EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Decisions rejecting business projects on national security grounds respected fair-trial rights

In today's **Chamber** judgments[1] in the cases of UAB Ambercore DC and UAB Arcus Novus v. Lithuania and UAB Braitin v. Lithuania (application nos. 56774/18 and 13863/19) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights in either case.

Both cases concerned decisions refusing the applicant companies permission to proceed with planned business projects in Vilnius because they were a threat to national security as their shareholders had links either to the Russian secret services or to the Lukashenko regime in Belarus. The companies in the first case had wanted to build a data-storage facility, while the company in the second case had intended to acquire an investment company.

In their complaints to the Court, the applicant companies alleged a breach of their right to adversarial proceedings and equality of arms because the decisions had been taken on the basis of evidence which had not been disclosed to them as it had been classified.

The Court found that the restrictions on the applicant companies' rights had been counterbalanced by other procedural safeguards. They had been able to participate effectively in the administrative proceedings on their cases and have witnesses examined. The classified evidence had not been decisive for the proceedings as there had been other, publicly available, documents on which the decisions had been based. Overall, there had been nothing to suggest in either case that the decisions had been arbitrary or disproportionate.

Principal facts

The applicants are three companies based in or near Vilnius.

The companies in the first case are involved in telecommunications: UAB Arcus Novus deals with technological projects, and its subsidiary, UAB AmberCore DC, constructs and develops data centres. Ambercore DC is owned by a group of private investors.

The company in the second case, UAB Braitin, manages collective investment schemes and was 100% owned by a private individual, R.K.

In 2016-17 both companies asked the Lithuanian authorities to assess their compliance with national security in the context of their respective projects, as required by the relevant domestic law (the Law on Enterprises and Facilities of Strategic Importance to National Security and Other Enterprises of Importance to Ensuring National Security).

The commission which carried out the assessments decided that the applicant companies did not comply with the conditions set out by that Law because they were a threat to national security. It based its findings on reports submitted to it by the State Security Department ("the SSD"), which were classified.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

In particular, the commission found that UAB Arcus Novus' shareholders had links to the Russian secret services. One shareholder had previously worked in Russian companies directly linked to the Russian State, including Gazprom, and Russian law-enforcement. The commission specifically voiced concerns that the planned data-storage facility risked facilitating Russian intelligence activities and cyber spying.

As concerned UAB Braitin, the commission concluded that the then applicant company's sole shareholder had connections with individuals who were linked to persons of States not belonging to the European Union (EU) or North Atlantic Treaty Organisation (NATO).

The applicant companies challenged those decisions in the administrative courts. In 2018 the Supreme Administrative Court upheld the commission's findings in both cases, concluding in particular that the applicant companies had not met the criteria set forth in the relevant domestic law for following through with their projects.

Throughout the administrative proceedings the applicant companies argued that there had been a breach of their defence rights because they had not been given access to the classified documents on which the decisions against them had been based. The courts asked the SSD, in both cases, whether it was possible to declassify the documents. The SSD replied in the negative, stating that the documents had to be kept secret on public-interest grounds.

Complaints, procedure and composition of the Court

Relying in particular on Article 6 § 1 (right to a fair hearing), the applicant companies complained that the decisions against them had been unfair because they had been taken on the basis of evidence which had been classified and thus withheld from them.

The applications were lodged with the European Court of Human Rights on 28 November 2018 and 4 March 2019, respectively.

Judgment was given by a Chamber of seven judges, composed as follows:

Arnfinn **Bårdsen** (Norway), *President*,
Jovan **Ilievski** (North Macedonia),
Egidijus **Kūris** (Lithuania),
Saadet **Yüksel** (Türkiye),
Lorraine **Schembri Orland** (Malta),
Frédéric **Krenc** (Belgium),
Davor **Derenčinović** (Croatia),

and also Dorothee **von Arnim**, *Deputy Section Registrar.*

Decision of the Court

The Court observed that the classified information on which the commission had based its findings had not been made available either to the applicant companies or to their lawyers. Nor had those classified documents been disclosed to the applicant companies during the proceedings in the administrative courts.

It went on to look at whether such restrictions on the adversarial and equality-of-arms principles had been sufficiently counterbalanced by other procedural safeguards both in the commission's decisions and the administrative-court proceedings.

In *UAB Ambercore DC and UAB Arcus Novus* the Court considered that the commission had given explicit reasons for its decisions and that therefore, even at that stage, the applicant companies should have been aware of why they had not been given clearance for their project.

The information available to the parties in that case had then increased throughout the administrative proceedings that followed. It had included unclassified material such as two decisions by the commission, documents regarding the applicant companies' shareholder structure, relevant information from the Lithuanian law-enforcement authorities on whether the companies represented a threat to national security, a presentation of the data-centre project, and the SSD's six-page-long response to the applicant companies' appeal.

In *UAB Braitin* the Court noted, on the other hand, that the commission's decision had been rather succinct, without giving details about its shareholders' connections.

Such limited disclosure of evidence had, however, been compensated for during the administrative-court proceedings that had followed as early as December 2017, when the SSD had provided 59 pages of publicly available information regarding specific businesspeople in Belarus, a non-EU and non-NATO country, who had been under EU sanctions for financially supporting the Lukashenko regime.

Indeed, overall, the Court found in both cases that the domestic law and the practice of the administrative courts had provided the required level of protection to the applicant companies.

Firstly, the applicant companies had been able to participate in the administrative proceedings to defend their interests via oral hearings, held at their request. During those hearings, the companies had, moreover, been able to examine the shareholders who had been central to the findings against them.

Secondly, the classified information had not been the only evidence on which the commission and the courts had based their decisions, which had been corroborated by numerous other unclassified documents. The classified information had not therefore been decisive in the proceedings.

Lastly, the Court reiterated that the right to disclosure of all relevant evidence was not absolute and could be subject to restrictions. It did not see anything in either case to suggest that classifying the documents in question had been arbitrary or disproportionate.

The courts had thus duly exercised the powers of scrutiny available to them and the special responsibility required of them in this type of proceedings, both regarding the need to preserve the confidentiality of classified documents and regarding the assessment of the reasonableness and lawfulness of the commission's decisions, giving reasons for the courts' decisions with regard to the specific circumstances of the applicant companies' cases.

The Court therefore considered that the restrictions on the applicant companies' right to adversarial proceedings and equality of arms had been offset in such a way that the fair balance between the parties had not been affected and the applicant companies' right to a fair hearing had not been impaired.

Consequently, there had been no violation of Article 6 § 1 of the Convention in either of the cases.

Separate opinion

Judge Derenčinović expressed a concurring opinion in both cases, which is annexed to the judgments.

The judgments are available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.