

Sequence number: K18/220498

THE HAGUE APPEAL COURT

Council chamber complaints matters

INTERIM DECISION

given on the complaint, pursuant to article 12 of the Code of Criminal Procedure (hereinafter CCP), filed by:

G. Hohmann, in his capacity of U.S. receiver of both IB Capital FX (NZ) LLP and the private persons related to IB Capital E. Echadi and M. Geurkink, as well as representative of the former clients and investors of (amongst others) IB Capital,

complainant,

in this matter having chosen domicile at the offices of his lawyers G.J. van Oosten, J.P. de Korte, S.G.C. Bocxe and M.D. Rijnsburger, lawyers in Amsterdam.

1. The complaint

On 18 February 2016 the FIOD [Dutch Fiscal Information and Investigation Service], under the instructions of the Functional Public Prosecution Service and the National Public Prosecution Service, launched a criminal investigation into ING Bank NV (hereinafter: ING), by the name Houston. Following this investigation, the Public Prosecution Service ruled that ING was guilty of violating a number of provisions of the Money Laundering and Terrorist Financing Prevention Act (hereinafter: Wwft) multiple times while this became a practice, and of culpable money laundering, in the Netherlands in the period from 1 January 2010 up to and including 21 December 2016.

A transaction of EUR 775,000,000.= was offered to ING by the Public Prosecution Service, consisting of a penalty of EUR 675,000,000.= and recovery of illegally obtained benefits of EUR 100,000,000.=. ING accepted this offer and this led to the Houston transaction agreement dated 3 September 2018.

The complaint was received by the appeal court on 30 November 2018. The complaint addresses the aforementioned decision by the Public Prosecution Service not to prosecute **ING Bank N.V.**, the defendant.

2. The report of the attorney general

By report of 6 May 2019, the attorney general requested the appeal court primarily to declare the complainant inadmissible and in the alternative to dismiss the complaint.

By additional report of 2 July 2019, the attorney general again concluded to declare the complainant inadmissible in his complaint.

3. The documents relating to the complaint

In addition to the aforementioned documents, the appeal court reviewed, amongst others, the Statement of Facts and Conclusions Public Prosecution Service in the Houston Investigation (the criminal investigation into ING Bank N.V.) and the administrative report of the acting Chief Public Prosecutor at the Functional Public Prosecution Service in Amsterdam dated 24 April 2019.

Furthermore, the appeal court reviewed the following documents prior to the hearing of 22 May 2019:

- An e-mail dated 30 April 2019 by M.D. Rijnsburger, lawyer in Amsterdam, stating that he will act as lawyer of IB Capital in absence of his colleague S.G.C. Bocxe.
- An e-mail dated 6 May 2019 by G.J. van Oosten to the chairman concerning the absence of the underlying criminal file.
- An e-mail dated 14 May 2019 of G.J. van Oosten to the chairman, including a repeated request in relation to the criminal file.
- An e-mail dated 15 May 2019 by the attorney general to the chairman, amongst others stating that the primary position of the attorney general is that first, the discussion on the admissibility will have to take place before answering whether documents need to be added to the article 12-file.
- A letter sent by e-mail dated 15 May 2019 by M.D. Rijnsburger to the chairman, being a response to the positions of the Public Prosecution Service (including 4 annexes).
- A letter dated 16 May 2019 by the attorney general addressed to the appeal court, including a preliminary response to the request for access to the Houston criminal file.

Furthermore, after the hearing at the council chamber, the appeal court reviewed:

- A letter dated 19 June 2019 by S.G.C. Bocxe, including several annexes (including the translations of the documents in the English language submitted earlier).
- An exhibit (no. 8) sent by e-mail dated 19 June 2019 on behalf of complainant's lawyers, being a list of all "investors", namely all (legal) persons that transferred money to four bank accounts of ING in the name of IB Capital in the period December 2011-September 2012.
- A letter dated 2 July 2019 by the attorney general, amongst others concerning the position of the Public Prosecution Service regarding the admissibility of complainant.
- A letter dated 16 July 2019 by J.P. de Korte, concerning a response on behalf of complainant(s) to the position of the Public Prosecution Service of 2 July 2019.

4. The hearing in council chamber

The multiple-judge complaint chamber held a hearing on the complaint on 22 May 2019.

Complainant has not appeared. G.J. van Oosten, J.P. de Korte, G.J. Wilts and M.D. Rijnsburger, lawyers in Amsterdam, appeared as complainant's lawyers. They have explained the complaint.

Mr Rijnsburger pleaded in accordance with the pleading notes submitted.

The defendant has not been requested to appear.

At the hearing, the attorney general, M.E. de Meijer, requested to be provided with an opportunity to respond in writing regarding the position of complainant following receipt of the documents translated on behalf of complainant.

Consequently, a written exchange took place. After receipt of the additional documents and the written responses on behalf of the complainant and of the attorney general, the appeal court concluded the hearing.

5. Admissibility

Before proceeding to a substantive assessment of the complaint, the appeal court must assess whether the complainant is admissible in the complaint.

First, the question whether the complainant qualifies as directly interested party within the meaning of article 12, section 1 CCP will be addressed.

Pursuant to article 12 CCP, a directly interested party can file a complaint in writing if a criminal offence is not prosecuted, the prosecution is not continued or the prosecution takes place by issuing a penalty order. According to the wording of the statute and consistent case law, a direct interest concerns an own interest of the complainant that is to be determined objectively and specifically.

The appeal court reviewed the positions regarding admissibility of and on behalf of the complainant and of the attorney general.

In the additional report of 2 July 2019, the attorney general stated that the documents submitted on behalf of complainant sufficiently evidenced that both the complainant, Hohmann, and the lawyers referred to are authorised to act in the current complaint proceedings (regarding potential investors). However, she is of the opinion that it has not been established by complainant(s) in what way they are directly affected in their interest as a consequence of the transaction decision and what sense of justice is satisfied by the prosecution and trial of ING. According to the attorney general, the documents do not show a direct link between the damages that possible investors suffered and the facts underlying the transaction with ING.

In their written response of 16 July 2019, the lawyers of complainant(s), amongst others, emphasised that complainants are not familiar with the “facts underlying the transaction with ING”, as the file has not been provided to complainants, and the Public Prosecution Service and ING, when drafting the settlement documentation, chose not to specify the matters on which the settlement is based. Complainants are of the opinion that the current IB Capital matter, although not explicitly referred to in relation the ING settlement, is referred to implicitly. They state that, evidently, the IB Capital matter is one of the “other criminal investigations” based on which the Public Prosecution Service at least “was aware of multiple signals of violation of the Wwft and signals of culpable money laundering” in the period 2010-2016 and that “confirm the image that ING NL insufficiently complied to the Wwft” in the period 2010-2016.

As a consequence of the ING settlement, filing a criminal report against ING because of the acts and omissions of ING regarding the IB Capital matter can no longer lead to prosecution. According to the complainants, it is certain that the investors have suffered considerable damages that they would not have suffered if ING would not have violated its obligations under the Wwft.

According to the complainants, therefore, there is a direct link between the damages that the investors suffered and the facts underlying the transaction with ING.

In this regard, the appeal court considers the following.

After reviewing the documents, the appeal court rules that the complainant, in his capacity of “receiver”, can be considered to be an interested party in these complaint proceedings. The complainant represents parties injured as a consequence of the (obviously punishable) acts of ING.

Furthermore, the appeal court rules that confidence and integrity are essential in the relationship between a bank and its relations. It is undisputed that investors transferred many millions of euros to accounts that have been opened by ING, following which transactions for many millions of euros took place on these accounts. It is not inconceivable that, if the investors would have known that ING did not carefully perform its obligations – amongst others in the area of compliance – they would not have trusted ING with the monies. It follows from the foregoing that the complainant has been affected in an interest that concerns him specifically.

As a consequence, the appeal court rules that the complainant is admissible in his complaint.

6. Before further decisions

After reviewing the complaint and the other documents of the file and having heard what has been asserted at the hearing, the appeal court considers it to be desirable – before making further decisions – to again hear (the lawyers of) complainant in a hearing.

The appeal court considers that it is relevant to the assessment of the complaint to be able to have access to the underlying documents, including at least the documents of the investigation referred to in the Houston Statement of Facts and on which the Public Prosecution Service based its ruling.

The appeal court would like to note that if the appeal court – after reviewing the file made available – concludes that the file is not sufficiently complete, the appeal court will (again) instruct the attorney general to provide further (specific) documents.

After reviewing the file, the chairman will, in accordance with article 12f CCP, determine which documents will be made available to complainant and his lawyers (whether or not anonymised) or to which access will be provided.

Therefore, the appeal court will reopen and suspend the investigation in the council chamber.

The investigation in the council chamber will be reopened on a time to be determined later at a hearing in the council chamber on 18 December 2019.

7. Decision

The appeal court,

declares the complainant to be admissible in the complaint;

reopens and suspends the investigation in the council chamber until **the hearing in the council chamber of 18 December 2019**;

orders the **summoning of the complainant and his lawyers** against a date to be determined later on said hearing in the council chamber;

requests the attorney general to inform the appeal court of the documents of the underlying file and to at least provide the appeal court with a description of what the Houston investigation concerns;

requests the attorney general to provide the appeal court with the underlying documents, at least the documents of the investigation referred to in the Houston Statement of Facts and based on which the Public Prosecution Service based its ruling.

This decision has been rendered on 30 September 2019 by T.E. van der Spoel, chairman, T.P.L. Bot and A.N. Labohm, members, in the presence of M.M. Bakker-Otjens, clerk, and has been signed by the chairman and the clerk.

[signatures and stamp]