

## BULGARIA - SHAREHOLDER RIGHTS AND LOSS OF CORPORATE LICENCES

On 13 January 2015 the Bulgarian Supreme Administrative Court ("SAC") dismissed an appeal by the shareholders of Corporate Commercial Bank AD ("CCB") against a decision of the Bulgarian National Bank ("BNB") terminating the company's banking license, and thus triggering insolvency proceedings.

The court held that the rights of the shareholders were not directly affected by the licence termination and therefore the shareholders did not have a legal interest in the appeal. The claimant shareholders have now appealed to the highest panel of the SAC.

### *Shareholder submissions*

The shareholders submitted that they had a legal interest due to (i) the negative financial effect of the licence revocation, (ii) deprivation of their property rights; and (iii) the denial of opportunity for a shareholder rescue of the bank.

It was submitted by the shareholders that a right of appeal is guaranteed by the Constitution of the Republic of Bulgaria under Article 120, para. 2 which provides that "individuals and legal entities are entitled to appeal all administrative deeds that affect them, except for those expressly excluded under the law". Furthermore, it was submitted that denial of shareholder interest was a breach of the right to protection of property pursuant to Article 1 of Protocol 1 of the European Convention of Human Rights ("ECHR"), a breach of the right to a fair trial under Article 6 of the ECHR, a breach of the right to an effective remedy under Article 13 of the ECHR, as well as breach of free movement of capital protections in the EC Treaty.

### *Rejection by the Court*

The SAC held that shareholders in a licensed entity are not "directly, personally and immediately affected" by an administrative decision for revocation of a license. Rather, only the licensed entity itself has legal interest. The court acknowledged that revocation of the banking licence may have had an adverse economic impact on the value of the shares but determined that this was simply the inherent economic risk that all shareholders accept when investing.

### *Dissenting Ruling*

The decision of the three-member panel of the SAC is notable for the dissenting opinion of one of its members, which considered previous case law of the European Court of

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Human Rights.<sup>1</sup> In *Capitalbank AD v. Bulgaria* and *Credit and Industrial Bank v. Czech Republic* the court held that claims for damages for breach of Art.6, §1 of the ECHR by national courts lodged by shareholders of banks in receivership were admissible on the following grounds:

- Receivership involves the release of all corporate bodies that had been appointed by the shareholders and the appointment by the relevant central bank of receivers acting as sole legal representatives of the bank;
- Receivers are not expected to cooperate with the shareholders for the purposes of appealing actions of the same supervisory body;
- Protection of rights under the ECHR and its Protocols are not theoretical or illusory but shall be practical and effective. In the case of CCB, the dissenting opinion considered that protection cannot be achieved if the right of appeal is granted only to the receivers of the bank and not to its shareholders and/or depositors<sup>2</sup>.

In addition to the assessment of the above case law, the dissenting ruling of the SAC also draws support pursuant to the right of appeal under Art. 72 of Directive 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 ("Directive 2013/36/EU"), which has been implemented in the Bulgarian Credit Institutions Act.

### ***Outcome of the appeal to the final appellate SAC Panel?***

The final five-member appellate panel of the SAC is not bound to follow case law of the European Court of Human Rights.

One option for the claimant shareholders is to request the SAC to seek interpretation of Art. 72 of Directive 2013/36/EU from the Court of Justice of the European Union. Notwithstanding an interpretative referral to the Court of Justice of the European Union, however, if the final appeal is dismissed, the shareholders will only be able to defend their rights in Bulgaria within the insolvency proceedings.

A further claim by the shareholders may be brought before the European Court of Human Rights for damages against Bulgaria due to deprivation of the right of appeal against acts of the Bulgarian National Bank, although the difficulties of quantifying damages in this case may thwart the effectiveness of such claim.

If the court finds that the inability to appeal against decisions of the Bulgarian National Bank constitutes a breach of fair trial right under Article 6 of the ECHR, the decision could be used as grounds for revocation of the final decision of SAC as per Article 239,

<sup>1</sup> *Capitalbank AD v. Bulgaria*, case No. 49429/99; *Credit and Industrial Bank v. Czech Republic*, case No. 29010/95

<sup>2</sup> The revocation of the banking license of CCB was also appealed by a number of depositors in CCB. All appeals submitted by depositors were similarly dismissed by the SAC on grounds that they lack legal interest to appeal.

para. 6 of the Bulgarian Administrative Procedure Code.

The timing of such a claim – up to five years – would not provide the shareholders with financial compensation but may provide an incentive for legislative changes to the Bulgarian Credit Institutions Act for the purposes of ensuring the effective protection of shareholders' rights of appeal against BNB acts in similar future cases. It would also provide a footnote to the collapse of CCB that the shareholders were denied the right to try to rescue the institution from insolvency.

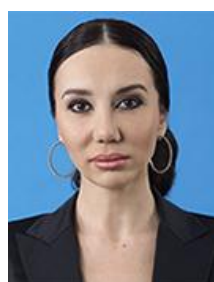
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