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Date: 20/04/2018

DH-DD(2018)429

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

Communication from the applicant (13/04/2018) in the case of RJ IMPORT ROGER JAEGER A.G. and RJ IMPORT BUCURESTI S.A. v. Romania (Application No. 19001/05).

Information made available under Rule 9.1 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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

Communication du requérant (13/04/2018) dans l'affaire RJ IMPORT ROGER JAEGER A.G. et RJ IMPORT BUCURESTI S.A. c. Roumanie (Requête n° 19001/05) ***[anglais uniquement]***

Informations mises à disposition en vertu de la Règle 9.1 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

Barreau de Strasbourg

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DGI
13 AVR. 2018
SERVICE DE L'EXECUTION DES ARRETS DE LA CEDH

By registered post mail

Strasbourg, 10 April 2018

Nos réf. : RJ IMPORT BUCUREŞTI S.A. v. ROMANIA, n° 19001/05, arrêt du 3 Novembre 2011

V/Réf. : CM/Inf/DH(2012)24 **DG1/DL/RP**

(Updated) Individual Communication

In application of:
Article 46 § 2 of the ECHR
The Rules of the Committee of Ministers on the supervision of the execution of the judgments of the European Court of Human Rights

Dear Madam,
Dear Sir,

I am following up on my letter dated 25th of August 2017 and on the last Human Rights Committee of Ministers' meeting of 15-18 March 2018 in which the Committee of Ministers:

"requested the (romanian) authorities to ensure that the domestic court decisions which have not yet been complied with are swiftly implemented;

invited them to keep the Committee informed of the progress made in this respect and rapidly to indicate how they envisage overcoming the difficulties highlighted in the cases of RJ Import Roger Jaeger A.G. and RJ Import Bucureşti S.A. (Application No. 19001/05), Bod and Others (Application No. 30403/06) and Elena Popa (Application No. 67634/11) ».

I recall that I am the legal counsel of the applicant company, RJ IMPORT BUCURESTI SA, a company governed by Romanian law, having its registered office in Bd. Mircea Voda n° 44 - block M 17, floor 5, sector 3 in

BUCAREST (ROUMANIA), registered in the Trade Register of BUCAREST, under the unique number 10028874.

I have the honour to introduce this updated individual communication, in accordance with the rules of the Committee of Ministers on the supervision of the execution of judgments of the European Court of Human Rights, as seven months have passed since the 25th of August 2017 without any beginning of execution of the ECHR Judgment of 3 November 2011 nor ay explanations from Romania.

I. The facts of the RJ IMPORT BUCURESTI S.A. case ans RJ IMPORT ROGER JAEGER AG v. Romania, n° 19001/05, judgment of the 3th of November 2011:

A. The context of the case:

1. The 20th of December 1997, the applicant company RJ IMPORT BUCURESTI SA, a company governed by Romanian law, concluded with a Romanian national company, SC CRASER, a sale contract by which it acquired all the assets (land, buildings, constructions, installations and industrial equipment intended for the operation of its trade, including 200 greenhouses) and liabilities (the repurchase of the real estate loans contracted by company S.C Crack at several banks).

The contract was entirely honoured by RJ Bucuresti, in return for the payment of the acquired materials (valued at 1 350 000 Swiss francs) and bank and tax debts in an even larger amount. It invests in addition to money in renovation and optimization of materials.

The contract was entirely honoured by RJ IMPORT BUCURESTI SA, in return for the payment of the acquired materials (valued at 1 350 000 Swiss francs) and bank and tax debts in an even larger amount.

The RJ IMPORT BUCURESTI SA society then invests additional funds in renovation and optimization of materials.

2. Subsequently, the Romanian State requested the nullity of the sale contract dated of the 20th of December 1997.

By a final judgment of 16 April 2002, the Court of Appeal of BUCAREST cancelled the contract dated of the 20th of December 1997, so that RJ IMPORT BUCURESTI SA was obliged to return the purchased equipment to the State-owned company SC CRASER without being compensated.

RJ IMPORT BUCURESTI SA executed and returned the assets in question which it had duly paid for. She then applied for bankruptcy proceedings against S. C. Craser to recover receivables, like the repayment of the

purchase contract price and amounts relating to investments made between 1998 and 2004.

However, the State and its components multiplied legal proceedings, challenging the opening of bankruptcy proceedings in an abusive manner until all the assets of S. C. Craser were sold at auction.

Finally, the bankruptcy proceedings were opened, when S. C. Craser no longer had any assets in his estate. With regard to the assets of S. C. Craser, the General Directorate of Public Finance of the Romanian State, in its capacity of creditor, organised public auctions on **12 August 2004** in order to proceed with the direct and block sale of all the assets of S. C. Craser.

The lawsuits brought by the plaintiffs to prevent the State from selling the property of the S. C. Craser, and to obtain the debts owed to it by the company, were all dismissed.

In August and September 2004, the forced sale was realised, following which the assets of the state-owned company S. C. Craser, put up for sale, were directly attributed to the Ministry of Finance.

To obtain the restitution of the sale price and compensation for the damage suffered as a result of the investments it had made, RJ Import Bucuresti has repeatedly approached the Romanian authorities, in particular the FBS (State property fund), the Agency for the Deprivation of State-owned Assets or also the State domain agency.

As all efforts were unsuccessful, RJ Import Bucuresti had no other choice but to take the matter to the competent courts to have S. C. Craser condemned to pay him the selling price of the contract and to pay him compensation for the investments made at loss.

3. On 22 April 2004, RJ Import Bucuresti applied to the commercial division of the Bucharest Court of Appeal for a refund of the contract price and sums relating to the investments made between 1998 and 2004.

By a final judgment dated of the 17th of November 2004, the commercial division of the Court of Appeal of BUCAREST ordered SC CRASER (Romanian national company) to pay the applicant company RJ IMPORT BUCURESTI SA the following sums:

- 1 350 000 Swiss francs (or 35 578 500 000 ROL) corresponding to the sale contract price,
- 35 994 375 000 ROL (old Romanian Lei) corresponding to the amount of the investments made between 19998 and 2004,
- and 5 171 000 ROL for legal costs.

Which represent a total of € 2,269,090 according to the currency decided on the 3rd of November 2011, date of the ECHR judgment (see infra n°5).

4. The final decision dated of the 17th of November 2004 had never been executed by the Romanian authorities, despite the actions engaged to this end in Romania by the applicants.

In order to obtain the execution of the judgment dated of the 17th of November 2004, RJ Import AG put into action the article 9.3 of the 30th of July 1994 agreement between the Swiss federal council and the Romanian government regarding the promotion and reciprocal protection of investments with a view to resolve this dispute by conciliation.

This remain unanswered by the Romanian authorities.

It is in these conditions that the companies RJ IMPORT BUCURESTI SA and RJ IMPORT Roger JAEGER AG have decided to bring an action before the European Court of Human Rights against the Romanian State for breach of Articles 6 § 1 of the European Convention on Human Rights and 1 of Additional Protocol No. 1.

B. The proceeding before the European Court of Human Rights

5. The proceeding brought before the ECHR was engaged by a request introduced the 17th of May 2005.

By a judgment dated of the 3rd of November 2011, the Court, in a restricted panel of three judges under Protocol No. 14, said and ruled that:
-the application brought by RJ Import AG was inadmissible, because this applicant was not a victim within the meaning of Article 34 of the Convention,
-the application brought by RJ Import Bucuresti was admissible, as the preliminary objections raised by the State of Romania had previously been rejected

On the merits, the Court found that Romania had infringed Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 of the ECHR regarding the applicant RJ IMPORT BUCURESTI, giving the following reasons for its judgment:

« 27. The Court recalls that that it is not open to a State authority to cite the lack of funds or other resources as an excuse for not honouring a court award, nor can the State, in such circumstances, justify its failure to enforce the judgment against a State enterprise with reference to the liquidation of the company (see *Grigoryev and Kakaurova* v. Russia, no. 13820/04, § 37, 12 April 2007; *Moldoveanu v. Romania*, no. 13386/02, § 35, 29 July 2008; *Aurelia Popa v. Romania*, no. 1690/05, § 24, 26 January 2010, and, *mutatis mutandis*, *Burdov v. Russia*, no. 59498/00, § 35, ECHR 2002-III).

(…).

29. (The Court) therefore finds that, by failing for years to comply with the enforceable judgment in the second applicant's favour, **the domestic authorities impaired the essence of its "right to a court" and prevented it from receiving the money it had legitimately expected to receive**. (Nous soulignons).

30. The foregoing considerations are sufficient to enable the Court to dismiss the Government's objection as to the exhaustion of domestic remedies and to conclude that there has accordingly been a violation of Article 6 of the Convention and Article 1 of Protocol No. 1 with respect to the second applicant. »

Furthermore, the Court severely dismissed the applicant company's claims for just satisfaction on the grounds that these claims had not been formulated in accordance with the requirements of Article 60 of the Regulations of the Court.

C. The proceeding before the Committee of Ministers

6. The case is final since **the 3rd of February 2012**[1].

The case has been transmitted to the Committee of Ministers for supervision of its execution and forms part of the *Sacaleanu v. Romania* Group of Cases (Application No. 73970/01), which concern the failure of the State or legal persons subject to State responsibility to comply with final court decisions (violations of Article 6 § 1 and/or Article 1 of Protocol No. 1). These decisions were rendered between 1993 and 2012.

Considering that the violations identified were the consequence of a persistent structural dysfunction, the Court stated that the respondent State must first of all ensure, by appropriate legal and/or administrative measures, that the judicial decision rendered against it, binding and enforceable, be executed **ex officio and promptly**.

The Sacaleanu Group is subject to a sustained procedure which is used in cases requiring urgent individual measures or revealing significant structural problems (particularly pilot judgments) and in inter-State cases.

7. The recent meeting of the Committee of Ministers, from 7 to 10 March 2017 (meeting No. 1280 DH) shows that:

-Regarding the individual measures:

[1] And not on 3 November 2011 as indicated in the memorandum of the Secretariat for the execution of the Court's judgments.

The authorities have provided regular information for this purpose: the internal decisions that gave rise to 19 cases have been implemented either before or after the date of the Court's judgments. In the 16 remaining cases, some of which concerning several applicants, the execution of internal decisions would be ongoing or partially finalised or information about the execution still need to be submitted.

Regarding the actual case, it appears **that the RJ IMPORT BUCURESTI application has not received any commencement of enforcement since 17 December 2004** (!), whereas it's a cash and due debt obligation against a perfectly identified State entity and whereas it is for the State to enforce the contested decision ex officio and promptly.

Indeed, as analysed by the secretariat in its notes (CM/Notes/1280/H46-21), the applicant company considers that, in accordance with the Court's established case-law, an individual who has obtained a debt obligation against the State following judicial proceedings should not subsequently have to initiate enforcement proceedings in order to obtain satisfaction. The primary responsibility for ensuring enforcement belongs to the state authorities (see Străchinaru v. Romania, § 35 and Bourdov v. Russia (n° 2), §§ 68-70).

Also, in their communication of January 2018, Romania indicated that they will provide information as to the execution of the case RJ Import Bucuresti SA.

In vain so far …

- *Regarding the general measures:*

In response to the decision adopted by the Committee at its last review (September 2012), the authorities submitted preliminary information on the measures in the process of adoption (HD-HD (2015)14), followed on 16 December 2016 by a revised action plan (HD-HD (2017)38).

II. Requests from the company RJ IMPORT BUCURESTI

A. Reminder of the relevant principles

8. By virtue of the binding force of the judgments of the European Court of Human Rights under Article 46 of the Convention, States are legally bound to remedy the violations found, although in principle they have a margin of appreciation regarding the means to be used.

It doesn't matter that the Court has not been able to grant a precise request for just satisfaction on the material prejudice to the visa of Article 41 of the Convention, except regarding the payment of costs and expenses incurred

in domestic law and before the Court, as well as any compensation for non-material damage - which cannot be legitimately requested before the Committee from now on.

❖ **Principal amount:**

9. In the event of a State's failure to comply with a final judicial decision, the Court condemns the respondent State to the sums awarded by the judgment which has not been complied with (see, among a hundreds of other, *Golovin v. Ukraine*, no 3216/02, 4 october 2005, § 39, *Société de gestion du port de Campoloro v. France*, n° 57516/00, case dated of the 26th of september 2006, *Bezborodov v. Russia*, n° 36765/03, §§ 53-58, 20 november 2008).

The Court reminds in this case that a judgment which find a violation creates a legal obligation on the respondent State under the Convention to put an end to the violation and to remove its consequences so as to restore as far as possible the situation before the violation. *Metaxas v. Grèce*, no 8415/02, § 35, 27th of May 2004, and *Iatridis v. Greece* (just satisfaction) [GC], no 31107/96, § 32, ECHR 2000-XI).

More precisely, the Court considers that the determining factor is the infringement of Article 6 § 1 of the Convention and Article 1 of Protocol No.1 as a result of the failure by the domestic authorities to comply with the final judgment in question, together with the rate of inflation or the legal interest due.

The Court then considers that the payment of the amount fixed by the unenforced judicial decision, updated if appropriate, would place the requesting party in a situation equivalent to the one in which it would find itself if the requirements of Articles 6 § 1 of the Convention and 1 of Protocol No 1 had not been disregarded.

In addition to the non-material damage and the reimbursement of costs and expenses incurred, **it is the amounts awarded by the unenforced court decision that constitute the starting point for any reparation of the material damage suffered**, together with the legal interest that can be capitalised to take into account the flow of time.

Regarding the Romanian State, it is in no way an exception to the Court's consistent position in this matter. See, among many others, the following final judgments:

- *Aurelia Popa v. Romania,* No 1690/05, §§ 29 et following, judgment dated of the 26th of january 2010
- *Denes and others v. Romania*, No 25862/03, §§ 72 and 73, , judgment dated of the 3rd of march 2009

- *Miclici v. Romania*, No 23657/03, § 53, §§ 53 and following, judgment dated of the 20th of december 2007
- *Cone v. Romania*, No 35935/02, §§ 38 and 40, , judgment dated of the 24th of June 2008

❖ **Legal interest and inflation**

10. Furthermore, as the Court has repeatedly pointed out, the adequacy of compensation decreases "*if the payment of compensation did not take into account elements that could reduce its value, such as the passage of time*" (see, in addition to Aurelia Popa, Denes and others, Miclici and Cone v. Romania, cited above, *Greek Refineries Stran and Stratis Andreadis v. Greece*, 9 December 1994, § 82, Series A No 301-B, and, mutatis mutandis, *Motais de Narbonne v. France* (just satisfaction), No 48161/99, §§ 20-21, 21 May 2003).

In so doing, the Court takes into consideration, in addition to the principal amount, national statutory interests which may compensate, at least in part, for the long period of time which has elapsed since the dispossession of the"property", within the meaning of Article 1 of Protocol No. 1, in question[2].

❖ **Default interests**

11. Finally, the respondent State is condemned to pay an amount corresponding to the increase of the sums due by simple interest at a rate equal to that of the applicable marginal lending facility of the European Central Bank, increased by three percentage points from the finality of its judgment, three months after its delivery, in this case the 3rd of February 2012, until the sums due have actually been paid.

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[2] See the recent decision Guiso Galisay v. Italy, judgment delivered in the Grand Chamber on 22 December 2009 (most solemn formation) dealing precisely with just satisfaction, No 58858/00, in which the Court held that"in the Court's view, these interests must correspond to the simple Italian legal interest applied to the gradually revalued capital" - capital constituted by compensation granted by a final and unenforced judicial decision, in the case of RJ Import Bucuresti).
See also Di Pietro v. Italy, no. 73575/01, judgment of 26 June 2012 on just satisfaction, Milazzo v. Italy, no. 77156/01, judgment of 26 June 2012, Iandoli v. Italy, no. 77156/01, judgment of 26 June 2012. Italy, 67992/01, judgment (main proceedings and just satisfaction) of 14/06/2011, Santinelli and Others v. Italy 65141/01, judgment (main proceedings and just satisfaction) of 17/05/2011, Ventorino v. Italy, etc.
See also, again in the context of non-execution of a final judicial decision, PTK"Merkury" v. Russia (no. 3790/05), §§ 32-34, judgment of 14 June 2007: calculation of interest on the basis of Russian statutory monthly interest (application of the statutory interest rates of the Russian central bank).
See Streltsov and Others v. Russia (Applications nos. 8549/06, and following.), final judgment of 29 July 2010 (see in particular paragraphs 88-93).

The applicant company is therefore entitled to claim compensation for the double breach of the Convention found and to obtain full and updated payment of the sums owed by the Romanian State.

B. Application of principles to the case:

1. Material damage resulting from the non-execution of the judgment of the 17th of November 2004:

a. Calculation of compensation awarded:

12. The compensation granted by the judgment of 17 November 2004 is composed as follows:
-CHF 1 350 000 (or ROL 35 578 500 000) corresponding to the contract price;
-ROL 35 994 375 000 corresponding to investment prices;
-5 171 000 ROL legal costs;

Applying the currency conversion rates of the OANDA converter (used by the Court itself) into Swiss francs (CHF) on 17 December 2004 (the date on which the decision became final and enforceable and legal interest began to accrue), this corresponds to:
-CHF 1 350 000 for the contract price
-CHF 1 408 690 for investments made,
-and CHF 202 for legal costs

➢ A total of **2 758 892 CHF** (or 2.269.090 € according to the conversion adopted on 3 November 2011, date of the Strasbourg Court's decision)

b. Calculation of Applicable Interest

13. This sum must be divided into two parts: CHF 1 350 000 and CHF 1 408 690, as the interest rates are different depending on the nature of the sum in question.

In any event, it caused legal interest to accrue from the 17th of December 2004 (the date of the final nature of the judgment of 17 November 2004) until today, which corresponds to 4838 days.

Regarding the simple statutory interest (not capitalised) on the contract price, which corresponds to the sum of CHF 1350 000, granted in this currency by the judgment of 17 November 2004, it was decided to apply a fixed interest rate of 6 %, which corresponds to the Swiss statutory interest rate.

Indeed, to the extent that the contract price has been fixed, paid and then granted by the Romanian courts in CHF, it is necessary to apply a fixed Swiss rate, instead of the applicable Romanian variable rates, even if these are higher and therefore more favourable to our cause.

This amount was not paid for 4838 days until April 10, 2018.

According to the usual applicable formula (number of unpaid days per year x interest rate x amount due / (365 x 100)), the total amount of simple interest is CHF 1 123 265 or € 947 485 at the 10 April 2018.

As regards the simple statutory interest on the investment price, namely the sum of ROL 35 994 375 000, the Romanian statutory interest rates must be applied.

These rates are those already set out in Annex 1 (letter from the Director of the Romanian National Bank), varying between 17% and 6%, increased by 8 points, according to the applicable Romanian positive law relating to commercial claims owed by the State (according to Ordinance No 9 of 21.01.2000 and Ordinance 13 of 24.08.2011).

The applicant company encloses an accounting report carried out at its request by the accountant Mr Aranghel Georgeta, which indicates that the amount of interest due for the investment price is RON 4 307 272, 39, which corresponds to 988 702, 46 € on the 3rd of November 2011, the date of the Court judgment.

As of 10 April 2018, the total interest due amounts to € 1 283 502.

A total (excluding interest on legal costs) of 2 230 987 €.

- A total of **4 500 077 €** corresponding to the sums granted by the judgment of 17 November 2004 increased by the legal interest up to now.

2. Surcharge/moratorium interest

14. In the present case, Romania owes an amount corresponding to the increase in the sums due by simple interest at a rate equal to that of the applicable marginal lending facility of the European Central Bank, increased by 3 percentage points, from the finality of its judgment, i.e. three months after its delivery, in this case on 3 February 2012, until the sums due have actually been paid.

According to official data from the European Central Bank, the marginal lending facility interest rate on 3 November 2011 (date of the judgment of the European Court of Human Rights) was 1.5% (see Annex 2).

Increased by three percentage points, this default interest rate is 4.5%, which can be capitalised each year.

Thus, from 3 February 2012 until 10 April 2018, i.e. approximately 75 months, default interest amounts to € 1,154,028.

A total of 4 500 077 + 1 154 028= 5 654 105 €.

This is the sum which would constitute full compensation for the damage suffered by the applicant company.

III. Conclusions

In the light of the above reasons, the applicant company RJ Import BUCURESTI SA requests that the Committee of Ministers:

1) Consider the state of execution of the present case at its next meeting in September 2017 (n° 1292, 1293, 1294 DH and 1295);
2) To adopt an interim resolution in accordance with Rule 16 of the Rules for the supervision of the execution of judgments of the European Court of Human Rights in which the Committee:

- ✓ Notes the total non compliance with the Court's judgment of 3 November 2011
- ✓ Notes the total failure to comply with the judgment of the Bucharest Court of Appeal of 17 November 2004 (No. 42/42);
- ✓ Notes that it is not for the applicant company to initiate any internal enforcement proceedings;
- ✓ Considers that only the payment of the compensation granted by the judgment of 17 November 2004, together with statutory interest and default interest until 25 August 2017, would place the applicant as far as possible in a situation equivalent to that in which it would find itself if the requirements of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 had not been infringed, i.e. a total of 5 654 105 €;
- ✓ Urgently enjoins the Romanian State to pay the said sums into the hands of the applicant without further delay;
- ✓ To transmit to the Romanian State an official notice to this effect within the meaning of Article 46 § 4 of the Convention.

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