Report to His Excellency the Ambassador of the Netherlands to Romania in His capacity of observer of the evolution of the Romanian judicial system

Your Excellency,

Dear Mister Ambassador,

In your capacity as observer of the evolution of the Romanian judicial system on behalf of the European Union, we would like to bring to your attention, our comments as to the way the Tender case was handled in front of the Penal Court of Appeal of Bucharest.

We hope that our comments can be of value, as we are both lawyers registered with the Luxembourg Bar, trained in France and Belgium and experienced in pleading in front of various jurisdictions within the European Union.

Introduction

The Tender case originates in a commercial transaction which gave rise to a penal incrimination and the prosecution of M. Ovidiu TENDER and others.

Mr TENDER is or was one of the wealthiest businessmen in Romania.

The facts date from 2004 -2006.

The investigation lasted for quite some years and the cornerstone of the prosecution is a report drafted by two experts in view of the valuation of the shares of a company being the consideration in one commercial transaction, more specifically a collateral in a commercial vendor's loan transaction.

It must be brought to your attention that one of the experts received not less than three disciplinary sanctions about this expertise and was suspended as chartered accountant for six months. He essentially proceeded with such valuation based on the stock market value of the shares at the Romanian RASDAQ, at a time the latter institution had already been dissolved pursuant to a ruling of the ECJ.

Criminal complaints were filed by the expert versus Mr TENDER and vice versa.

It seems that one or the other prosecutor in charge of the file was later prosecuted for corruption issues in other files.

On the basis of said report, Mr TENDER was sentenced to ten years emprisonment by a first instance decision.

Such decision was appealed and we intervened as external counsels for Mr TENDER with our international expertise.

Our pleadings concentrated on pure procedural means and more specifically the respect of the European Convention of Human Rights.

Romanian lawyers pleaded on the pure local law issues and details of the case.

We took part in three hearings at the appeal level.

There had been a hearing prior to our intervention.

During that hearing the case had been postponed due to problems relating to the summons of an essential co-defendant who was not present.

1. The freezing of all the assets of Mr TENDER's relatives before any debate:

The same day the hearing was postponed, an order to freeze the assets of Mr TENDER, its companies and of all his relative's was issued to various governmental agencies.

This order was issued by the very same judges who postponed the case and who were supposed to later assess the merits of the case.

Such order was issued without any debate with the defendants. The latter were only incidentally informed about such order a few days later.

The blatant violations of human rights regarding this first issue are :

-lack of contradictory debate before issuing such order,

-no respect of the presumption of innocence

o sanction given before the final declaration of guilt of Mr TENDER

o relatives affected by such freezing

-disproportionate sanction

o the amounts at stake in the procedure amount to 40 million euros and the fortune of Mr TENDER seems to be 10 times that amount,

o assets belonging to Mrs TENDER prior to the facts were also seized,

Under Western European standards, such freezing may intervene at one of the following three stages:

-during the investigation when specific risks such as the disappearance of the products of crime, have been identified,

-when a first instance decision is issued and temporary measures are decided,

-when a final decision is given about the guilt of the accused,

Ordering the freezing just before the debate in appeal on the merits, and after more than 10 years after the facts, is just outrageous.

This order might also have been prepared before hand with the intent to be issued to governmental agencies as soon as the trial was over.

As the trial had been postponed we could imagine that someone forgot to refrain from delivering the order…

We intervened in the following hearing which took place on the 15th May 2015.

2. The recusation process:

At that hearing, our Romanian colleagues pleaded the recusation of one of the judges, whose impartiality could be questioned as she had already sentenced one of the co-accused in a file linked to this one.

We personally insisted on the fact that the judge had already expressed her opinion about the case as she had issued the freezing order before hearing the defendants and before any kind of pertinent debate.

This attitude affected the right for the defendants to be heard by an impartial judge.

At this stage we discovered the surprising way Romanian judges treat recusation requests.

The new penal procedural code, more precisely the article 67 (5) describes the first stage of the recusation procedure :

"Inadmissibility shall be ascertained by the prosecutor or the judicial panel with which the challenge to disqualify was filed."

The second stage is described in article 68 (2):

"The abstention or challenge to disqualify of judges who are part of a judicial panel shall be ruled on by another judicial panel."

In other words when lawyers file a request for the recusation of the sitting judges, the assessment of the admissibility of such request is to be done by the same judge(s).

Said judge(s) will apply a preliminary examination by which they decide whether the recusation is admissible. Only if the recusation is declared admissible will other judges be appointed to decide upon the grounds of such request.

Such procedure is a blatant violation of the basic rule of law principle of "Nemo Judex in Causa Propria". Such principle is indirectly enacted in the European Convention on Human Rights, more precisely its article 6-1 on the right to be heard by an impartial court.

We witnessed during the three hearings we attended to in Bucharest, that judge(s) use and abuse their right to "filter" recusation requests.

But during that hearing, the two sitting judges - after analyzing the admissibility of our requests for recusation - explained that they had reached divergent opinions.

As a consequence, a third judge was appointed and the panel reached the conclusion that our requests were admissible.

A few days later a new panel of judges was appointed in order to assess the merits of our recusation requests.

Such new panel issued a judgement on the 20th May 2015 by which the initial judges were recused as one of them had already assessed a case closely connected to this one, and the freezing order cancelled.

It is a well-motivated decision making reference to case law of the European Courts of Human Rights (hereinafter referred to as "ECDH").

This first procedural issue and the way it was handled is a demonstration that the Romanian judicial system can work in a modern and efficient manner and that wise and competent judges are indeed present within the Romanian Corps of Magistrates.

Two new judges were appointed shortly thereafter and the next hearing took place on the 3rd of June 2015 (after having been initially scheduled for the 16th June).

At the start of that new hearing, lawyers filed a new request for recusation for the same grounds as the previous one-i.e. the president of the new panel had already assessed a case connected to this one, in fact it seems he had done that assessment with the same judge as the one already impeached.

This new panel asked the lawyers to file all their preliminary requests before assessing the admissibility of the recusation request.

This was surprising as the question of recusation is typically to be dealt prior to any other question.

Despite the fact that we underlined the fact that this admissibility procedure was infringing the right to be heard by an impartial judge, and that the grounds for recusation were exactly the same as the one applied to the previously recused judges, the requests for recusation were declared not admissible. This was a further blatant breach of human rights in violation of ECHR case law.

Furthermore during that hearing further violations of human rights were committed.

3. Breach of the rights to a fair trial as to the evidence on which the defendants were condemned in first instance:

On the 3rd of June hearing, requests were filed to complete the investigation and allow a contradictory debate on witnesses and evidence brought by the prosecutor.

These requests were systematically rejected, breaching the rights to a fair trial, violations which can be listed as follows:

3.1 Witnesses:

The judges systematically declined :

-to summon and hear witnesses, previously auditioned by the prosecutor or new ones suggested by the defense,

-to summon and ask questions to the experts whose report was the cornerstone of the case,

These refusals are typical breaches to the fundamental right to a fair trial.

3.2 Classified documents and the refusal to their access:

Some of the phone recordings were considered as "classified for national defense purposes".

3.2.1 Refusal to declassify some documents in the file

The defense asked to be granted access to such recordings in order to respect the equality of arms-i.e. the prosecutor had access to such recordings and could decide to only use the ones detrimental to the accused and ignore the ones in favour of the accused.

3.2.2 Refusal to grant access to one of the defendent's lawyers to those classified documents despite his habilitation.

One of the defendant's lawyers was habilitated to access documents classified as confidential for national defense interest.

Despite his habilitation, the access to the phone recordings was refused.

Such means that only the prosecutor and the judges had a complete knowledge of – of full access to - the factual aspects file.

One must also point out that the litigation was about a company active in oil in the strategicically important petrochemical sector. This may explain why some of the phone recordings might have been classified as confidential.

But still, issues about the commercial transactions regarding that field of activity were known by the main defendant.

These confidential documents issues are characterized violations to the principle of equality of arms and to the right right of information.

3.3 Expert's report issues:

As mentioned before, the public prosecutor based its claim against Mr TENDER mainly on the basis of an expert's report.

The purpose of such report is the valuation of shares of a company, being the counterpart to a commercial transaction (compensation between a receivable and the ralisation of said shares given as a collateral to the acquisition debt).

Many different methods are typically recognized in order to evaluate the price of shares of a company.

These methods can be discussed and challenged on its own merits, and the choice of any method in any specific situation may be debated.

But in any case, when a report is drafted in such a way that it can be sufficient to to indict a defendant, such as in this case, then three warranties have to be provided:

-right to a contradictory process in the elaboration of such report,

-right to question the expert as witness,

-right to request a counter-expertise,

In this case, none of the defendants has been associated in any way in the elaboration and drafting of such report. In other words, the experts just worked on their own and did not ask any questions to the defendants or their accountants about the methods, the accounting, the existing documents which could have been at their disposal, etc...

When such process was not respected then the defendants should at least be able to ask questions to the experts during the trial.

Such requests were denied.

This is the more surprising as the experts apparently based their conclusions on the stock-market value of the shares at a time when no such listing existed anymore, pursuant to the law 151/2014 deciding the dissolution of the Romanian RASDAQ following the ECJ ruling of 22 March 2012.

The last option would have been to allow a counter-expertise, requests about this was also rejected.

4. Further violation of a right to a fair trial:

One of the defendants, Mr IANCU, was brought to court on the 4th June and was surprised to hear that the case took place that day. He mentioned that he had been informed of this at 1 AM the same night and obviously did not have time to talk with his lawyer before the hearing, but luckily he somehow managed to prepare lengthy writings some time ago as he had been serving time in jail for some time already.

He had been sentenced in a case related to this one by the very same judge presiding this hearing. He explained he had 3 points to develop about the recusation of said judge.

After two points, the judge indicated that he would assess his request and left the courtroom.

When he came back to declare the recusation request as not admissible, the defendant complained that he had not been able to develop his third point which was about a criminal complaint he had filed against the presiding judge.

This point was objectively a strong one in order for the judge to recuse himself but the judge refused to take it into consideration and more shockingly denied the right for the defendant to explain his case further and asked for him to be physically expelled from the court room.

This attitude was an introduction as to the way the hearing of the last day would be handled by the presiding judge.

This hearing was about the pleadings of the defendant's lawyers.

The presiding judge announced that said lawyers were only allowed to plead for 20 minutes each.

One must bear in mind that the file consisted in:

-documents totalling 20,000 pages,

-10 years long investigation and procedure,

-months of preparation by lawyers,

and that the issues at stake were :

-ten years prison sentence for some of the defendants,

-confiscation of Mr TENDER's complete fortune,

-future of companies totaling several thousand jobs,

-the fate of Mr TENDER's relatives who might be impacted by a new freezing and confiscation order,

taking into consideration also the fact that the judges had only been appointed a few days ago, and could not reasonably have gained a thorough knowledge of the case, these time restrictions were most shocking.

One must state that some lenience was granted as to the exact length of pleadings, but just the principle in itself was sufficiently shocking and demonstrates the consideration given by the sitting judges to such a case.

It also put an inappropriate pressure on lawyers which did not allow them to perform their duties in an appropriate manner.

We would also like to state a few general considerations.

5. General considerations:

The hearing of the 3rd of June started at 13:00 and ended shortly after midnight. During the evening, the defendants were providing statements about the case. It must be noted that after a few hours of hearing and so late in the evening, it was difficult for most defendants to perform such exercise in an approcpriate and efficient manner. The same remark also apply to the judges themselves who were evidently not paying attention to various declarations and/or pleadings, discussing among themselves in the most schocking manner.

The following hearing took place the next day and lasted until late in the evening.

More shocking, the decision was set to be given only two working days later (the 8th June).

Not only it is not possible to any minimal knowledge of the 20,000 pages file within a few days, but defendant's arguments and statements can

neither be reasonably assessed in such a short time after they have been made.

Significantly, no single question was asked to the defendants when pleading, which leads us to conclude that the judges did not know, nor checked, the facts in any way.

Justice is not about speed.

Another point is the young age of the presiding judge considering his senior posting and the complexity of the case.

We were told he was only 32 years old.

If such is the case, it is another shocking element.

Judges can be young but in that case they sit with more experienced judges who act as presidents or they sit in much lower courts, where their potential mistakes can still be corrected in appeal.

When young judges are presiding in the court of appeal of Bucharest there is no recourse possible beside the ECHR against their potential mistakes.

Common standards do not allow such situation.

As a general consideration, we had the feeling that this panel of judges formed an opinion about the outcome of this trial before the hearings started. This came as obvious considering their behavior during the hearing.

CONCLUSION

In a nutshell, we stated so many infringements in one single case that it can be considered as an exemplary case of mismanagement of justice - a school case which can be debated for years in university.

We need to state that no judgement has been issued yet and these violations could only be justified if the accused are all declared innocent. Even in such case, it would remain shocking to witness such blatant violations of the fair trial principles.

We hope that this information may be of use to the CVM, and we have been honoured to contribute in any way to the necessary success of its endeavours.

We remain at your disposal for any further comments.

Philippe-Fitzpatrick ONIMUS, Jean-Luc DASCOTTE