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Meeting: 1318th meeting (June 2018) (DH)

Item reference: Action plan (03/04/2018)

Communication from Bulgaria concerning the case of INTERNATIONAL BANK FOR COMMERCE AND DEVELOPMENT AD AND OTHERS v. Bulgaria (Application No. 7031/05)

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Réunion : 1318e réunion (juin 2018) (DH)

Référence du point : Plan d'action

Communication de la Bulgarie concernant l'affaire « INTERNATIONAL BANK FOR COMMERCE AND DEVELOPMENT AD » ET AUTRES c. Bulgarie (Requête n° 7031/05) ***(anglais uniquement)***

Action plan

International Bank for Commerce and Development AD and others *v.* Bulgaria /Application No 7031/05/

Judgment of 2 June 2016

Final on 17 October 2016

Circumstances of the case and Convention violations found

The case concerned a dispute between two groups of shareholders of a bank. The applicants –shareholders and persons appointed to the bank's management – raised a number of complaints, on behalf of the bank and on their own behalf, regarding the authorities' decisions following the dispute.

In early 2004 tensions arose among the bank's shareholders and between some of the shareholders and the bank's management. In June 2004 two general meetings of the bank's shareholders were held on the initiative of some of the shareholders holding more than five percent of the bank's shares.

However, the legitimacy of those meetings and resolutions was disputed by several minority shareholders, alleging that the provisional share warrants on which the majority shareholders had relied were false and did not correspond to the entries in the bank's register of shareholders. Criminal proceedings were brought against Mr Bonev, Mr Panev and Mr Ivanov on charges, in particular, of making or using false documents. They were eventually acquitted in 2006.

In August 2004 the Sofia City Prosecutor's Office ordered the police to assist one of the minority shareholders in preventing any changes to the status quo in the bank's management and operations, and to warn Mr Panev and Mr Ivanov to refrain from any actions in that regard until the matter had been duly resolved by the competent authorities. The appeals by Mr Panev and Mr Ivanov against that order were dismissed.

In 2005 the Bulgarian National Bank decided to place the bank under compulsory administration and to revoke its licence. In June 2005 the Sofia City Court granted the National Bank's petition to declare the bank insolvent and made an order for it to be wound up; it was struck out of the register of companies in August 2007. Mr Panev's and Mr Ivanov's bank accounts were frozen in June 2005; in January 2006 the National Bank unfroze them again.

The Court ruled that there is a violation of Article 1 of Protocol No. 1 of the Convention on account of the decisions of the prosecuting authorities concerning the bank's management.

The Court also found a violation of Article 1 of Protocol No. 1 – on account of the decision of the National Bank to revoke the bank's licence.

The case also concerns the lack of representation of the bank's interests in the proceedings opened pursuant to the National Bank's winding-up petition and the refusal of the Sofia City Court to scrutinise whether the bank had indeed been insolvent (violation of Article 6 § 1 of the Convention). A violation of Article 1 of Protocol No. 1 and Article 13 was found – on account of the freezing of Mr Panev's and Mr Ivanov's bank accounts and their inability to challenge that measure.

1. Individual measures

The Court has noted that all complaints raised by Mr Bonev, Mr Panev, Mr Ivanov and Mr Radev in their personal capacity, save for those raised by Mr Panev and Mr Ivanov in relation to the freezing of their bank accounts, were declared inadmissible. To the extent that they relate to inadmissible complaints, their claims for just satisfaction were rejected.

The Court has ruled that even if Mr Panev and Mr Ivanov have endured some non-pecuniary damage as a result of the unjustified freezing of all of their bank accounts, since they did not make any claim in respect of a just satisfaction, the Court did not award them anything.

The Court awarded indemnification for costs and expenses, duly paid by the authorities.
No further individual measures seem possible.

2. General measures

a) Publication and dissemination of the judgment

The translation of the judgment in Bulgarian is awaited. A short summary of the case and the findings of the ECtHR thereto were sent to the relevant authorities.

b) Measures concerning the revocation of the bank`s licence

In respect to the violation found of Article 1 of Protocol No. 1 – on account of the decision of the National Bank to revoke the bank's licence it should be noted that it was revoked in 2005 on the grounds of section. 21, par.2, p. 2 and p.5 in connection with section 101, par.1 of the Banks Act (1997). Under the repealed Banks Act the decision revoking a bank`s licence was not subject to judicial appeal.

Currently the Credit Institutions Act (2006) guarantees the right of appeal and the judicial control on the legality of all the administrative acts of the Bulgarian National Bank including the decision revoking one bank`s licence. The disposition of section 151, par.3 of the Credit Institutions Act did not existed at the relevant time.

It should be noted that this legislative amendment is in conformity with the European legislation as it transposes **Directive 2013/36/**EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC. According to section 151, par.3 of

the Credit Institutions Act all the administrative acts covered under Paragraph (1) shall be subject to appeal before the Supreme Administrative Court under the rules of the Code of administrative procedure as to their conformity with the law.

According to an analysis of 7 April 2017 of the Bulgarian National Bank within the proceedings before the Supreme administrative court concerning the validity and the legality of the decision revoking one bank`s licence, the legislator has not limited the scope of the persons entitled to litigate under section 151, par.3 of the Credit Institutions Act. The assessment regarding the availability or the lack of legal interest of the appeal of the act is done on case by case principle on the basis of all the concrete circumstances of the case.

In paragraph 82 of its judgment ECHR it is pointed out that when dealing with legal challenges against the decision of the BNB to revoke the licence of a bank the Supreme Administrative Court held that the shareholders did not have standing to bring claims under section 151(3) on their own behalf (see опр. № 3725 от 02.04.2015 г. по адм. д. № 3438/2015 г., ВАС, петчл. с-в). Further it noted the following: “In a parallel case, it held that the bank’s managers, who had earlier been replaced by special administrators appointed by the BNB, did not have such standing either (see опр. № 2038 от 25.02.2015 г., по адм. д. № 1813/2015 г., ВАС, петчл. с-в). In the wake of those decisions, on 9 March 2015 the President of the Supreme Bar Council asked that court to give an interpretative decision on these points, arguing that its rulings were contrary to, inter alia, Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.” The underlying principle in the abovementioned jurisprudence of the Supreme Administrative Court is that the existence of a legal interest to challenge a particular administrative decision depends on the concrete circumstances of each case.

By a ruling 1 of 14/06/2016 the Supreme Administrative Court declined the request to deliver an interpretative decision. The judges reasoned that the content of a legal provision could not be amended through an interpretative decision.

A proposal in order to comply with the ECHR`s judgment was made to the Ministry of finance.

b) Measures concerning the violation of art.6 §1 of the Convention

According to the analysis provided by the Bulgarian National Bank the special administrators are a separate body, vested with powers provided within the law. In conformity with section 36, par.5 by the decision revoking a bank licence the Bulgarian National bank mandatorily appoints special administrators. The legal requirement of the Credit Institutions Act on the appointment of legal administrators aims the protection of the interests of the debtor, preservation of the assets, protection of the interests of the depositors and the public interest as well.

The special administrator represents a separate figure, different from the body which appoints him and of the bank whose management and supervision was assigned to him. According to section 112, par.1 of the Credit Institutions Act the special administrator assumes his own responsibility for his actions and the acts produced during his

questorship. The special administrator is not a part of the structure of the central bank (section 112, par.1, p.1 in relation to section 105, par.1 of the Credit Institutions Act).

The Credit Institutions Act imposes a number of requirements in order to guarantee the objective and impartial fulfilment of the powers of the special administrator. An accountancy requirement has been introduced. The fulfillment of the powers is assigned to at least two persons. The management and the representation of the bank from special administrators is given to persons who have the qualifications, skills and knowledge necessary for the performance of the assigned functions and tasks.

The special administrator is under the obligation to declare all the circumstances which could give rise to a substantiated doubt about his impartiality (section 11 of the Credit Institutions Act).

In case that the Bank Deposit Guarantee Fund or the liquidator of a bank ascertain in the process of compulsory liquidation of a bank that the bank concerned is insolvent within the meaning of Item 2 of Article 36 (2) or that the bank has not settled its due and payable monetary obligations for over 60 days, the Fund/liquidator can suggest to the BNB to submit a petition in bankruptcy to the court of law (section 130, par.1 of the Credit institutions Act).

In December 2002 the provisions of the Banks Act 1997 governing bank insolvency were superseded by the Bank Insolvency Act 2002. A section 11 (4) of the 2002 Act provides that shareholders who at the time of revoking the bank`s licence hold more than five per cent of its shares are entitled to take part in the proceedings in which the court was to decide whether to grant BNB`s petition to open insolvency proceedings against a bank. However, section 16(1) in fine provides that only the BNB, the special administrators appointed by it, and the public prosecutor may appeal against the insolvency court's decision on the winding-up petition against the bank.

After the initiation of the insolvency proceedings the bank is represented by a trustee, appointed by the Bank Deposit Insurance Fund (section 26, par.1 of the Bank Insolvency Act; section 31, par.1, p.1). The vast majority of the insolvency decisions are taken by the court of insolvency (section 46 of the Banks insolvency Act). At this stage nor BNB or the special administrators are entitled to act on behalf of the bank.

It should be pointed out that according to the Central Bank the development of the legislative framework regulating the insolvency of the banks as well as the adoption of the European legislation in the field of recovery and resolution of credit institutions and investment terms would prevent similar violations of the Convention.

A proposal in order to comply with the ECHR`s judgment was made to the Ministry of finance.

c) Violation of art.1 of Protocol no. 1 of the Convention in relation to Mr. Panev`s and Mr. Ivanov`s banks accounts

In relation to the freezing of Mr Panev`s and Mr Ivanov bank accounts it should be noted that it was imposed according to paragraph 4 (1) the transitional and concluding

provisions of the Bank Deposits Guarantee Act 1998, which provided that when seeking the opening of insolvency proceedings against a bank the BNB's governor had to ask the investigating authorities to check whether members of the bank's executive and supervisory boards had committed offences, and freeze their bank accounts and immovable property.

That law was superseded by the Bank Deposit Guarantee Act who was transposed by the Deposit Guarantee Scheme Directive 2014/49/EU.

It should be pointed out as well that the newly adopted law does not contain similar rule as paragraph 4 (1) of the transitional and concluding provisions of the Bank Deposits Guarantee Act 1998. Furthermore as corroborated by the Central bank such a rule does not exist in the whole legislation currently in force.

In 2015 was adopted the Recovery and Resolution of Credit Institutions and Investment Firms Act transposing Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms.

The regime introduced was needed to provide the authorities with a credible set of tools to intervene sufficiently early and quickly in an unsound or failing institution so as to ensure the continuity of the institution's critical financial and economic functions, while minimizing the impact of an institution's failure on the economy and financial system.

In accordance with the requirements of Directive 2014/59/EU rules and procedures are being introduced through the application of tools for resolution of credit institutions as an alternative to the normal insolvency proceedings when its declaration would threaten the public interest and would represent a threat to the financial stability. By keeping the financial stability and reducing the losses of the taxpayers with the resolution measures in shot terms will be achieved results similar to those of the normal insolvency proceedings with respect to the repartition of the losses incurred between the shareholders and creditors.

The enacted law lays down actions for early intervention when the bank violates the capital requirements or the requirements for liquidity provided for in the Credit Institutions Act as well is in Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms.

It should be noted that as a result of the financial crisis a number of measures to strengthen the regulation of the banking sector were introduced.

d) Violation of art.1 of Protocol no.1 in relation to the decisions of the prosecuting authorities

Section 119 par.1(6) of the Judicial Power Act of 1994 provided that in carrying out their duties prosecutors may take all measures provided for by law, if they have information that a publicly prosecutable criminal offence or other illegal act may be committed.

Section 119 par.1 (6) of the Judicial Power Act 1994 was superseded by an identical provision (section 145 par.1(6)).

As the Court specified the bulgarian law provides for specific remedies in respect of resolutions of the general meeting of shareholders of a company and of the courts` decisions to enter them in the register of companies.

Under section 74 of the Commerce Act 1991 every shareholder is entitled to file a request before the district court, having jurisdiction over the company's registered office, to revoke a decision of the General Meeting by challenging its legality on grounds of the law the Memorandum of Association or, respectively, the Articles of Association of the company.

Conclusion

The Government will keep the Committee of the ministers fully informed on any developments.

Sofia, 30 March 2018