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

FOURTH SECTION

CASE OF MEGADAT.COM SRL v. MOLDOVA

(Application no. 21151/04)

JUDGMENT

STRASBOURG

8 April 2008

FINAL

08/07/2008

This judgment may be subject to editorial revision.

[….]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

1. The applicant, Megadat.com SRL, is a company incorporated in the Republic of Moldova.

1. Background to the case

2. At the time of the events the applicant company was the largest internet provider in Moldova. According to it, it held approximately seventy percent of the market of internet services. While agreeing that the applicant company was the largest internet provider in the country, the Government disputed the ratio of its market share without, however, presenting any alternative figures.

3. The applicant company had two licences issued by the National Regulatory Agency for Telecommunications and Informatics ("ANRTI") for providing internet and fixed telephony services. The licences were valid until 18 April 2007 and 16 May 2007 respectively and the address 55, Armenească Street was indicated in them as the applicant company's official address.

4. The company had three offices in Chişinău. On 11 November 2002 its headquarters was moved from its Armenească street office to its Ştefan cel Mare street office. The change of address of the headquarters was registered with the State Registration Chamber and the Tax Authority was informed. However, the applicant company failed to request ANRTI to modify the address in the text of its licences.

5. On 20 May 2003 the applicant company requested a third licence from ANRTI indicating in its request the new address of its headquarters. ANRTI issued the new licence citing the old address in it, without giving any reasons for not indicating the new address.

2. The invalidation of the applicant company's licences

6. On 17 September 2003 ANRTI held a meeting. According to the minutes of the meeting, it found that ninety-one companies in the field of telecommunications, including the applicant company, had failed to pay a yearly regulatory fee and/or to present information about changes of address within the prescribed time-limits. ANRTI decided to invite those companies to eliminate the irregularities within ten days and to warn them that their licences might be suspended in case of non-compliance.

7. On unspecified dates the ninety-one companies, including the applicant company, were sent letters asking them to comply within ten days

of the date of receipt of the letter. They were also warned that their licences might be suspended in case of non-compliance in accordance with section 3.4 of the ANRTI Regulations. The applicant company was sent such a letter on 24 September 2003.

8. Following ANRTI's letters, only thirty-two companies, including the applicant company, complied with the request.

9. On 29 and 30 September 2003 the applicant company lodged documents with ANRTI indicating its new address, together with a request to modify its licences accordingly, and paid the regulatory fee.

10. On Friday 3 October 2003 ANRTI informed the applicant company that it had some questions concerning the documents submitted by it. In particular it had a question concerning the lease of the applicant company's new headquarters and about the name of the applicant company. ANRTI informed the applicant company that the processing of its request concerning the amendment of the licences would be suspended until it had submitted the requested information.

11. On Monday 6 October 2003 ANRTI held a meeting at which it adopted a decision concerning the applicant company. In particular it reiterated the content of section 15 of the Law on Licensing and of section 3.5.7 of the ANRTI Regulations, according to which licences which had not been modified within ten days should be declared invalid. ANRTI found that those provisions were applicable to the applicant company's case, and that its licences were therefore not valid.

12. On the same date ANRTI wrote to the Prosecutor General's Office, the Tax Authority, the Centre for Fighting Economic Crime and Corruption and the Ministry of Internal Affairs that the applicant company had modified its address on 16 November 2002 but had failed to request ANRTI to make the corresponding change in its licences. In such conditions, the applicant company had traded for eleven months with an invalid licence. ANRTI requested the authorities to verify whether the applicant company should be sanctioned in accordance with the law.

13. On 9 October 2003 ANRTI amended the Regulations concerning the issuing of licences in order to provide that an entity whose licence was withdrawn could re-apply for a new licence only after six months.

14. On 21 October 2003 ANRTI held a meeting at which it found that fifty-nine of the ninety-one companies which it had warned, in accordance with its decision of 17 September 2003, had failed to comply with the warning. It decided to suspend their licences for three months and to warn them that in case of non-compliance during the period of suspension, their licences would be withdrawn. It appears from the documents submitted by the parties that the applicant company was the only one to have its licence invalidated.

3. The court proceedings between Megadat.com and ANRTI

15. On 24 October 2003 the applicant company brought an administrative action against ANRTI arguing, *inter alia*, that the measure applied to it was illegal and disproportionate because the applicant company had always had three different offices in Chişinău of which ANRTI had always been aware. The change of address had only occurred because the applicant company's headquarters had transferred from one of those offices to another. The tax authority had been informed promptly about that change and thus the change of address had not led to a failure to pay taxes or to a drop in the quality of services provided by the applicant company. Moreover, ANRTI's decision of 6 October 2003 had been adopted in breach of procedure, because the applicant company had not been invited to the meeting and ANRTI had disregarded its own instructions given to the applicant company on 3 October 2003.

16. On 25 November 2003 the Court of Appeal ordered a stay of the execution of ANRTI's decision of 6 October 2003. It also set 16 December 2003 as the date of the first hearing in the case. Later, at the request of ANRTI, that date was changed to 2 December 2003.

17. On 1 December 2003 the representative of the applicant company lodged a request for adjournment of the hearing of 2 December on the ground that he was involved in a pre-arranged hearing at another court on the same date and at the same time.

18. On 2 December 2003 the Court of Appeal held a hearing in the absence of the representative of the applicant company and dismissed the latter's action. The court considered, *inter alia*, that since the applicant company had failed to inform ANRTI about the change of address, the provisions of section 3.5.7 of the ANRTI Regulations were applicable.

19. The applicant company appealed against the decision arguing, *inter alia*, that it had not been given a chance to participate in the hearing before the first-instance court. It submitted that, according to the Code of Civil Procedure, the court had the right to strike the case out of the list of cases if it considered that the applicant had failed to appear without a plausible justification, but not to examine the case in its absence. It also submitted that by declaring the licences invalid, ANRTI had breached its own decision of 17 September 2003. It was ANRTI's usual practice to request information concerning changes of address and to sanction companies which did not comply by suspending their licences. The applicant company drew attention to two other decisions of that kind dated 12 June 2003 and 17 July 2003. In this case, however, the applicant company had fully complied with ANRTI's decision of 17 September 2003 by submitting information about the new address within the prescribed time-limit. Notwithstanding, ANRTI had asked for supplementary information on Friday 3 October 2003 and without waiting for it to be provided by the

applicant company, had decided to declare the licences invalid on Monday 6 October 2003.

The applicant company also argued that ANRTI's decision of 6 October 2003 had been adopted in serious breach of procedure because the applicant company had not been informed three days in advance about the meeting of 6 October 2003 and had not been invited to it.

Lastly, the applicant company argued that ANRTI's decision to declare its licences invalid was discriminatory since the other ninety companies listed in ANRTI's decision of 17 September 2003 had not been subjected to such a severe measure.

20. On 3 March 2004 the Supreme Court of Justice dismissed the applicant company's appeal and found, *inter alia*, that it had been summoned to the hearing of 2 December 2003 and that its request for adjournment could not create an obligation on the part of the Court of Appeal to adjourn the hearing. Moreover, the decision of 6 October 2003 was legal since the applicant company admitted to having changed its address, and according to section 3.5.7 of the ANRTI Regulations a failure to request a modification of an address in a licence led to its invalidity. The Supreme Court did not refer to the applicant company's submissions about its discriminatory treatment, ANRTI's usual practice of requesting information about changes of address and ANRTI's breaching of its own decision of 17 September 2003.

21. One of the members of the panel of the Supreme Court, Judge D. Visterniceanu, disagreed with the opinion of the majority and wrote a dissenting opinion. He submitted, *inter alia*, that the first-instance court had failed to address all the submissions made by the applicant company and had illegally examined the case in its absence. Moreover, only one provision of the ANRTI Regulations had been applied, whereas it was necessary to examine the case in a broader light and to apply all the relevant legislation. Finally, ANRTI's decision of 6 October 2003 contravened its decision of 17 September 2003. Judge Visterniceanu considered that the Supreme Court should have quashed the judgment of the first-instance court and remitted the case for a fresh re-examination.

4. The applicant company's attempts to save its business and the repercussions of the invalidation of its licences

22. In the meantime, the applicant company has transferred all of its contracts with clients to a company which was part of the same group, Megadat.com International, which had valid licences. However, the State-owned monopoly in telecommunications, Moldtelecom, refused to sign contracts with the latter company and made it impossible for it to continue working.

23. On 16 March 2004 ANRTI and Moldtelecom informed the applicant company's clients that on 17 March their internet connection would be shut

down and offered them internet services from Moldtelecom without any connection charge.

24. On 17 March 2004 Moldtelecom carried out the disconnection of the applicant company and of Megadat.com International from the internet and all of their equipment on the Moldtelecom premises was disconnected from the power supply.

25. In July 2004 the licences of Megadat.com International were withdrawn by ANRTI.

26. As a result of the above, the applicant company and Megadat.com International were forced to close down the business and sell all of their assets. One week later, the applicant company's chairman, Mr Eduard Muşuc, was arrested for peacefully demonstrating against his company's closure.

27. Following ANRTI's letter of 6 October 2003 (see paragraph 12 above) the Tax Authorities imposed a fine on the applicant company for having operated for eleven months without a valid licence and the CFECC initiated an investigation as a result of which all the accounting documents of the applicant company were seized.

5. International reactions

28. On 18 March 2004 the Embassies of the United States of America, the United Kingdom, France, Germany, Poland, Romania and Hungary, as well as the Council of Europe, the IMF and World Bank missions in Moldova issued a joint declaration expressing concern over the events surrounding the closure of the applicant company. The declaration stated, *inter alia*, the following: "Alleged contraventions of registration procedures do not appear to justify a decision to put a stop to the functioning of a commercial company. ... We urge Moldtelecom and the relevant authorities to reconsider this question. This seems all the more important in view of the commitment of the public authorities of Moldova to European norms and values."

[….]

THE LAW

29. The applicant company argued that the invalidation of its licences had violated its right guaranteed under Article 1 of Protocol No. 1 to the Convention, which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

30. The applicant company further submitted that it had been the victim of discrimination on account of the authorities' decision to invalidate its licences, since they had treated differently ninety other companies which were in a similar situation. It relied on Article 14 of the Convention, which provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[…..]

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

[….]

B. The Court's assessment

1. Whether the applicant company had "possessions" for the purpose of Article 1 of Protocol No. 1 to the Convention

31. It is undisputed between the parties that the applicant company's licences constituted a possession for the purposes of Article 1 of Protocol No. 1 to the Convention.

32. The Court notes that, according to its case-law, the termination of a licence to run a business amounts to an interference with the right to the peaceful enjoyment of possessions guaranteed by Article 1 of Protocol No. 1 to the Convention (see *Tre Traktörer AB v. Sweden,* judgment of 7 July 1989, Series A no. 159, § 53, and *Bimer S.A. v. Moldova*, no. 15084/03, § 49, 10 July 2007). The Court must therefore determine whether the measure applied to the applicant company by ANRTI amounted to an interference with its property rights.

2. Whether there has been an interference with the applicant company's possessions and determination of the relevant rule under Article 1 of Protocol No. 1

33. The Government did not expressly argue that there was no interference with the applicant company's possessions; however, they submitted that ANRTI's decision was a mere finding of a fact which had

come into existence long before and emphasised the distinction between withdrawal and invalidation of licences (see paragraph **Fehler! Verweisquelle konnte nicht gefunden werden.** above). Insofar as these submissions are to be interpreted as meaning that ANRTI's decision of 6 October 2003 did not interfere with the possessions of the applicant company for the purposes of Article 1 of Protocol No. 1, the Court is unable to accept this view. The Court notes in the first place that before 6 October 2003 the applicant company had been operating unhindered. Moreover, it is clear from the parties' submissions that ANRTI was well aware long before 6 October 2003 of the applicant company's failure to request a modification of the address in the text of its licences. ANRTI was informed by the applicant company about the change of address in May 2003 (see paragraph 5 above) and the latter even requested a new licence with the new address in it. For unknown reasons, ANRTI did not consider it necessary to invalidate the applicant company's existing licences at that time and even issued it with a new one. Moreover, the Government implicitly admitted that ANRTI was well aware of the situation by submitting that in July 2003 it had drawn the applicant company's attention to the irregularity and urged it to remedy it (see paragraph **Fehler! Verweisquelle konnte nicht gefunden werden.** above). In such circumstances, the Court cannot but note that ANRTI's decision of 6 October 2003 had the immediate and intended effect of preventing the applicant company from continuing to operate its business and of terminating its existing licences. The fact that the domestic authorities decided to attribute retroactive effect to ANRTI's decision of 6 October 2003 does not change that. Accordingly, the Court considers that ANRTI's decision of 6 October 2003 had an effect identical to a termination of valid licences and thus constituted an interference with the applicant company's right to the peaceful enjoyment of its possessions for the purposes of Article 1 of Protocol No. 1 to the Convention.

34. Although the applicant company could not carry on its business, it retained economic rights in the form of its premises and its property assets. In these circumstances, as in the *Bimer* case, the termination of the licences is to be seen not as a deprivation of possessions for the purposes of the second sentence of Article 1 of Protocol No. 1 but as a measure of control of use of property which falls to be examined under the second paragraph of that Article.

35. In order to comply with the requirements of the second paragraph, it must be shown that the measure constituting the control of use was lawful, that it was "in accordance with the general interest", and that there existed a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *Bimer*, cited above, § 52).

3. Lawfulness and aim of the interference

36. In so far as the lawfulness of the measure is concerned, the Court notes that this issue is disputed between the parties. While apparently agreeing that section 3.5.7 of the ANRTI Regulations was accessible and foreseeable, the applicant argued that the measure had been contrary to ANRTI's decision of 17 September 2003, by which it had been given a ten-day time-limit to remedy the situation. In the Court's view, this is a factor which is relevant to the assessment of the proportionality of the measure. Therefore, it will leave the question of lawfulness open and focus on the proportionality of the measure.

As regards the legitimate aim served by the interference, in the light of the findings below, the Court has doubts as to whether the measures taken against the applicant company by the Moldovan authorities pursued any public interest aim. However, for the purposes of the present case, the Court will leave this question open too and will proceed to examine the question of proportionality.

4. Proportionality of the interference

37. The Court will consider at the outset the nature and the seriousness of the breach committed by the applicant company. Without underestimating the importance of State control in the field of internet communications, the Court cannot but note that the Government were only able to cite theoretical and abstract negative consequences of the applicant company's failure to comply with the procedural requirement. They could not indicate any concrete detriment caused by the applicant company's omission to have its address modified in the text of its licences. Indeed, it is common ground that ANRTI was well aware of the applicant company's change of address and it had no difficulty in contacting Megadat.com on 24 September 2003 (see paragraph 7 above). Moreover, it is similarly undisputed that the applicant company kept its old address and any attempt to contact it at that address would have certainly been successful. Immediately after changing address, the applicant company informed the State Registration Chamber and the Tax Authorities (see paragraph 4 above). Accordingly, the company could not be suspected of any intention to evade taxation in connection with its failure to notify its change of address to ANRTI. Nor had it been shown that any of the company's clients had problems in contacting the company due to the change of address. It is also important to note that the applicant company did in fact inform ANRTI about its change of address in May 2003 and even requested a third licence using its new address. For reasons which ANRTI did not spell out at the time, the new licence was issued with the old address on it.

38. Against this background, the Court notes that the measure applied to the applicant company was of such severity that the company, which used to

be the largest in Moldova in the field of internet communications, had to wind up its business and sell all of its assets within months. Not only did the measure have consequences for the future, but it was also applied retrospectively, thus prompting sanctions and investigations by various State authorities, such as the Tax Authorities and the Centre for Fighting Economic Crime and Corruption (see paragraph 27 above).

39. The Court must also have regard to the conduct of ANRTI in its dealings with the applicant company. It notes in this connection that the applicant company had operated at all times, notwithstanding the technical flaw in its licences, with the acquiescence of ANRTI. It recalls that ANRTI had been apprised of the change of address in May 2003, at the time of the applicant company's application for a third licence. Without giving reasons, ANRTI failed to take note of the change of address and issued the applicant company with a new licence indicating the old address in it. Had ANRTI considered that the defect in the licence was a matter of public concern, it could have intervened at that stage. However, it failed to do so.

40. The Court further notes that in ANRTI's letter of 17 September 2003 the applicant company was clearly led to believe that it could continue to operate provided it complied with the instructions contained therein within ten days. In these circumstances it can only be concluded that the applicant company, by submitting an application for the amendment of its licences within the time-limit, could reasonably expect that it would not incur any prejudice. Despite the encouragement given by it to the applicant company, ANRTI invalidated its licences on 6 October 2003 (see, *mutatis mutandis*, *Pine Valley Developments Ltd and Others v. Ireland*, judgment of 29 November 1991, Series A no. 222, § 51 and *Stretch v. the United Kingdom*, no. 44277/98, § 34, 24 June 2003).

41. The Court recalls in this connection that where an issue in the general interest is at stake it is incumbent on the public authorities to act in good time, in an appropriate manner and with utmost consistency (see *Beyeler v. Italy* [GC], no. 33202/96, § 120, ECHR 2000-I). It cannot be said that the conduct of ANRTI complied with these principles.

42. The Court has also given due consideration to the procedural safeguards available to the applicant company to defend its interests. It notes in the first place that the applicant company was not given an opportunity to appear and explain its position before ANRTI. Procedural safeguards also appear to have failed at the stage of the court proceedings. While the case was not one which required special expediency under the domestic law, the Court of Appeal appears to have acted with particular diligence in that respect. After setting the date of the first hearing, the Court of Appeal acceded to ANRTI's request to speed up the proceedings and advanced the hearing by two weeks (see paragraph 16 above). Not only did the Court of Appeal decide the case in the applicant company's absence, but it failed to provide reasons for dismissing the latter's request for

adjournment. The Court recalls in this connection that the matter to be examined by the Court of Appeal affected the applicant company's economic survival (see paragraph 38 above).

43. Moreover, the domestic courts did not give due consideration to some of the major arguments raised by the applicant company in its defence, such as the lack of procedural safeguards before the ANRTI and the alleged discriminatory treatment. The examination carried out by the courts appears to have been very formalistic and limited to ascertaining whether the applicant company had failed to inform ANRTI about the change of its address. No balancing exercise appears to have been carried out between the general issue at stake and the sanction applied to the applicant company.

44. The Court further notes the applicant company's allegation that it was the only one from the list of ninety-one companies to which such a severe measure was applied. The Government disputed this allegation and made two conflicting submissions. Firstly, they argued that the other ninety companies concerned had committed other, less serious irregularities, such as, *inter alia*, failure to present to ANRTI annual reports (see paragraph **Fehler! Verweisquelle konnte nicht gefunden werden.** above). Secondly, they argued that at least three other companies were in a similar position and were treated in a similar manner to the applicant company.

45. Having examined both submissions made by the Government, the Court cannot accept them. As regards the first one, it finds it inconsistent with the minutes of ANRTI's meeting of 17 September 2003, in which it was clearly stated that the companies concerned had failed to pay a yearly regulatory fee and/or to present information about changes of address within the prescribed time-limits (see paragraph 6 above). The minutes do not contain reference to irregularities such as failure to present annual reports. Moreover, this submission was made for the first time by the Government in the proceedings before the Court, and must therefore be treated with caution especially in the absence of any form of substantiation (see, *mutatis mutandis*, *Sarban v. Moldova*, no. 3456/05, § 82, 4 October 2005). No such submissions appear to have been made by ANRTI during the domestic proceedings despite the applicant company's clear and explicit contention about alleged discriminatory treatment (see paragraph 19 above). Regrettably, the Supreme Court of Justice disregarded the applicant company's complaints about discrimination, apparently treating them as irrelevant.

46. As regards the Government's second submission, the Court has examined the parties' statements (see paragraphs **Fehler! Verweisquelle konnte nicht gefunden werden.** and **Fehler! Verweisquelle konnte nicht gefunden werden.** above) and the evidence adduced by them, and finds that the Government have failed to show that there were other companies in an

analogous situation which were treated in the same manner as the applicant company.

47. The Court also notes that the above findings do not appear to be inconsistent with the previous practice of ANRTI as it appears from the minutes of its meetings of 12 June and 17 July 2003, when several companies had their licences suspended for failure to comply with section 3.5.2 of its Regulations (see paragraph **Fehler! Verweisquelle konnte nicht gefunden werden.** above). The Government did not contest the existence of such a practice.

48. The arbitrariness of the proceedings, the discriminatory treatment of the applicant company and the disproportionately harsh measure applied to it lead the Court to conclude that it has not been shown that the authorities followed any genuine and consistent policy considerations when invalidating the applicant company's licences. Notwithstanding the margin of appreciation afforded to the State, a fair balance was not preserved in the present case and the applicant company was required to bear an individual and excessive burden, in violation of Article 1 of Protocol No. 1.

[….]

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

3. *Holds* that it is not necessary to examine separately the applicant's complaint under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1;

4. *Holds*
   (a) that the question of the application of Article 41 of the Convention is not ready for decision;
   accordingly,
   (b) reserves the said question;
   (c) invites the Moldovan Government and the applicant company to submit, within the forthcoming three months, their written observations on the matter and, in particular, to notify the Court of any agreement they may reach;
   (d) reserves the further procedure and delegates to the President of the Chamber power to fix the same if need be.

Done in English and notified in writing on 8 April 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early Registrar	Nicolas Bratza President