of the foregoing and pursuant to Art.236 of the APC the Supreme Administrative Court

**HAS RULED:**

**REMAIN IN FORCE** decision No.7516 dated 29.05.2012 of the Supreme Administrative Court pronounced on administrative case No. 6182//2012.

**THE DECISION** shall not be subject to appeal.

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| **True to the original** | **CHAIRPERSON:**/signature/ | Giuseppe Roggeri |
| **Secretary:** |  **MEMBERS:**/signature//signature//signature/ /signature/ | Ivan RadenkovSonya YankulovaLozanPanovGeorgiCholakov |