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Art. 1 Protocol 1 EVRM

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Vestiging van staatsmonopolie op schoolboekendistributiemarkt leidt tot schending eigendomsrecht art. 1 Protocol 1 EVRM.

Klagers zijn drie Hongaarse ondernemingen, Könyv-Tár Kft, Suli-Könyv Kft en Tankönyv-ker Bt, die schoolboeken distribueren. De schoolboekendistributiemarkt, waarop de ondernemingen actief waren, was een deels gereguleerde markt, Zo werden er al eisen gesteld met betrekking tot de maximumprijzen van de schoolboeken. Hieraan kwam een einde door wetgeving die in 2011 en 2012 werd aangenomen door het Hongaarse parlement. Het Hongaarse scholensysteem werd gecentraliseerd en hiermee werd tegelijkertijd een nieuw systeem voor de schoolboekendistributie gecreëerd. Er werd een non-profit staatsinstelling 'Könyvtárellátó Kiemelten Közhasznú Nonprofit Kft' ingesteld. Deze instelling zou de distributie van schoolboeken in handen krijgen. Deze maatregel zou het schoolboekendistributiesysteem transparanter moeten maken en zo de koper van de boeken moeten beschermen.

De klagers menen dat door het instellen van de non-profit staatsinstelling de schoolboekendistributiemarkt wordt gemonopoliseerd en gecentraliseerd. De voormalige marktdeelnemers, waaronder de klagers, worden hiervoor niet gecompenseerd. Derhalve kunnen de klagers niet meer effectief concurreren op de markt waar dat voorheen wel mogelijk was. De klagers stellen bij het constitutionele gerechtshof een klacht in, dat echter niet tot een inhoudelijke beoordeling van de zaak komt.

De klagers voeren bij het EHRM aan dat hun recht op ongestoord genot van hun eigendom, in de zin van art. 1 Protocol 1 EVRM, is geschonden door de nieuwe wetgeving die de schoolboekendistributiemarkt monopoliseert en centraliseert. De staat brengt hier tegen in dat de klagende ondernemingen nog steeds vrijelijk hun activiteiten zouden kunnen voortzetten. De staatsinstelling zou namelijk willen samenwerken met een zeer gering aantal bedrijven. In de overwegingen van het Hof wordt voorop gesteld dat er in deze zaak een eigendomsrecht in het geding is. Dit eigendomsrecht moet volgens het Hof ruim uitgelegd worden. Hieronder vallen het gevormde klantenbestand en de opgebouwde goodwill van de klagende ondernemingen. Het Hof overweegt dat sprake is van een interventie door de overheid in het recht op ongestoord genot van hun eigendom. Het Hof toetst vervolgens of deze inbreuk gerechtvaardigd is. Hiervoor wordt beoordeeld of sprake is van een legitiem doel en of het middel dat door de staat is gebruikt proportioneel is. Het Hof overweegt dat weliswaar sprake kan zijn van een legitiem doel dat gediend is met deze inbreuk, maar benoemt wel dat de maatregelen ongeschikt zijn om het beoogde doel, bescherming van de kopers van de boeken, te realiseren. Voor de centralisatie van de markt waren er immers al gereguleerde prijzen en de winstmarges van het staatsinstituut zijn hoger dan die van de voormalige marktdeelnemers. Het Hof overweegt dat het middel disproportioneel is. Dit omdat ten eerste de klagende ondernemingen hun clientèle verliezen. Ten tweede is er geen effectieve wijze om de marktactiviteiten voort te zetten, nu het samenwerken met het staatsinstituut niet een reële mogelijkheid is. Ten derde zijn de klagende ondernemingen op geen enkele wijze gecompenseerd voor het verliezen van hun marktpositie, ondanks dat de klagende ondernemingen niet hadden hoeven te voorzien dat monopolisering van de distributiemarkt zou optreden, aangezien het ging om een ongereguleerde markt. Het Hof concludeert derhalve dat deze wetgeving in strijd is met art. 1 Protocol 1 EVRM.

Könyv-Tár Kft e.a.,
tegen
Hongarije.

The Law

I. Alleged violation of article 1 of protocol no. 1 to the convention

22. The applicant companies complained that the creation of a State monopoly in the schoolbook distribution market had deprived them of the peaceful enjoyment of their possessions, in breach of Article 1 of Protocol No. 1 to the Convention, which reads:

> '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.'

A. Admissibility

23. The Government argued that the complaint was premature and that the applicant companies had not exhausted all the effective domestic remedies, as required by Article 35 § 1 of the Convention. They submitted that the constitutional complaint submitted by the applicant companies was an effective remedy whose proceedings were still on-going at that time. It was not disputed by the Government that the Constitutional Court could not award damages for the violation of one's constitutional rights. However, the Government asserted that once the preliminary issue of the constitutionality of the legislation was determined by that court, damages could be sought before the ordinary courts in civil proceedings.

24. Moreover, maintaining that EU law was not relevant in the present case and that, in any event, its application fell outside the Court's jurisdiction, the Government argued, referring to *Laurus Invest Hungary KFT and Others v. Hungary* ((dec.), nos. 23265/13 and 5 others, ECHR 2015 (extracts)), that the applicants should have brought an action in damages on the basis of breach of the EU law, failing which they failed to exhaust domestic remedies.

25. The applicant companies emphasised that the Government failed to prove that an action against the legislator underpinned by a constitutional complaint was available and effective. They referred to the case of *Vékony v. Hungary* (no. 65681/13, 13 January 2015), arguing that, under the current Hungarian jurisprudence, the lawmaker could not be held liable for its actions; and any such lawsuit against the lawmaker was only a theoretical possibility which could not be considered an effective remedy. Moreover, they submitted that, to their knowledge, no provision of EU law required a government to monopolise, without compensation, the schoolbook distribution market.

26. With regard to the applicant companies' constitutional complaint which was pending at the time of the introduction of the application, the Court reiterates that the requirement for the applicant to exhaust domestic remedies is normally determined with reference to the date on which the application was lodged with the Court (see *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V (extracts)). However, the Court also accepts that the last stage of the exhaustion of domestic remedies may be reached shortly after the lodging of the application but before the Court determines the issue of admissibility (see *Škorjanec v. Croatia*, no. 25536/14, § 44, ECHR 2017 (extracts)). In the present case, the Court observes that the Constitutional Court eventually terminated the case without examining its merits. The Court is of the view — without addressing the question as to whether in general a constitutional complaint to the Hungarian Constitutional Court is an effective remedy for the purposes of Article 35 § 1 of the Convention — that in the present case the applicants cannot be expected to have lodged another constitutional complaint challenging Act no. CCXXXII of 2013, once their first constitutional complaint had been dismissed by the Constitutional Court without an examination of the merits.

27. In respect of a potential action in damages on the basis of breach of EU law, the Court takes into consideration a recent judgment of the *Kúria* (no. Pfv.IV.20.602/2017, see paragraph 21 above) where the latter examined the responsibility of the Hungarian State for wrongful implementation of EU legislation. It found that the State had failed to properly implement an EU Directive which omission had repercussions on the claimant's private life. Therefore, the State's responsibility could in principle be engaged; however, the *Kúria* dismissed the damage claim because the Civil Code does not contain any provision on the direct responsibility of the lawmaker. The Court is thus not persuaded that an action in damages on the basis of breach of EU law would have been a remedy capable of providing redress for the applicant companies' complaints and offering reasonable prospects of success (see *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II).

28. In sum, the Court is satisfied that it is not possible to reject the application for non-exhaustion of domestic remedies.

29. Further, the Government argued that there was no 'possession' in the present case attracting the guarantees of Article 1 of Protocol No. 1, and therefore the applicant companies' complaint was incompatible *ratione materiae* with the provisions of the Convention. They emphasised that the Convention did not guarantee the right to acquire property, and future income was generally not regarded as a 'possession'. The Government argued that the applicant companies' market share and future income had been affected by a change in the organisation of public education, which had occurred within the limits of the wide margin of appreciation afforded to the authorities in such matters, and the fact remained that the applicant companies' mere hope to be able to continue trading on a market with a decentralised system of school procurement for an unlimited period of

time did not constitute a 'possession' for the purposes of Article 1 of Protocol No. 1.

30. The applicant companies stressed that the concept of property and thus 'possessions' under Article 1 of Protocol 1 was to be broadly interpreted. Similarly to physical goods, certain rights and interests constituted assets and might also be qualified as 'possessions'. The applicant companies had accumulated significant business know-how and goodwill, and acquired a clientele (schools and school publishers) which fell within the ambit of 'possessions'. These elements represented value only in the realm of schoolbook distribution. The applicant companies argued that the State, through the New Regulations, had not simply limited their opportunities to continue their business, but, by legislative measures, had made it completely impossible.

31. The Court reiterates that the concept of 'possessions' in Article 1 of Protocol No. 1 has an autonomous meaning which is certainly not limited to the ownership of physical goods: certain other rights and interests constituting assets can also be regarded as 'property rights', and thus 'possessions' for the purposes of this provision (see *Iatridis v. Greece* [GC], no. 31107/96, § 54, ECHR 1999-II). Rights akin to property rights have existed in cases where, by dint of their own work, the applicants concerned had built up a clientele. This clientele had, in many respects, the nature of a private right and constituted an asset, and hence a possession within the meaning of the first sentence of Article 1 (see *Van Marle and Others v. the Netherlands*, 26 June 1986, § 41, Series A no. 101, and *Malik v. the United Kingdom*, no. 23780/08, § 89, 13 March 2012). The applicability of Article 1 of Protocol No. 1 extends, among others, to professional practices, their clientele and their goodwill, as these are entities of a certain worth that have in many respects the nature of private rights, and thus constitute assets, being possessions within the meaning of the first sentence of this provision (see *Van Marle and Others*, cited above, § 41; *Döring v. Germany* (dec.), no. 37595/97, ECHR 1999-VIII; *Wendenburg and Others v. Germany* (dec.), no. 71630/01, ECHR 2003-II; *Buzescu v. Romania*, no. 61302/00, § 81, 24 May 2005; and *Oklešen and Pokopališko Pogrebne Storitve Leopold Oklešen S.P. v. Slovenia*, no. 35264/04, § 54, 30 November 2010; compare and contrast *Tipp 24 AG v. Germany* (dec.), no. 21252/09, § 26, 27 November 2012). The Court held, for example, that operating a cinema for eleven years without the interference of the authorities had resulted in the creation of a clientele which constituted an asset (see *Iatridis*, cited above, § 54). The Court also held that an applicant could be said to have an existing possession in respect of providing the funeral services during a period of legal vacuum (see *Oklešen and Pokopališko Pogrebne Storitve Leopold Oklešen S.P.,* cited above, § 58).

32. In the present case the Court observes that the applicant companies, who had been in the schoolbook distribution business for years, had built up close relations with the schools located in their vicinity. The volume of clients in this business is limited, as it will always correspond to the number of schools and pupils in a given region. The Court is therefore convinced that the clientele — although somewhat volatile in nature — is an essential basis for the applicant companies' established business, which cannot, by the nature of things, be easily benefited from in other trading activities. Indeed, the applicant companies' lost clientele has in many respects the nature of private right, and thus constitutes an asset, being a 'possession' within the meaning of Article 1 of Protocol No. 1 (see *Van Marle and Others, Döring* (dec.), and *Wendenburg and Others* (dec.), all cited above). The complaint therefore cannot be rejected as incompatible *ratione materiae* with the provisions of the Convention.

33. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

34. The Government argued that the New Regulations had not monopolised the business in which the applicant companies had been active, but, as an inherent consequence of the centralisation of schoolbook management, had merely centralised the procurement of schoolbooks. The Government stressed that the New Regulations had not re-regulated the rules of providing services in the field of schoolbook distribution, and had not given exclusive rights to a State-owned entity to carry out these activities. The new rules did no more than reorganise the relevant system of public procurement. They emphasised that the applicant companies had had no 'licence to operate' in this field which could be seen as having been 'withdrawn'; they were free to continue their schoolbook distribution activities and provide services to the new centralised procurer of schoolbooks. Indeed, Könyvtárellátó had concluded a number of schoolbook distribution agreements in public procurement procedures. Further, they argued that schoolbook publishers and distributors had previously been able to influence the choice and

purchase of books by giving bonuses or discounts, which prejudiced the legislature's aim to ensure that educational aspects prevailed with regard to the selection of schoolbooks.

35. The Government argued that, although the new rules of schoolbook procurement might have indirectly interfered with the applicant companies' financial interests, such interference had complied with the requirements of Article 1 of Protocol No 1. The measure complained of was lawful; it allowed sufficient time for the applicant companies to adjust their business practice to the new circumstances, and did not interfere with the existing contracts between the applicant companies and their clients. Further, as to the existence of general interest, the Government stressed that the New Regulations' legislative objectives could clearly be identified from the lawmaker's explanation attached to the amendment proposals (see paragraph 14 above). The Government argued that the schoolbook market had been a distorted one where the end-consumers (that is, the pupils or their parents) did not freely select the product and the product was not paid for by the schools or the teachers who actually selected them.

36. The Government, however, emphasised that the primary reason for introducing the impugned legislation had been to strengthen the market position of the procurer vis-à-vis the publishers in order to ensure more efficient spending of public funds, rather than addressing any potential market distortions. The Government added that the market had been rather static in that schools had not changed textbooks (publishers) easily but, at the same time, schools were often ready to change distributors for higher premiums. The Government maintained that the impugned measure was thus justified, since the State could not be compelled to maintain an irrational system of budgetary expenditures.

37. The applicant companies argued that creating a State-owned entity and centralising within such an entity a formerly decentralised economic activity on an unregulated market qualified as monopolisation, and as such amounted to an interference with their right to peaceful enjoyment of their possessions. They stressed that the New Regulations did not comply with the requirement of lawfulness: as the State had not provided for a sufficient transitional period, the impugned legislation violated customary international law and the Fundamental Law of Hungary. Furthermore, there was no legal avenue available to the applicant companies to challenge the impugned provisions.

38. The applicant companies also submitted that, contrary to the Government's argument, they could not continue their former business by concluding contracts with the centralised procurer. Könyvtárellátó had not issued public procurement tenders for schoolbook distribution activities, but only two public procurement tenders for the performance of certain partial activities, such as logistics and packaging, and only in certain areas of Hungary (excluding, for example, the capital). In addition, these public procurement tenders of limited scope were all 'closed tenders', that is only invited participants could participate. Further, the applicant companies doubted the need to make schoolbook distribution more transparent. Adverse influencing of schools' decision-making in terms of schoolbook procurement was inconceivable, since the contents and, most importantly, the prices of all schoolbooks distributed by the applicant companies had been regulated by the State.

39. The applicants emphasised that there had been no strong correlation between the facts that the distributors were chosen by the schools whereas the products were paid by the parents. This structural feature did not particularly affect the operation of the distribution market, and had little or no impact on the number of market participants and return rates. Since the price of the schoolbooks had always been regulated, the level of profit was mostly depending on the price margins provided by the publishers, a margin in a range of 11 to 16 per cent. Further, schoolbook distributors offered a commission of 2 to 7 per cent to schools — depending on the services provided by them (labelling, distributing to students, handling of returns, etc.) — deducted from the margin received from the publishers. The remaining 4 to 14 per cent had to cover the distributors' cost of operation. The applicant companies emphasised that the 11 to 16 per cent margin provided by the publishers was a free market margin. Under the New Regulations, the official, State-owned schoolbook distributor has a guaranteed margin of 20 per cent which in itself undermines the Government's premise that schoolbook distribution in the new regime would be cheaper and more efficient.

40. The Government and the applicant companies both argued that although buying schoolbooks from alternative sources had always been available, it had never been the market practice, representing only an insignificant part of the overall market.

2. The Court's assessment

(a) Whether there was an interference

41. The Court reiterates that Article 1 of Protocol No. 1 comprises three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph (see *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 61, Series A no. 52).

42. In the present case, it has not been disputed by the Government that the New Regulations introduced a new system of schoolbook distribution in Hungary, and that this affected the applicant companies' business and financial interests.

43. The Court notes that, as a consequence of the impugned legislative measure, the applicant companies effectively lost their clientele which could be considered a 'possession' for the purposes of Article 1 of Protocol No. 1 (see paragraph 32 above). It thus finds that there has been an interference with the applicant companies' rights under that provision, consisting of a measure entailing control of the use of their property. Such an interference falls to be considered under the second paragraph of Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Buzescu*, cited above, § 88, and *Tre Traktörer AB v. Sweden*, 7 July 1989, § 55, Series A no. 159).

(b) Whether the interference was justified

(i) Lawfulness

44. The first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful (see *Iatridis*, cited above, § 58), which presupposes that the applicable provisions of domestic law be sufficiently accessible, precise and foreseeable (see *Beyeler v. Italy* [GC], no. 33202/96, § 109, ECHR 2000-I). In the present case, the Court observes that the measure complained of was based on two statutory amendments duly published. It thus satisfied the lawfulness requirement.

(ii) General interest — legitimate aim

45. Any interference with the enjoyment of a right or freedom recognised by the Convention must pursue a legitimate aim. The principle of a 'fair balance' inherent in Article 1 of Protocol No. 1 itself presupposes the existence of a general interest of the community (see *Beyeler*, cited above, § 111). Because of their direct knowledge of their society and its needs, the national authorities enjoy a wide margin of appreciation in determining what is in the general interest of the community (see, *mutatis mutandis, James and Others v. the United Kingdom*, 21 February 1986, § 46, Series A no. 98, and *Vékony*, cited above, § 33). Furthermore, the notion of 'public interest' is necessarily extensive. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation (see *James and Others*, cited above, § 46).

46. In the present case, the Court does not need to determine whether the implementation of the impugned reform pursued a legitimate aim. Even assuming that this reform was aimed at ensuring a more efficient spending of public funds, the Court is not convinced that this aim consisted in protecting the end-users' (that is, the parents' or the pupils') interests, given that the prices of schoolbooks were and remained State-regulated, independently of the measures under scrutiny (see paragraph 38 above). Moreover, the Court notes that the fact that the State-owned schoolbook distributor has a guaranteed margin of 20 per cent, exceeding the 11 to 16 per cent margin rate that had been provided to the applicants on a free market before the New Regulations, might also call into question the Government's argument about ensuring more efficient spending of public funds.

47. At any rate, assuming the existence of a legitimate aim pursued by those measures, it must be ascertained whether the circumstances of the case disclose a violation of the applicant companies' rights under Article 1 of Protocol No. 1 in terms of proportionality.

(iii) Proportionality of the measure

48. In order to be compatible with the general rule set forth in the first sentence of the first paragraph of Article 1 of Protocol No. 1, in the light of which the second paragraph is to be construed, an interference must strike a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental

rights (see *Sporrong and Lönnroth*, cited above, § 69). The search for this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole (ibid.), and hence also in the second paragraph. There must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *James and Others*, cited above, § 50). A fair balance between the general interest and the individual's rights will not be found if the person concerned has had to bear an individual and excessive burden (see *Vékony*, cited above, § 32).

49. In the determination of the proportionality of the interference in cases concerning loss of clientele and the exercise of a profession, the Court has considered, *inter alia*, (i) the existence of regulations applicable to the applicant's business, (ii) the nature of such regulations (for example, if the industry was such that, in view of the dangers inherent to it, it was traditionally subject to restrictions) and (iii) whether transitional measures existed (for example, at least partial continuation of the activity was possible for some time) (see *Oklešen and Pokopališko Pogrebne Storitve Leopold Oklešen S.P.*, cited above; see also, *a contrario, Tipp 24 AG,* cited above, § 34).

50. It is of crucial importance for the State to put in place measures of protection against arbitrariness, as required by the rule of law in a democratic society (see, *mutatis mutandis*, *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 156, ECHR 2012, and *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 71, ECHR 2007 I). Moreover, although the second paragraph of Article 1 of Protocol No. 1 contains no explicit procedural requirements, it has been construed to require that persons affected by a measure interfering with their possessions be afforded a reasonable opportunity of putting their case to the responsible authorities for the purpose of effectively challenging those measures (see *Microintelect OOD v. Bulgaria*, no. 34129/03, § 44, 4 March 2014).

51. Furthermore, compensation terms under the relevant legislation may be material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes an individual and disproportionate burden on the applicants (see, *mutatis mutandis, Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, § 38, Series A no. 332).

52. At the outset, the Court notes an attribute inherent in the schoolbook market which is unusual in some aspects. The protagonists who select the products (that is, the schools or the teachers) are not the ones who pay for them (that is, the end-users: the pupils and their parents). For the Court, this scheme can be explained by the need to ensure that all pupils in a class use the same textbook. This arrangement might however entail some market distortions and a potentially exposed situation of the end-consumers. The latter can be balanced by market regulations, such as maximised prices or State subsidies.

53. However, the Court is not convinced that these features of the schoolbook market produce a distortive effect on the competition amongst the participants of the distributing business, such as the applicant companies. It observes that the distributors maintained contractual relationships with the schools and not with the end-users; and, for their part, the schools were entirely free to select any distributor as their long- or short-term supplier. It is true that there was a constant market outlet (that is, the multitude of pupils in the need of textbooks in a given school year) ultimately corresponding to the entirety of the applicants' and other distributors' combined services. However, the respective shares of this constant market outlet were in no way guaranteed to the applicant companies, who needed to acquire and preserve their clientele (the schools) in a largely unregulated and competitive market environment. The Court is therefore satisfied that although the schoolbook market indeed had some special attributes, these did not yield any special or privileged market situation for the applicant companies which would have justified in itself the impugned State's intervention.

54. Furthermore, the Court is not persuaded by the Government's argument according to which the New Regulations did not monopolise schoolbook distribution or give exclusive rights to a State-owned entity to perform a business activity previously exercised by the applicant companies. On the contrary, in terms of market reality, the Court considers that the State, through the New Regulations, stopped the applicant companies from continuing their business operations and in fact created a monopolised market in schoolbook distribution. The monopolised nature of the market was confirmed and strengthened by the subsequent legislation (see Act no. CCXXXII of 2013 on Schoolbook Supply in the National Public Education System, cited in paragraph 19 above). The Court observes that, although there was no formal withdrawal of a licence (compare and contrast *Tre Traktörer AB*, cited above, § 53, and *Vékony*, cited above, 29), the New Regulations introduced a system of schoolbook procurement where, inevitably, the applicant companies' entire clientele was taken over by the State-owned Könyvtárellátó. As of the 2013/2014 school year, the applicant companies

were practically excluded from the schoolbook distribution contracts.

All these observations allow the conclusion that in practice the applicant companies' business could not be continued.

55. It is true that the applicant companies could, in theory, conclude schoolbook distribution agreements with Könyvtárellátó within the framework of public procurement procedures. However, at this juncture, the Court notes the applicant companies' submission, unrefuted by the Government, that, in practice, these tenders were limited in scope and open only to invitees (see paragraph 38 above). The Court therefore cannot consider these public procurement tenders a realistic prospect by which the applicant companies could have continued their business and maintained their clientele.

56. Although the interference with the applicant companies' possessions was a control of use rather than a deprivation of possessions and therefore the case-law on compensation for deprivations is not directly applicable (see *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], no. 44302/02, § 79, ECHR 2007-III), it nevertheless must be emphasised that a disproportionate and arbitrary control measure, especially without any scheme of compensation (see paragraphs 50 and 51 above), does not satisfy the requirements of the protection of possessions under Article 1 of Protocol No. 1 (see, *mutatis mutandis, S.C. Antares Transport S.A. and S.C. Transroby S.R.L. v. Romania*, no. 27227/08, § 48, 15 December 2015, and *Vékony*, cited above, § 35).

57. In the present case it is noteworthy that the State made it impossible for the applicant companies to continue their business but provided no possibility of judicial redress or any financial compensation (see, *a contrario, Pinnacle Meat Processors Company and 8 Others v. the United Kingdom*, no. 33298/96, Commission decision of 21 October 1998, unreported, and *Ian Edgar (Liverpool) Limited v. the United Kingdom* (dec.), no. 37683/97, 25 January 2000).

58. The margin of appreciation afforded to the State in identifying appropriate measures for the implementation of the reform in question is a wide one (see paragraph 45 above). However, they must not be disproportionate in terms of the means employed and the aim sought to be realised; and must not expose the business players concerned to an individual and excessive burden. In the present case the drastic change to the applicant companies' business was not alleviated by any positive measures proposed by the State. Moreover, the intervention concerned a business activity that was not subject to previous regulations, the business activities were not in any sense dangerous, and the applicants were not expected to assume that the business will be *de facto* monopolised by the State (see *Oklešen and Pokopališko Pogrebne Storitve Leopold Oklešen S.P.*; as well as, *a contrario, Pinnacle Meat Processors Company and 8 Others*; *Ian Edgar (Liverpool) Ltd*, and *Tipp 24 AG*, all cited above).

59. Having regard to (i) the eighteen-month transitional period, (ii) the fact that the applicant companies were never invited by Könyvtárellátó to any closed tenders after the entry into force of the New Regulations and that they were *de facto* excluded from the schoolbook distribution contracts as of the 2013/2014 school year, (iii) the fact that no measures were put in place to protect the applicant companies from arbitrariness or to offer them redress in terms of compensation, (iv) the impossibility for the applicant companies to continue or reconstitute their business outside the schoolbook distribution and (v) the absence of real benefits for the parents or pupils, the Court concludes that the interference with the applicant companies' right was disproportionate to the aim pursued, in that they had to bear an individual and excessive burden. Therefore, it finds that there has been a violation of Article 1 of Protocol No. 1 to the Convention.

II. Other alleged violations of the convention

60. The applicant companies complained that the implementation of the New Regulations and the introduction of a completely new schoolbook management system by the State, without providing any opportunity for them to seek judicial control or remedy, amounted to violations of their rights under Article 6, as well as Article 13 read in conjunction with Article 1 of Protocol No. 1.

61. They further alleged that, with the New Regulations, the lawmaker had created a monopolised schoolbook distribution market in favour of the State-owned Könyvtárellátó, which had previously only been one of the market players. In their view, this course of action was discriminatory, in breach of Article 14 read in conjunction with Article 1 of Protocol No. 1.

62. The Court reiterates that Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the grounds of being contrary to the Convention (see, among other authorities, *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, nos. 70945/11 and 8 others, § 124, ECHR 2014 (extracts), and *Paksas v. Lithuania* [GC], no. 34932/04, § 114, ECHR 2011). In the instant case, the applicant companies' complaint under Article 13 is at odds

with this principle. Consequently, this complaint is manifestly ill-founded and as such must be declared inadmissible, in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

63. Furthermore, the Court considers that, in the light of its findings concerning Article 1 of Protocol No. 1 (see paragraph 59 above), it is not necessary to examine separately either the admissibility or the merits of the complaints raised under Article 6 of the Convention and Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1 (see, *mutatis mutandis, Magyar Keresztény Mennonita Egyház and Others*, cited above, §§ 121 and 123).

III. Application of article 41 of the convention

64. Article 41 of the Convention provides:

> 'If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.'

65. The first applicant company claimed 159,000,000 Hungarian forints (HUF — approximately 521,000 euros (EUR)) in respect of pecuniary damage. The second applicant company claimed HUF 575,000,000 (approximately EUR 1,885,000) in respect of pecuniary damage. The third applicant company claimed HUF 14,500,000 (approximately EUR 47,500) in respect of pecuniary damage. These figures represent the decrease of the companies' equity values, as per an audit report, as a result of the violation suffered.

They made no claims in respect of non-pecuniary damage.

66. The first applicant company also claimed EUR 25,000 plus value added tax (VAT) for legal fees, and EUR 3,125 plus VAT for expert fees incurred before the Court. The second applicant company claimed EUR 5,750 plus VAT, and the third applicant company claimed HUF 590,551 (approximately EUR 1,940) plus VAT for expert fees.

67. The Government contested these claims as excessive.

68. The Court considers that the question of the application of Article 41 is not ready for decision. It is therefore necessary to reserve the matter, due regard being had to the possibility of an agreement between the respondent State and the applicant companies (Rule 75 §§ 1 and 4 of the Rules of Court).

69. Accordingly, the Court reserves this question and invites the Government and the applicant companies to notify it, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, of any agreement that they may reach.

For these reasons, the Court,

1. *Declares*, unanimously, the complaint concerning Article 1 of Protocol No. 1 to the Convention admissible;
2. *Declares*, unanimously, the complaint concerning Article 13 of the Convention, read in conjunction with Article 1 of Protocol No. 1, inadmissible;
3. *Holds*, unanimously, that there is no need to examine separately the admissibility or the merits of the complaints under Article 6 § 1 of the Convention and Article 14 read in conjunction with Article 1 of Protocol No. 1;
4. *Holds*, by six votes to one, that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
5. *Holds*, by six votes to one, that the question of the application of Article 41 is not ready for decision; and accordingly,

(a) *reserves* the said question in whole;

(b) *invites* the Government and the applicant companies to notify the Court, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, of any agreement that they may reach;

(c) *reserves* the further procedure and delegates to the President of the Chamber the power to fix the same if need be.

6. Holds, unanimously,

(a) that the respondent State is to pay to the second applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) any sums which it has paid in execution of the domestic court judgment and the domestic statutory default interest on these sums, plus any tax that may be chargeable, in respect of pecuniary damage;

(ii) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, to be converted into Hungarian forints at the rate applicable at the date of settlement, in respect of non-pecuniary damage;

(iii) EUR 1,800 (one thousand eight hundred euros), plus any tax that may be chargeable to the applicant, to be converted into Hungarian forints at the rate applicable at the date of settlement, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest

shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. Dismisses unanimously the remainder of the applicants' claim for just satisfaction.

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Pinto de Albuquerque (niet opgenomen; *red.*);

(b) concurring opinion of Judge Kūris (niet opgenomen; *red.*);

(c) dissenting opinion of Judge Wojtyczek (niet opgenomen; *red.*).

Noot

1. Deze uitspraak is opgenomen omdat daaruit een helder toetsingsschema naar voren komt dat geldt bij statelijke regulering van (daarvoor vrije) markten met name voor die gevallen waarin dat voor private ondernemingen leidt tot verlies van clientèle c.q. goodwill of zelfs tot de noodzaak een bedrijf geheel te beëindigen. Of en zo ja onder welke voorwaarden opgebouwde clientèle c.q. goodwill wordt beschermd onder het eigendomsrecht van artikel 1 Protocol 1 EVRM is belangrijk, omdat het EHRM in vaste jurisprudentie heeft uitgemaakt dat dit eigendomsrecht geen (onzeker) toekomstig inkomen beschermt. Dat is temeer het geval omdat onder het EVRM geen recht bestaat dat als zodanig de vrije markt beschermt, zoals de dissenters graag zouden willen. Wil artikel 1 Protocol 1 EVRM relevantie hebben bij regulering van markten dan is het aanknopingspunt van wel beschermde clientèle c.q. goodwill dus heel belangrijk.

2. Wanneer wordt opgebouwde clientèle onder artikel 1 Protocol 1 EVRM beschermd? Het Hof verwoordt het zelf als volgt in randnummer 31 e.v.:

> "The applicability of Article 1 of Protocol No. 1 extends, among others, to professional practices, their clientele and their goodwill, as these are entities of a certain worth that have in many respects the nature of private rights, and thus constitute assets, being possessions within the meaning of the first sentence of this provision. (…) In the present case the Court observes that the applicant companies, which had been in the schoolbook distribution business for years, had built up close relations with the schools located in their vicinity. The volume of clients in this business is limited, as it will always correspond to the number of schools and pupils in a given region. The Court is therefore convinced that the clientele — although somewhat volatile in nature — was an essential basis for the applicant companies' established business, which cannot, in the nature of things, be easily benefited from in other trading activities. Indeed, the applicant companies' lost clientele has in many respects the nature of a private right, and thus constitutes an asset, being a "possession" within the meaning of Article 1 of Protocol No. 1."

Belangrijke elementen daarbij zijn dat het gaat om zeer hechte relaties met een door het soort onderneming beperkte groep cliënten. De cliëntengroep was daardoor cruciaal voor de onderneming van klagers die ook moeilijk van andere zakelijke activiteiten zouden kunnen profiteren. Daarom wordt, ondanks een zekere dynamiek in het cliëntenbestand, aangenomen dat dit wordt beschermd als eigendomsrecht.

3. Volgens het Hof is daarmee sprake van een regulering van eigendom in de zin van de tweede regel van artikel 1 Protocol 1. Vervolgens loopt het Hof de bekende 'drietrapsraket' af om te bezien of al dan niet sprake is van een gerechtvaardigde inmenging op het eigendomsrecht. De inmenging is volgens het Hof bij wet voorzien, namelijk via twee wetswijzingen die op adequate wijze zijn gepubliceerd. Ten aanzien van de vraag naar een gerechtvaardigd doel betwijfelt het Hof of het doel van de litigieuze wettelijke maatregelen daadwerkelijk de bescherming van de belangen van de eindgebruikers was. Vóór deze maatregelen genomen waren, bestonden er immers al gereguleerde prijzen en de winstmarges van de staatsonderneming zijn hoger dan die van de voormalige marktdeelnemers. Toch laat het Hof het hier niet bij en beoordeelt voor het geval dat toch een gerechtvaardigd doel kan worden aangenomen of de betrokken maatregelen proportioneel zijn, dat wil zeggen dat een 'fair balance' bestaat tussen de eisen van het algemeen belang en de fundamentele rechten van het individu, dat hierbij geen individuele en excessieve last moet dragen.

4. Bij de vraag naar de proportionaliteit spelen de volgende factoren onder meer een rol. In de eerste plaats het al voor de maatregel bestaan van regels die van toepassing zijn op klagers onderneming; in de tweede plaats de aard van dergelijke regels (bijvoorbeeld als een onderneming traditioneel aan beperkende regels moest voldoen vanwege het gevaar van haar activiteiten); in de derde plaats het bestaan van overgangsmaatregelen (bijvoorbeeld ten minste gedeeltelijke voortzetting van de activiteiten voor enige tijd); in de vierde plaats is van belang of klager bij inmenging in zijn eigendomsrecht voldoende (procedurele)

mogelijkheden heeft deze inmenging aan de (rechterlijke) autoriteiten voor te leggen; en in de vijfde plaats de voorwaarden die het nationale recht stelt om voor compensatie in aanmerking te komen. Uiteindelijk komt het Hof tot de conclusie dat de in het geding zijnde wettelijke maatregelen niet proportioneel zijn vanwege de volgende factoren: (i) de (relatief te korte) overgangsperiode van achttien maanden; (ii) het hier gaat om een ondernemersactiviteit waar eerder geen regels voor golden en die niet gevaarlijk was en de klagende ondernemingen daarom niet konden verwachten dat hun bedrijfstak *de facto* zou worden gemonopoliseerd door de staat; (iii) het feit dat de klagende ondernemingen nooit zijn uitgenodigd door de nieuwe staatsonderneming om deel te nemen aan enige besloten tender sinds de inwerkingtreding van de wettelijke maatregelen en zo *de facto* van de distributie van schoolboeken vanaf het jaar 2013/14 werden uitgesloten; (iv) het feit dat geen maatregelen getroffen werden om de klagende ondernemingen te beschermen tegen willekeur (geen rechtsmiddel om maatregelen aan te vechten en ook geen financiële compensatie); (v) het feit dat het onmogelijk was voor de klagende ondernemingen hun business voort te zetten binnen dan wel buiten het segment van schoolboeken; (vi) en het ontbreken van enig profijt bij de leerlingen of hun ouders.

5. Al met al geeft het Hof een soort van 'spoorboekje' dat kan worden gebruikt om na te gaan of een inmenging in het eigendomsrecht al dan niet kan worden gerechtvaardigd. Tegelijkertijd laat de uitspraak ook zien dat diverse factoren en omstandigheden in het concrete geval een rol kunnen spelen en iedere kwestie betreffende regulering van eigendom weer op haar eigen merites moet worden beoordeeld. Bij de hier opgenomen uitspraak kunnen wij ons met rechter Pinto de Albuquerque in zijn hier niet opgenomen concurring opinion niet geheel aan de indruk onttrekken dat de maatregelen in kwestie er toe dienen voor de staat om meer vat te krijgen op het publiceren en distribueren van schoolboeken en dat dit feit de toetsing door het EHRM eveneens inkleurde.

T. Barkhuysen & M.L. van Emmerik

AB 2020/49

HOF VAN JUSTITIE VAN DE EUROPESE UNIE
12 november 2019, nr. C-261/18
(K. Lenaerts, president, R. Silva de Lapuerta, J.-C. Bonichot, A. Arabadjiev, A. Prechal, M. Safjan, S. Rodin, L. Bay Larsen, T. von Danwitz, C. Toader, F. Biltgen, K. Jürimäe, C. Lycourgos)
m.nt. R. Ortlep

Art. 4 lid 3 VEU; art. 260 lid 2 VWEU; Richtlijn 85/337/EEG

ECLI:EU:C:2019:955

Verzuim om milieueffectbeoordeling te verrichten: verplichting om betrokken vergunningen in te trekken?

Om te beginnen zij eraan herinnerd dat volgens vaste rechtspraak een lidstaat zich niet mag beroepen op bepalingen, praktijken of situaties van zijn interne rechtsorde ter rechtvaardiging van de niet-nakoming van uit het Unierecht voortvloeiende verplichtingen (arresten van 2 december 2014, Commissie/Griekenland, C-378/13, ECLI:EU:C:2014:2405, punt 29, en 24 januari 2018, Commissie/Italië, C-433/15, EU:C:2018:31, punt 56 en aldaar aangehaalde rechtspraak). Hieruit volgt dat Ierland de niet-uitvoering van de verplichtingen die voortvloeien uit het arrest van 3 juli 2008, Commissie/Ierland (C-215/06, ECLI:EU:C:2008:380), niet kan rechtvaardigen door zich te beroepen op nationale bepalingen waarbij de mogelijkheden om een regularisatieprocedure in te leiden worden beperkt, zoals section 177 B en section 177 C van deel XA van de PDAA, die Ierland juist ter uitvoering van dat arrest in zijn nationale wetgeving heeft ingevoerd.

Met betrekking tot de stelling dat het voor deze lidstaat onmogelijk is om de bevoegde gemeentelijke autoriteiten te verplichten de in de Ierse wetgeving geregelde regularisatieprocedure in te leiden, moet in elk geval eraan worden herinnerd dat volgens de in punt 75 van het onderhavige arrest aangehaalde rechtspraak elk orgaan van die lidstaat en met name die gemeentelijke autoriteiten gehouden zijn om in het kader van hun bevoegdheden alle nodige maatregelen te treffen om het verzuim van een milieueffectbeoordeling voor het windturbinepark te herstellen.

Met betrekking tot het argument dat Ierland ontleent aan het feit dat het rechtszekerheidsbeginsel en het beginsel van bescherming van het gewettigd vertrouwen zich verzetten tegen intrekking van de aan de beheerder van het windturbinepark onrechtmatig verleende vergunningen, dient ten eerste eraan te worden herinnerd dat de niet-nakomingsprocedure berust op de objectieve