EHRM 30 augustus 2022, AB 2023/90, m.nt. Barkhuysen en Van Emmerik

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AB 2023/90

EUROPEES HOF VOOR DE RECHTEN VAN DE MENS
30 augustus 2022, nr. 46564/15, nr. 68140/16
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Art. 1 Protocol 1 EVRM; art. 6 EVRM

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Bankrun na liquiditeitsproblemen. Maatregelen door Bulgaarse centrale bank. Intrekking bankvergunning. Aandeelhouders bank niet ontvankelijk in beroep tegen intrekkingsbesluit. Ontbindingsprocedure. Bank vertegenwoordigd door afwikkelingsfunctionarissen, die waren aangesteld door de Bulgaarse centrale bank. Geen mogelijkheid zaak voor te leggen aan rechter en voor eigen belangen op te komen. Artikel 6 lid 1 EVRM geschonden. Onvoldoende waarborgen tegen willekeur. Interventie in strijd met artikel 1 EP EVRM. Derde soortgelijke zaak. Wat is oorzaak van schending? Lacunes in regelgeving, toepassing van regelgeving door rechter?

Klager Korporativna Targovska Banka AD (KTB) is een Bulgaarse bank gevestigd in Sofia. Als gevolg van meerdere strafrechtelijke onderzoeken naar KTB vond een bankrun plaats. KTB liet de Bulgaarse centrale Bank (BNB) weten als gevolg van de bankrun met liquiditeitsproblemen te kampen. BNB nam de volgende maatregelen. De BNB trok de bankvergunning van KTB in vanwege een negatief eigen vermogen. De BNB verklaarde ook dat het management van KTB zich schuldig had gemaakt aan "wrede bank- en handelspraktijken" en misleidende rapporten had ingediend over de bank. (Groot)aandeelhouders hebben tevergeefs beroep ingesteld tegen de intrekking van de bankvergunning. De nationale rechter heeft de aandeelhouders niet-ontvankelijk verklaard, nu alleen KTB zelf in beroep kon gaan tegen het besluit tot intrekking van de bankvergunning. In 2014 heeft BNB een procedure tot ontbinding van KTB gestart. De nationale rechter oordeelde dat KTB in deze procedure zou worden vertegenwoordigd door de afwikkelingsfunctionarissen die waren aangesteld door BNB. Het verzoek van KTB om zelf een vertegenwoordiger ad litem te kiezen, werd afgewezen. De nationale rechter verklaarde KTB insolvent en gaf een bevel tot ontbinding. Aandeelhouders en managers van de bank poogden tegen deze uitspraak eveneens in beroep te gaan, maar dit zonder succes.

Klager stapt naar het Europese Hof voor de Rechten van de Mens en stelt zich op het standpunt dat artikel 6 lid 1 EVRM, artikel 1 EP EVRM en artikel 13 EVRM zijn geschonden. Dit nu klager het besluit tot intrekking van de bankvergunning niet bij de rechter heeft kunnen laten toetsen en bij de ontbindingsprocedure geen vertegenwoordiger mocht kiezen. Het Hof stelt voorop dat bij de nationale procedures KTB alleen is bijgestaan door de afwikkelingsfunctionarissen die door BNB in een eerder stadium waren aangesteld. Deze afwikkelingsfunctionarissen waren bevoegd om de procedures namens KTB te voeren, maar blijven uiteraard in overwegende mate afhankelijk van BNB. Dit betekent dat KTB in de procedures tegen BNB enkel werd bijgestaan door functionarissen die door BNB zelf zijn aangesteld. Deze functionarissen zouden dan ook geen belang hebben om op te komen tegen de besluiten en verzoeken van BNB. De nationale rechter bood de aandeelhouders en de bestuurders van KTB, die wel belang hebben op te komen tegen het intrekkingsbesluit, deze mogelijkheid niet. Om deze redenen heeft KTB het intrekkingsbesluit niet kunnen voorleggen aan een rechter, wat strijdig is met artikel 6 lid 1 EVRM. Het Hof oordeelt ten aanzien van de liquidatie en ontbindingsprocedure dat KTB alleen is bijgestaan door functionarissen die zijn aangesteld door BNB. De aandeelhouders en het bestuur mochten weliswaar deelnemen aan de procedure, maar enkel als derde-partijen en zodoende hadden de aandeelhouders en het bestuur geen recht om in beroep te gaan. Om deze redenen oordeelt het Hof dat KTB niet in staat is geweest voor haar eigen belangen op te komen en de zaak voor te leggen aan een rechter. Het Hof oordeelt dat er geen (procedurele) waarborgen waren tegen willekeur. De interventie in het eigendomsrecht van KTB was zodoende in strijd met artikel 1 EP EVRM. Gezien de aangenomen schendingen van artikel 6 EVRM en artikel 1 EP EVRM is het Hof niet ingegaan op het onderdeel van de klacht dat zag op de schending van artikel 13 EVRM.

Het Hof acht het heropenen van de procedure in zaken zoals deze een passende oplossing om de gemaakte inbreuk te herstellen. Het Hof benadrukt dat daarmee niet wordt beoogd de rechtszekerheid in civiele procedures te verstoren. De oplossing hoeft niet in elk geval het nietig verklaren van de uitspraak te zijn. Het gaat erom dat procedures op zodanige wijze dienen te worden vormgegeven dat banken de mogelijkheid hebben om de besluiten en maatregelen voor te leggen aan een rechter. Het Hof merkt op dat dit de derde soortgelijke Bulgaarse zaak is inzake het intrekken van een bankvergunning. Het Hof oordeelt dat de staat moet nagaan wat de oorzaak is van de schendingen in deze zaken. Hierbij benoemt het Hof de mogelijkheid dat het kan liggen aan lacunes in de wetgeving, de toe-

passing van het recht door de rechter en de problematische bepalingen inzake vertegenwoordiging in ontbindingsprocedures.

Korporativna Targovska Banca,
tegen
Bulgarije.

(…)

The Law

I. Joinder of the two applications

109. The two applications raise closely intertwined issues. It is hence appropriate to join them (Rule 42 § 1 of the Rules of Court).

II. Standing to complain on KTB's behalf

110. The Government argued that KTB's former executive directors had no standing to act on its behalf before the Court since they had not tried to do so when seeking judicial review of the BNB's decision to withdraw KTB's licence, having instead referred to the effects of that decision on them personally.

111. The Court notes that both applications were lodged on KTB's behalf by its former executive directors at times when they had already been removed from office (see paragraphs 4 and 5 above). When the applications were submitted to the Court on17 September 2015 and 18 November 2016 respectively, under Bulgarian law KTB had to be represented by the liquidators appointed in the course of the proceedings relating to the BNB's winding-up application against it (see paragraph 101 above). Those liquidators had been appointed with immediate effect on 23 April 2015 (see paragraph 62 above). However, they (and indeed the special administrators appointed by the BNB earlier) had a disincentive to apply to the Court on behalf of KTB in relation to the matters under consideration in this case, as well as a potential conflict of interests in that regard. Both applications lodged on KTB's behalf relate to the chain of events leading to their appointment, in particular the role of the BNB in those events, and the second application also concerns their role in the proceedings relating to the BNB's winding-up application against KTB (see paragraphs 147 and 169–170 below). Moreover, the liquidators' ability to continue in office was fully dependent on the BNB, as to do so they had to remain on a list kept by it, and a decision by the BNB to strike them off that list was not amenable to any scrutiny (see paragraph 101 above). In view of that, KTB's former executive directors were, exceptionally, entitled to apply to the Court on its behalf, even though when they did so they no longer represented the bank under Bulgarian law (see *Credit and Industrial Bank v. the Czech Republic*, no. 29010/95, §§ 48–52, ECHR 2003-XI (extracts); *Roseltrans, Finlease and Myshkin v. Russia* (dec.), no. 60974/00, 27 May 2004; *Capital Bank AD v. Bulgaria* (dec.), no. 49429/99, 9 September 2004; and *Feldman and Slovyanskyy Bank v. Ukraine*, no. 42758/05, §§ 25–28, 21 December 2017).

112. The question whether KTB's former executive directors had attempted to act on its behalf in the proceedings in which they sought judicial review of the BNB's decision to withdraw the bank's licence is irrelevant in that context, since standing under Article 34 of the Convention and standing in domestic proceedings ought not to be conflated (see, among other authorities, *Norris v. Ireland*, 26 October 1988, § 31, Series A no. 142; *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 139, ECHR 2000-VIII; and *Zehentner v. Austria*, no. 20082/02, § 39, 16 July 2009). That point pertains only to the questions whether domestic remedies have been exhausted and whether KTB was actually unable to seek judicial review of the withdrawal of its licence, which will be examined below.

113. The Government's objection must therefore be rejected.

III. Scope of the case

114. In its observations, KTB stated that it maintained all complaints raised in the two applications, in particular the complaints (a) under Article 6 § 1 of the Convention that the panels of the Supreme Administrative Court which had dealt with Bromak's claim for judicial review of the withdrawal of KTB's licence had been dependent and partial; (b) under the same provision that in the same proceedings the Supreme Administrative Court had refused to submit a preliminary reference to the CJEU, as had the Supreme Court of Cassation in the proceedings relating to the BNB's application for KTB to be wound up; and (c) under Article 46 § 1 of the Convention that Bulgaria had not complied with the judgments in *Capital Bank AD v. Bulgaria* (no. 49429/99, ECHR 2005-XII (extracts)) and *International Bank for Commerce and Development AD and Others v. Bulgaria* (no. 7031/05, 2 June 2016).

115. The Court notes that on 8 December 2020 those complaints — as indeed all complaints by KTB of which the Government were not given notice, as well as all complaints by Bromak — were declared inadmissible by the (then) Vice-President of the Section, sitting as a single judge (Rules 27A § 2 (a) and 54 § 3 of the Rules of Court read in conjunction with Rule 12). That decision is final (Article 27 § 2 of the Convention and Rule 54 § 3).

The Court cannot therefore re-examine those complaints (see *Mazepa and Others v. Russia*, no. 15086/07, §§ 61–62, 17 July 2018).

IV. Alleged impossibility for KTB to obtain judicial review of the withdrawal of its licence

116. In application no. 46564/15, a complaint was made on behalf of KTB under Article 6 § 1 of the Convention that it had been unable to obtain a review by the Supreme Administrative Court of the BNB's decision to withdraw its licence.

117. In application no. 68140/16, a complaint was made on behalf of KTB under the same provision that the Sofia City Court had refused to examine the BNB's decision to withdraw KTB's licence, even though it had not been reviewed by the Supreme Administrative Court either.

118. Article 6 § 1 of the Convention provides, in so far as relevant:

> 'In the determination of his civil rights and obligations …, everyone is entitled to a fair and public hearing … by an independent and impartial tribunal established by law.'

A. Admissibility

1. The parties' submissions

(a) The Government

119. The Government argued that KTB had failed to exhaust domestic remedies. It had not duly sought judicial review of the BNB's decision to place it under special administration (see paragraphs 12 and 13 above), even though that decision had affected its capacity to conduct its affairs, in particular its ability to operate via its management. KTB's former executive directors, purporting to act on its behalf, had only challenged that decision out of time, when KTB had already been declared insolvent and ordered to be wound up, and when it was already being run by liquidators (see paragraph 82 above). Furthermore, KTB had not sought judicial review of the BNB's decisions to (a) extend the special administration and (b) instruct the special administrators to reflect the findings of the audit reports in its accounts and report on its financial situation (see paragraphs 16 and 18 above) — indeed, it had not done so in respect of any of the decisions of the BNB preceding that to withdraw its licence.

120. The Government also pointed out that when seeking judicial review of the BNB's decision to withdraw KTB's licence (see paragraphs 20 and 44–47 above), its former executive directors had not attempted to act on its behalf, seeking instead to justify their standing solely with reference to the effects of the BNB's decision on them personally. KTB itself had thus not tried to seek judicial review of the BNB's decision.

121. Lastly, the Government submitted that KTB had not sought a judicial declaration that the BNB's decision to withdraw its licence was null and void.

(b) KTB

122. KTB submitted that its shareholders, principally Bromak, had, acting both in their own capacity and on its behalf, tried to seek judicial review of the withdrawal of its licence. As for KTB's former executive directors, they had been removed from office and thus unable to represent it in any such proceedings. They had tried to obtain a judicial declaration that the BNB's earlier decision to place KTB under special administration was null and void. Their powers, including the capacity to bring proceedings on KTB's behalf, had been vested in the special administrators, who had been subordinate to and dependent on the BNB. Those special administrators could not have been realistically expected to contest the BNB's decision to withdraw KTB's licence.

123. KTB also argued that the financial difficulties in which it had found itself had forced it to request the BNB to place it under special administration and thus protect its assets, depositors and shareholders. Indeed, its management had been under a duty to seek such measures. It would thus have been absurd for KTB to then apply for judicial review of the BNB's decision to place it under special administration; it would have had no legal interest in doing so. KTB could not have predicted that the BNB would then misuse the procedure and push it into insolvency. Moreover, since the BNB's decision to place KTB under special administration had also removed its management from office, it would have been impossible for that management to then represent the bank in any proceedings. All those considerations applied equally to the possibility of seeking judicial review of the BNB's decision to extend the special administration. As for BNB's decision instructing the special administrators to reflect the findings of the audit reports in KTB's accounts and report on KTB's financial situation, it had not been notified to KTB's shareholders or management, or even made public.

2. The Court's assessment

124. The alleged impossibility for KTB to obtain judicial review of the BNB's decision to withdraw its licence lies at the heart of the present two complaints (see paragraphs 116 and 117 above). The Government's assertion that such a review could have been obtained by way of challenges against the BNB's earlier decisions in re-

spect of KTB (to place it under special administration, appoint special administrators for it, extend the special administration and instruct the special administrators to reflect the findings of the audit reports in its accounts and report on its financial situation — see paragraphs 12, 13, 16 and 18 above) is closely linked to this issue. So are the Government's assertions that such a review could have been obtained if (a) KTB's former executive directors had formulated their claim against the BNB's decision to withdraw KTB's licence differently and if (b) KTB had sought a judicial declaration that the BNB's decision was null and void. The Government's objection that domestic remedies have not been exhausted must therefore be joined to the merits of the two complaints (see, *mutatis mutandis, Credit and Industrial Bank*, cited above, § 53, and *Pintar and Others v. Slovenia*, nos. 49969/14 and 4 others, § 79, 14 September 2021).

125. The two complaints are, furthermore, not manifestly ill-founded or inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

126. KTB submitted that under Bulgarian law, as interpreted by the Supreme Administrative Court, its former executive directors could not have acted on its behalf in proceedings for judicial review of the withdrawal of its licence. Its shareholders, in particular Bromak, had also been denied the right to challenge that decision. The Supreme Administrative Court had permitted only the special administrators to act on KTB's behalf in proceedings before it, even though there had been a clear conflict of interests between them and the bank, and they had been dependent on the BNB. KTB added that although the law provided for judicial review of a decision by the BNB to withdraw a bank's licence, it was unclear who could seek such a review. The bank's management were precluded from doing so, and the Supreme Administrative Court had refused to let KTB's shareholders do so either.

127. The Government submitted that by law the withdrawal of a bank's licence was amenable to judicial review. They pointed out that when KTB's former executive directors had sought judicial review of the withdrawal of its licence, they had only cited the effects of the BNB's decision on them personally rather than attempting to act on KTB's behalf. The Supreme Administrative Court had thus been justified in refusing to deal with their claim, and it was unsurprising that it had not examined the possibility for KTB itself to seek judicial review of the withdrawal of its licence. The court had simply dealt with the former executive directors' claim as formulated by them. Thus, KTB itself had not sought judicial review of the withdrawal of its licence.

2. The Court's assessment

128. The Court has already held that a bank whose licence has been withdrawn must be able to challenge that decision — which has a decisive impact on the bank's ability to continue as a going concern and manage its own affairs, and which under Bulgarian law almost automatically triggers the opening of insolvency proceedings against the bank — before a court capable of examining all points of fact and law pertaining to the lawfulness of that decision (see *Capital Bank AD*, cited above, §§ 87–88 and 98–116). The Government did not contend that there were any reasons to rule otherwise in this case. Indeed, since 2007 Bulgarian law has provided for the possibility of seeking judicial review of a decision by the BNB to withdraw a bank's licence (see paragraphs 94 and 106 above). The Government maintained that it had been possible for KTB to obtain such a review.

129. The question here is thus limited to ascertaining whether Bulgarian law ensured this possibility with a sufficient degree of certainty (see paragraph 107 above). According to the Court's case-law, for the right of access to a court to be effective, the persons concerned must have a clear, practical opportunity to challenge an act interfering with their civil rights or obligations (see, among other authorities, *Bellet v. France*, 4 December 1995, § 36, Series A no. 333-B; *Cañete de Goñi v. Spain*, no. 55782/00, § 34, ECHR 2002-VIII; and *Kandarakis v. Greece*, nos. 48345/12 and 2 others, § 46, 11 June 2020).

130. Section 151(3) of the Credit Institutions Act 2006 provides that all decisions made by the BNB under the Act are amenable to judicial review, but does not specify who can seek a review of a decision by the BNB to withdraw a bank's licence, or lay down the procedure for doing so. This gives rise to a difficulty, because when the BNB withdraws a bank's licence, it must at the same time appoint special administrators to run the bank, regardless of whether — as in this case — it has already done so (see paragraph 91 above). Those special administrators take over all powers of the bank's management, including the power to bring proceedings on the bank's behalf, unless the BNB has prescribed otherwise in its decision to appoint them (see paragraph 88 above), which did not happen in this case (see paragraph 21 above). A decision by the BNB to withdraw a bank's licence is immediately enforceable and cannot be stayed pending the determination

of any claim for it to be judicially reviewed (see paragraph 90 above). That means that from the very moment the BNB withdrew KTB's licence, the power to act on KTB's behalf, including to bring proceedings on its behalf, was conferred on its special administrators.

131. It is hence evident that even if KTB had obtained judicial decisions quashing the BNB's earlier decisions to appoint special administrators and extend their mandate (see paragraphs 12 (b) and 16 above) — indeed all decisions by the BNB preceding that of withdrawing KTB's licence — it would have still been placed under the stewardship of special administrators when it had its licence withdrawn. It follows that the remedies cited by the Government (see paragraph 119 above) could not have prevented the situation of which KTB is complaining. The first limb of the Government's non-exhaustion objection (based on the absence of timely legal challenges against the BNB's earlier decisions in respect of KTB), which was joined to the merits (see paragraph 124 above), must therefore be rejected.

132. Before KTB's case, the Supreme Administrative Court had not had occasion to interpret section 151(3) of the 2006 Act (see paragraph 94 above). It was thus unclear whether, even though with the withdrawal of a bank's licence all powers of its management were immediately conferred on the bank's special administrators, the management could retain a residual power to seek judicial review of the BNB's decision to withdraw the bank's licence. Nor was it clear whether such a review could be sought by others, such as the bank's shareholders. Indeed, this uncertainty even prompted the Supreme Bar Council to seek an interpretative decision on the point in March 2015 (see paragraphs 38 and 42 above).

133. Faced with this uncertainty, KTB's majority shareholder, Bromak, itself attempted to seek judicial review of the withdrawal of KTB's licence (see paragraph 22 above). Three other shareholders in KTB also did so (see paragraph 23 above). After somewhat convoluted proceedings, the Supreme Administrative Court held that KTB's shareholders had no standing to do that (see paragraphs 31 and 41 above). It ruled in the same way with respect to a member of KTB's supervisory board, as well as to KTB's depositors, other clients and bondholders (see paragraphs 48–50 above).

134. KTB's former executive directors likewise attempted to seek judicial review of the BNB's decision to withdraw its licence. Since they had been removed from office, they sought to justify their standing to do so with reference to the effects of that decision on them personally (see paragraphs 44 and 46 above).

135. The Government reproached the former executive directors for not trying to instead convince the Supreme Administrative Court that they should be permitted to act on KTB's behalf even though they had been removed from office (see paragraphs 120 and 127 above).

136. The Court, for its part, is not persuaded that this argument was as readily apparent in November 2014 as the Government suggested. As already noted, the uncertainty about who had standing to seek judicial review of a decision by the BNB to withdraw a bank's licence prompted the Supreme Bar Council to seek an interpretative decision on the point in March 2015 (see paragraphs 38 and 42 above). More importantly, the manner in which the Supreme Administrative Court dealt with this argument in other proceedings in which KTB's former executive directors tried to act on its behalf after the withdrawal of its licence strongly suggests that that court would have rejected that argument in the proceedings in which the former executive directors sought judicial review of the BNB's decision to withdraw KTB's licence.

137. When KTB was joined as an interested party to the proceedings in which its shareholders were trying to seek judicial review of the withdrawal of its licence, both its former executive directors and the special administrators made submissions on its behalf, and the former executive directors sought to justify their capacity to do so with the argument that they had a residual power to represent KTB (see paragraphs 28–30 above). In its subsequent decision, the Supreme Administrative Court did not even mention the submissions made by the former executive directors and instead referred only to the submissions made on KTB's behalf by its special administrators. That court thus implicitly rejected the former executive directors' assertion that they had a residual power to act on KTB's behalf.

138. More tellingly, when KTB's former executive directors later tried to seek a judicial declaration that the BNB's initial decision to appoint special administrators was null and void, the Supreme Administrative Court expressly held that since the BNB had removed the executive directors from office, the only persons who could act on KTB's behalf were the special administrators, and that the former executive directors had no residual power do so (see paragraphs 83 and 87 above). It is true that the reasons given by the Supreme Administrative Court in that regard were to some extent coloured by the fact that the former executive directors' claim had been made outside the normal time-limit, and that in the

meantime the special administrators had been replaced by liquidators. However, as is clear from the phrase '[f]or completeness, and in connection with the arguments that …' featuring in the beginning of the relevant paragraph in the decision of the Supreme Administrative Court's five-member panel (see paragraph 87 above), its remarks on the point were *obiter*. Moreover, the panel's reasoning on the point could hardly be read as suggesting, by converse implication, that the Supreme Administrative Court would have been inclined to permit the former executive directors to act on KTB's behalf in the event of a timely legal challenge against the BNB's decision to withdraw its licence.

139. In the light of the Supreme Administrative Court' approach in those two cases, it appears highly unlikely that it would have acceded to a residual-power argument when examining the former executive directors' claim for judicial review of the BNB's decision to withdraw KTB's licence. It follows that the second limb of the Government's non-exhaustion objection, which was likewise joined to the merits (see paragraphs 120 and 124 above), must also be rejected.

140. The Supreme Administrative Court's reasons in the second of those cases (see paragraphs 83 and 87 above) also suggest that it would not have accepted for examination any claim by KTB's former executive directors for the BNB's decision to withdraw KTB's licence to be declared null and void. The third limb of the Government's non-exhaustion objection, which was also joined to the merits (see paragraphs 121 and 124 above), must therefore also be rejected.

141. In the light of the above, it is clear that the special administrators could apply on KTB's behalf for judicial review of the BNB's decision to withdraw its licence. But the special administrators were dependent on and accountable to the BNB, and had little if any incentive to challenge its decision (see *Capital Bank AD*, § 117, and *International Bank for Commerce and Development AD and Others*, § 115, both cited above). Indeed, that decision had been, at least in part, based on their reports to the BNB (see paragraphs 19 and 20 above). Moreover, the right of access to a court entails that the person whose civil rights and obligations are at stake be able to bring proceedings before the courts directly and independently (see *Vujović and Lipa D.O.O. v. Montenegro*, no. 18912/15, § 41, 20 February 2018, and, *mutatis mutandis, Philis v. Greece (no. 1)*, 27 August 1991, § 65, Series A no. 209).

142. KTB was thus left in a situation in which there was no one with both standing and an interest in seeking judicial review of the withdrawal of its licence.

143. The Court is not persuaded that this state of affairs could have been overcome by appointing a special representative *ad litem* for KTB in the proceedings brought by its shareholders (see paragraph 105 above), since KTB was a mere interested party in those proceedings. In any event, the Supreme Administrative Court refused the repeated requests of KTB's former management to do so (see paragraphs 29 *in fine*, 36 and 40 above).

144. The civil courts dealing with the BNB's ensuing application for KTB to be declared insolvent and wound up also refused to examine the BNB's decision to withdraw KTB's licence (see paragraphs 61, 67 and 81 *in fine* above).

145. The relevant legislation and the way in which it was applied by the Bulgarian courts did not offer KTB itself, by proper representation, a clear and practical possibility of seeking and obtaining proper judicial review of the withdrawal of its licence (see, *mutatis mutandis, Kandarakis*, cited above, §§ 58 and 62). KTB's situation was thus effectively the same as those of the applicant banks in the cases of *Capital Bank AD* (cited above, §§ 98–116) and *International Bank for Commerce and Development AD and Others* (cited above, § 116), even though the statutory bar on judicial review of decisions by the BNB to withdraw a bank's licence had been lifted in 2007.

146. There has therefore been a breach of Article 6 § 1 of the Convention.

V. KTB's representation in the proceedings relating to the BNB's application for KTB to be wound up

147. In application no. 68140/16, a complaint was made on behalf of KTB under Article 6 § 1 of the Convention that in the proceedings relating to the BNB's application for it to be declared insolvent and wound up, KTB had first been represented by the special administrators appointed by the BNB and then by the liquidators, who had also been dependent on the BNB.

148. The relevant part of Article 6 § 1 of the Convention was set out in paragraph 118 above.

A. Admissibility

1. The Government's non-exhaustion objections

(a) First objection

149. From the tenor of the Government's observations, it remains unclear whether their non-exhaustion objection with respect to the first two complaints under Article 6 § 1 of the Convention (see paragraphs 119 and 120 above) was also intended to concern the present complaint. Even if that was the case, the fact remains that, having

been joined to the merits of the first two complaints under Article 6 § 1 of the Convention, that objection was already rejected in its entirety (see paragraphs 124, 131, 139 and 140 above).

(b) Second objection

(i) The Government's submissions

150. In their initial observations, the Government argued, with reference to the complaint under Article 13 of the Convention, that (a) it had been open to KTB to complain to the Deposit Insurance Fund that the liquidators were not acting properly, or seek compensation from the liquidators themselves; (b) the claim for judicial review of the BNB's decision to appoint special administrators had been made out of time; and (c) the BNB's decision to extend their mandate had not been challenged.

151. In their additional observations, the Government referred to those arguments in support of their assertion that the complaint was inadmissible.

(ii) The Court's assessment

152. The Government formulated the abovementioned arguments as a non-exhaustion point for the first time in their additional observations. It is hence open to question whether there is estoppel (see, *mutatis mutandis, G.S. v. Bulgaria*, no. 36538/17, §§ 69–70, 4 April 2019). There is, however, no need to resolve this issue, as the complaint cannot in any event be rejected for non-exhaustion of domestic remedies on the basis of those arguments.

153. The first argument was that KTB could have complained about the procedural conduct of the liquidators to the Deposit Insurance Fund or sought compensation in that regard from the liquidators themselves. But the present complaint does not relate to the actual conduct of the liquidators during the proceedings relating to the BNB's application for KTB to be declared insolvent and wound up (contrast, *mutatis mutandis, Camberrow MM5 AD v. Bulgaria* (dec.) (no. 50357/99, 1 April 2004). The issue is rather that under Bulgarian law it was the liquidators and not KTB's management who could represent KTB in those proceedings. It is unclear how a complaint against the liquidators to the Deposit Insurance Fund or a compensation claim against them could have remedied that state of affairs. Moreover, it is apparent from the relevant provisions of the Bank Insolvency Act 2002 that the primary duty of the liquidators is to the bank's creditors, not to the bank, and that any liability that the liquidators could face in connection with their work is chiefly premised on a failure to act with due care with respect to the bank's creditors (see paragraphs 102–104 above).

154. The second and third arguments were, respectively, that the legal challenge against the BNB's decision to appoint special administrators had been made by KTB's former executive directors belatedly, and that the BNB's decision to extend the special administrators' mandate had not been contested. But, as already noted in paragraph 131 above, even if KTB had obtained judicial decisions quashing the BNB's decisions to appoint special administrators and extend their mandate in the run-up to the BNB's decision to withdraw KTB's licence, KTB would have still been placed under the stewardship of such special administrators when it had its licence withdrawn. Special administrators would have thus still represented KTB at the initial stage of the proceedings relating to the BNB's application for it to be declared insolvent and wound up. It follows that the remedies cited by the Government could not have prevented the situation of which KTB is complaining.

155. The Government's objection of non-exhaustion of domestic remedies must therefore be rejected.

2. The Court's decision on the admissibility of the complaint

156. The complaint is not manifestly ill-founded or inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

157. In KTB's view, the situation in its case had been almost exactly the same as those in the cases of *Capital Bank AD* and *International Bank for Commerce and Development AD and Others* (both cited above), as it had throughout the proceedings been represented by persons dependent on the opposing party, the BNB: at first the special administrators and then the liquidators. The possibility for KTB's shareholders to intervene had not corrected the resulting procedural imbalance. The need for a special representative *ad litem* had been apparent even before the Constitutional Court's decision and had not arisen as a result of it.

158. The Government submitted that the special administrators had only represented KTB for a short while, during the initial stage of the proceedings. Both the special administrators and the liquidators had had to meet a number of criteria ensuring their impartiality and professionalism. There had thus been enough guarantees that they would protect KTB's interests effectively and in good faith. The fact that they had not opposed the

BNB's application for KTB to be wound up did not in itself suggest that they had been dependent on the BNB.

The possibility for KTB's shareholders to take part in the proceedings had been a further guarantee that KTB's interests would be properly defended. Moreover, KTB's former executive directors had been able to appeal against the Sofia City Court's decision to allow the BNB's application, based on arguments almost fully coinciding with those raised by Bromak. As a result, the Sofia Court of Appeal had in effect engaged with their arguments. Furthermore, the request for the appointment of a special representative *ad litem* for KTB had not been renewed after the decision of the Constitutional Court, even though that court had expressly adverted to that possibility.

159. The Government also underlined the special nature of the proceedings and the limited scope of the issues falling to be decided in them, pointing out that the question whether the bank's licence had been properly withdrawn had to be decided in proceedings for judicial review before the Supreme Administrative Court. They further argued that the State's liability could not be engaged by actions or omissions of the liquidators. In any event, the conduct of the liquidators had demonstrated that they had been capable of effectively protecting KTB's interests.

2. The Court's assessment

160. In *Capital Bank AD* (cited above, §§ 117-18), the Court found that if a bank facing an application by the BNB to be declared insolvent and wound up is represented in those proceedings by its special administrators and liquidators, who are all dependent to varying degrees on the BNB, the bank could not properly state its case and protect its interests, in breach of the rights of access to a court and of adversarial proceedings enshrined by Article 6 § 1 of the Convention. In *International Bank for Commerce and Development AD* (cited above, § 115), the Court came to the same conclusion.

161. Despite some differences in the way in which the proceedings relating to KTB unfolded, the present case does not present any material difference.

162. The applicant in those proceedings was the BNB (see paragraph 51 above).

163. As required by section 11(3) of the Bank Insolvency Act 2002 (see paragraph 96 above), at the outset KTB, the respondent, was represented by its special administrators (see paragraph 53 above). Those special administrators were directly dependent on the BNB: it had appointed them and fixed their remuneration, and could dismiss them without any external scrutiny (see paragraphs 88 and 89 above). Indeed, they were described by the Sofia City Court as 'officers assisting the BNB' (see paragraph 56 above).

164. Later, when the Sofia City Court appointed provisional liquidators, they took on the role of representing KTB in the proceedings, again in line with the requirements of section 11(3) of 2002 Act (see paragraphs 56 and 96 above). One day after that court declared KTB insolvent and ordered that it be wound up, those provisional liquidators were appointed by the Deposit Insurance Fund as permanent ones and continued to represent KTB in the proceedings by virtue of their powers under section 31(1)(7) of the 2002 Act (see paragraphs 56, 62 and 101 *in fine* above). Although to a lesser degree, those liquidators were likewise dependent on the BNB, since it could strike them off its list of persons qualified to act as bank liquidators and thus bring about their automatic discharge (by the insolvency court while they were still provisional liquidators, and by the Deposit Insurance Fund after they became permanent liquidators — see paragraphs 100 and 101 above).

165. All attempts to circumvent that situation were unsuccessful. The courts denied KTB's former executive directors standing to act on its behalf (see paragraphs 68 and 78 above). The Sofia City Court also refused Bromak's request to appoint a special representative *ad litem* for KTB (see paragraphs 54 and 59 above). The Government suggested that this request could have been renewed after the Constitutional Court had adverted to the possibility of appointing such a special representative *ad litem* as a means of overcoming the potential conflicts of interests between KTB and the special administrators, and KTB and the liquidators (see paragraphs 75 and 158 *in fine* above). But it cannot be overlooked that the Constitutional Court's decision came at a late stage in the proceedings relating to KTB: at the time it was issued, the main issues falling to be decided by the Supreme Court of Cassation had little to do with the question whether KTB was indeed insolvent and should be wound up; they were rather whether KTB's shareholders and former executive directors had standing to appeal, in their own capacity or on KTB's behalf (see paragraph 78 above). It is thus hard to see how the participation of a special representative *ad litem* for KTB at that stage of the proceedings would have served to protect its rights and interests, as represented by its shareholders and former executive directors. Moreover, asking a court to reconsider a procedural decision is normally not an avenue which an applicant needs to pursue (see, *mutatis mutandis, Vasil Vasilev v. Bulgaria*, no. 7610/15, § 112, 16 November 2021).

166. It is true that KTB's two biggest shareholders were permitted to intervene in the proceedings (see paragraphs 52 and 55 above, and contrast *International Bank for Commerce and Development AD*, cited above, § 69), as has been possible under Bulgarian law since 2007 (see paragraph 96 *in fine* above). But their participation could not in itself remedy the absence of proper representation for KTB, since (a) they were a mere third party, and (b) section 116(1) *in fine* of the 2002 Act barred them from appealing against the first-instance judgment (see paragraphs 68, 78, 81 and 99 above). More importantly, it is not apparent that their interests as shareholders in KTB and those of KTB itself should fully coincide.

167. KTB was thus effectively in the same position as the applicant banks in *Capital Bank AD* and *International Bank for Commerce and Development AD and Others* (both cited above): as it was represented exclusively by persons dependent on the opposing party, the BNB, it was unable to properly state its case and protect its interests, as it saw them.

168. There has therefore also been a breach of Article 6 § 1 of the Convention in this regard.

VI. Alleged violation of Article 1 of Protocol no. 1

169. In application no. 46564/15, a complaint was made on behalf of KTB under Article 1 of Protocol No. 1 that the BNB's decision to withdraw its licence had been based on incorrect findings about KTB's situation, and had been unlawful (both in terms of Bulgarian law and in terms of not being surrounded by sufficient safeguards against arbitrariness) and unjustified.

170. In application no. 68140/16, a complaint was made on behalf of KTB under the same provision that the judicial decision to declare it insolvent and wind it up had been unlawful and disproportionate, owing to, *inter alia*, a lack of sufficient safeguards, in particular the refusal of the Sofia City Court to examine whether the findings underpinning the withdrawal of KTB's licence had been correct.

171. Article 1 of Protocol No. 1 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.'

A. Whether a separate examination of the complaints is necessary

172. The Government invited the Court to not deal with those two complaints, saying that they raised the same issues as those under Article 6 § 1 of the Convention.

173. The Court notes that the two complaints under Article 1 of Protocol No. 1 and the first two complaints under Article 6 § 1 of the Convention both touch upon the alleged lack of safeguards surrounding the BNB's decision to withdraw KTB's licence. The complaints under Article 1 of Protocol No. 1 are however broader in scope, since they relate not only to the possibility of seeking judicial review of the BNB's decision, but more generally to the possibility of contesting that decision (see paragraphs 116–117 and 169–170 above). There is, moreover, a difference in the nature of the interests protected by Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 in such situations: the former affords an explicit procedural safeguard (to have any dispute relating to one's civil rights or obligations determined by a court), whereas the procedural requirements inherent in the latter are ancillary to the purpose of ensuring respect for the right peacefully to enjoy one's possessions (see, *mutatis mutandis, Iatridis v. Greece* [GC], no. 31107/96, § 65, ECHR 1999-II; *Karamitrov and Others v. Bulgaria*, no. 53321/99, § 75, 10 January 2008; and *Borzhonov v. Russia*, no. 18274/04, § 50, 22 January 2009). In the circumstances of this case, the complaints under Article 1 of Protocol No. 1 are hence not absorbed by the complaints under Article 6 § 1 of the Convention, and they must be examined separately (see, *mutatis mutandis, Project-Trade d.o.o. v. Croatia*, no. 1920/14, § 38, 19 November 2020).

B. Admissibility

174. From the tenor of the Government's observations, it can be seen that their non-exhaustion objection with respect to the first two complaints under Article 6 § 1 of the Convention (see paragraphs 119 and 120 above) relates to the present two complaints as well.

However, that objection, having been joined to the merits of the first two complaints under Article 6 § 1 of the Convention, was already rejected in its entirety (see paragraphs 124, 131, 139 and 140 above).

175. With reference to Article 1 of Protocol No. 1, the Government further submitted that none of the legal challenges against the withdrawal of KTB's licence had argued, expressly or in substance, that this had been contrary to that provision. KTB replied that when seeking judicial review of the BNB's decision to withdraw its li-

cence, Bromak had relied on Article 1 of Protocol No. 1.

176. The Court notes, in relation to this assertion by the Government, that it was already established that KTB itself did not have a clear and practical possibility of seeking judicial review of the withdrawal of its licence by proper representation (see paragraph 145 above). It is therefore hard to see how KTB could have, by such representation, usefully argued in any such proceedings that this withdrawal had been in breach of Article 1 of Protocol No. 1. In so far as this argument can be seen as a further non-exhaustion objection by the Government in respect of the two complaints under that provision, this objection must therefore be rejected.

177. The two complaints are, furthermore, not manifestly ill-founded or inadmissible on any other grounds. They must therefore be declared admissible.

C. Merits

1. The parties' submissions

(a) KTB

178. KTB submitted that the BNB's decision to withdraw its licence had been based on unreliable reports (which, moreover, had been kept secret from it), and on arbitrary findings which KTB had been unable to contest. The way in which the BNB and the special administrators had acted in the run-up to that decision had also been illegitimate and shown a lack of independence. The difficulties experienced by KTB had been wholly due to actions and omissions by the authorities. The BNB's failure to take any steps to support KTB while it had been under special administration had also made the ensuing withdrawal of its licence arbitrary.

The authorities had, moreover, not provided KTB with State aid, even though they had provided such aid to another bank.

179. KTB added that, owing to the approach of the Bulgarian courts to the question of who could act on its behalf, it had been impossible for it to seek judicial review of the BNB's decision to withdraw its licence.

(b) The Government

180. The Government submitted that in the light of the auditors' findings about KTB's financial situation in June 2014, it could hardly be said that its difficulties could be attributed to acts or omissions by the authorities. In their view, the difficulties had actually resulted from the way in which it had been run. Moreover, it could not be said that the State had had to provide financial aid to KTB, or that the special administration under which it had been placed should have necessarily averted its insolvency.

181. The Government also pointed out that KTB had itself asked to be placed under special administration, and that it had not sought judicial review of the BNB's decisions in that regard. KTB could not therefore pretend that it had been unaware of its difficulties or surprised by the steps taken by the BNB with respect to it, especially in the light of the powers which the law gave to the special administrators.

182. The BNB's decision to withdraw KTB's licence had been fully in line with the applicable rules, had been based on proper findings about KTB's insolvency and had not resulted from any discretionary assessment by the BNB. Moreover, the BNB and its officers were independent and required to abide by the law, and there was no evidence that anyone had influenced its decision to withdraw KTB's licence. That decision had been amenable to judicial review, but KTB's former executive directors had failed to apply for such a review properly, since in their claim they had only cited the effects of that decision on them personally. Further safeguards had been available in the proceedings relating to the winding-up application made by the BNB.

183. The Government also emphasised the need to regulate banks more strictly, and that the authorities had acted with a view to protecting the interests of KTB's clients and the stability of the banking system. Those interests had trumped those of the bank itself and of its shareholders.

2. The Court's assessment

184. The withdrawal of KTB's licence, which was almost automatically followed by the Sofia City Court's decision to declare KTB insolvent and order that it be wound up, amounted to an interference with its possessions (see ***Capital Bank AD***, cited above, § 130, and, *mutatis mutandis, Feldman and Slovyanskyy Bank*, cited above, § 51).

185. It has already been established that KTB could not obtain judicial review of the BNB's decision to withdraw its licence, whether directly, in judicial review proceedings before the Supreme Administrative Court, or indirectly, in the proceedings relating to the BNB's application for it to be declared insolvent and wound up (see paragraphs 130–145 above).

186. No other procedural safeguards surrounded the BNB's decision to withdraw KTB's licence. KTB was not informed that the BNB would adopt the decision or given an opportunity to object to it, either before the decision was made or afterwards. That was because section 36(6) of the Credit Institutions Act 2006, as in force at the

time, expressly excluded those general procedural safeguards in administrative proceedings for the withdrawal of a bank's licence (see paragraph 92 above). Nor was there any possibility of contesting the BNB's decision before a non-judicial authority. There was therefore no opportunity for KTB to challenge the grounds for that decision: the BNB's findings that its own funds were a negative value and that its management had engaged in 'vicious banking and business practices' (see paragraph 20 above).

187. KTB's situation was thus effectively the same as those of the applicant banks in *Capital Bank AD* (cited above, §§ 130-40) and *International Bank for Commerce and Development AD and Others* (cited above, § 106): the withdrawal of its licence was not surrounded by any safeguards against arbitrariness.

188. It follows that the interference with KTB's possessions was not lawful within the meaning of Article 1 of Protocol No. 1. There has therefore been a breach of that provision.

189. That said, the Court expresses no opinion on whether the decision to withdraw KTB's licence was correct in terms of Bulgarian law. Its power to review compliance with domestic law is limited, and it is not its task to do so in the place of the competent national authorities and courts (see *Capital Bank AD*, § 132; *International Bank for Commerce and Development AD and Others*, § 108; and *Feldman and Slovyanskyy Bank*, § 54, all cited above).

190. Nor is it necessary to assess in this judgment whether the withdrawal of KTB's licence was in the general interest or struck a fair balance between that general interest and KTB's right to the peaceful enjoyment of its possessions (see *Capital Bank AD*, cited above, § 139; see also, *mutatis mutandis, Project-Trade d.o.o.*, § 87, and *Pintar and Others*, § 110, both cited above).

VII. Alleged violation of Article 13 of the Convention

191. In application no. 46564/15, a complaint was made on behalf of KTB under Article 13 of the Convention that it had not had an effective remedy in respect of the alleged breaches of its rights under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.

192. In application no. 68140/16, a complaint was made on behalf of KTB under the same provision that it had not had an effective remedy in respect of its complaint under Article 1 of Protocol No. 1, as it had been unable to obtain any sort of review of the BNB's decision to withdraw its licence and of the Sofia City Court's decision to declare it insolvent.

193. Article 13 of the Convention reads:

> 'Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

A. The parties' submissions

194. KTB submitted that the law, as interpreted by the Bulgarian courts, in particular as regards the question of standing, had deprived it of a practical and effective opportunity to challenge the withdrawal of its licence and participate in the ensuing proceedings in which it had been declared insolvent and ordered to be wound up.

195. As regards the existence of effective remedies in respect of the complaints under Article 6 § 1 of the Convention that KTB could not obtain judicial review of the withdrawal of its licence and the complaints under Article 1 of Protocol No. 1, the Government referred to their submissions on the admissibility of those complaints (see paragraphs 119–120 and 174 above). As for the existence of effective remedies in respect of the complaint under Article 6 § 1 of the Convention about the way in which KTB had been represented in the proceedings relating to the BNB's application for it to be declared insolvent and wound up, the Government argued that it had been open to KTB to complain to the Deposit Insurance Fund that the liquidators were not acting properly, or to seek compensation from the liquidators themselves. The Government further pointed out that the claim for judicial review of the BNB's decision to appoint special administrators had been made out of time, and that its decision to extend their mandate had not been challenged.

B. The Court's assessment

196. In the light of the findings in respect of KTB's complaints under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 (see paragraphs 128–146, 160–168 and 184–190 above), it is not necessary to rule on the admissibility or merits of these two complaints (see *Capital Bank AD*, cited above, § 121).

VIII. Application of Article 46 of the Convention

197. Under Article 46 §§ 1 and 2 of the Convention, a judgment in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a duty to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be taken in its domestic legal order to end the violation and make all feasible reparation for its consequences by restoring as far as possi-

ble the situation which would have obtained if it had not taken place. Furthermore, it follows from the Convention, and from its Article 1 in particular, that in ratifying the Convention and its Protocols the Contracting States undertake to ensure that their domestic law is compatible with them (see, among other authorities, *Maestri v. Italy* [GC], no. 39748/98, § 47, ECHR 2004-I; *Roman Zakharov v. Russia* [GC], no. 47143/06, § 311, ECHR 2015; and *Ekimdzhiev and Others v. Bulgaria*, no. 70078/12, § 427, 11 January 2022).

A. Individual measures

1. The parties' submissions

198. KTB requested the Court to indicate to the Bulgarian State to reopen (a) the proceedings in which Bromak and its other shareholders had tried to seek judicial review of the BNB's decision to withdraw KTB's licence and (b) the ensuing proceedings in which KTB had been declared insolvent and wound up, and to carry out the reopened proceedings fully in line with the requirements of a fair trial. That was, in KTB's view, the most fitting way to put right the breaches of Article 6 § 1 of the Convention found in the case.

199. The Government argued that although a reopening of the domestic proceedings was in principle an appropriate way of remedying a breach of Article 6 § 1 of the Convention, this could not be ordered by the Court and was ultimately for the competent domestic court to decide. In their view, in this case such a reopening would upset legal certainty, since the BNB's decision to withdraw KTB's licence and the ensuing judicial decision to declare it insolvent and wind it up had already affected many other persons. The public interest in not reopening those proceedings was stronger than KTB's interest in obtaining *restitutio in integrum*.

2. The Court's assessment

200. The Court has no competence to order the reopening of domestic proceedings (see *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 89, ECHR 2009; *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, §§ 48–49, 11 July 2017; and *Tsonyo Tsonev v. Bulgaria (no. 4)*, no. 35623/11, § 61, 6 April 2021).

201. It has, however, many times observed that when someone has been the victim of proceedings entailing a breach of Article 6 of the Convention, a reopening of those proceedings, if requested, is in principle an appropriate way of redressing the breach (see *Verein gegen Tierfabriken Schweiz (VgT)*, § 89; *Moreira Ferreira (no. 2)*, § 49; and *Tsonyo Tsonev (no. 4)*, § 61, all cited above). This is particularly so when the breach has consisted in an inability to obtain effective access to a court (see, for instance, *Yanakiev v. Bulgaria*, no. 40476/98, § 90, 10 August 2006; *Lesjak v. Croatia*, no. 25904/06, § 54, 18 February 2010; *Cudak v. Lithuania* [GC], no. 15869/02, § 79, ECHR 2010; *Fazliyski v. Bulgaria*, no. 40908/05, § 76, 16 April 2013; *Kardoš v. Croatia*, no. 25782/11, § 67, 26 April 2016; *Miryana Petrova v. Bulgaria*, no. 57148/08, § 50, 21 July 2016; *Centre for the Development of Analytical Psychology v. the former Yugoslav Republic of Macedonia*, nos. 29545/10 and 32961/10, § 54, 15 June 2017; and *Inmobilizados y Gestiones S.L. v. Spain*, no. 79530/17, § 45, 14 September 2021).

202. At the same time, the execution of the Court's judgments should not unduly upset the principles of *res judicata* and legal certainty in civil litigation, in particular where such litigation concerns third parties with their own legitimate interests to be protected (see *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, § 57, ECHR 2015, and *Beg S.p.a. v. Italy*, no. 5312/11, § 162, 20 May 2021). The lapse of time since the domestic decisions complained of is also a material consideration in that regard (see *Bochan (no. 2)*, cited above, § 72).

203. It is not in doubt that the decision to withdraw KTB's licence and the ensuing judicial declaration of insolvency and order that it be wound up, all made more than seven years ago, have affected many other persons, such as KTB's clients and creditors, as well as Bulgaria's financial system as a whole. Thus, although the only way to put right the breach of Article 6 § 1 of the Convention relating to the absence of a clear and practical possibility for KTB itself to seek and obtain proper judicial review of the withdrawal of its licence is to give it such a possibility, it does not necessarily follow that the form of redress following a possible finding that the BNB's decision to withdraw KTB's licence was unlawful or unjustified should consist in the annulment of that decision and a reversal of its effects rather than in an award of compensation. In accordance with the general position under public international law, restitution is the rule under Article 46 § 1 of the Convention, but not when it is materially impossible or would involve a burden out of all proportion to the benefit deriving from it (see *Ilgar Mammadov v. Azerbaijan* (infringement proceedings) [GC], no. 15172/13, § 151, 29 May 2019).

204. Any such proceedings should, however, be organised in a way which gives KTB an effective opportunity to contest the findings which prompted the BNB to withdraw its licence by proper representation. In particular, KTB should be able to access any reports or other material which had a bearing on those findings (see, *mutatis mutandis, Pintar and Others*, cited above, §§ 99 and 114).

B. General measures

1. The parties' submissions

205. KTB also requested the Court to indicate to Bulgaria that the general measures required to prevent such breaches of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 entailed altering Bulgarian law — in particular the Credit Institutions Act 2006 and the Bank Insolvency Act 2002 — in a way that provided effective legal safeguards for banks facing special administration and insolvency.

206. The Government submitted that the Committee of Ministers was better placed to assess what general measures would be required to abide by the Court's judgment.

2. The Court's assessment

207. Since this is the third case against Bulgaria (the previous two being *Capital Bank AD* and *International Bank for Commerce and Development AD and Others*, both cited above) in which issues arise with regard to the way in which the withdrawal of a bank's licence on grounds of insolvency and the ensuing winding-up proceedings are regulated under Bulgarian law, it seems appropriate for the Court to give some indications on how breaches of the kind found here are to be avoided in the future.

208. The breach of Article 6 § 1 of the Convention flowing from the absence of a clear and practical possibility for KTB itself to seek and obtain judicial review of the withdrawal of its licence resulted, depending on how the matter is seen, either from a gap in the relevant legislation or from the manner in which the Supreme Administrative Court construed and applied that legislation (see paragraphs 130–146 above). It is not for the Court to say whether one or the other has to change to avoid future breaches of that kind. Be that as it may, Bulgaria should take steps to ensure that a bank whose licence has been withdrawn be able to directly and independently seek and obtain effective judicial review of that measure.

209. For its part, the breach of Article 6 § 1 of the Convention relating to the manner in which KTB was represented in the proceedings relating to the BNB's application for it to be declared insolvent and wound up flowed chiefly from the terms of sections 11(3) and 16(1) *in fine* of the Bank Insolvency Act 2002 (see paragraphs 163–164 and 166 above). Bulgaria should hence amend those provisions in a way that permits a bank facing an application by the BNB to be declared insolvent and wound up to be represented in those proceedings, both at first instance and on appeal, in a way which enables it to properly state its case and protect its interests, as it sees them.

210. As for the breach of Article 1 of Protocol No. 1, it should be noted that the statutory provision removing all procedural safeguards from the BNB's decision-making process in relation to the withdrawal of a bank's licence — section 36(6) of the Credit Institutions Act 2006 — was repealed in 2021 (see paragraph 93 above). This legislative amendment, seen in the light of the explanatory notes to the bill which led to it, appears to have largely eliminated the underlying cause of the breach, the only other component of which was the absence of a clear and practical possibility for KTB itself, by proper representation, to seek and obtain judicial review of the BNB's decision to withdraw its licence (see paragraphs 185 and 186 above). It is hence superfluous to indicate any general measures in addition to those already indicated in paragraph 208 above with reference to the first breach of Article 6 § 1 of the Convention (see, *mutatis mutandis, Sejdovic v. Italy* [GC], no. 56581/00, §§ 121-24, ECHR 2006-II, and *Lenev v. Bulgaria*, no. 41452/07, § 173, 4 December 2012).

IX. Application of Article 41 of the Convention

211. 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.'

A. Pecuniary damage

1. KTB's claim and the Government's comments on it

(a) KTB's claim

212. KTB claimed 5,337,582,081 Bulgarian levs (BGN), plus interest, in respect of the pecuniary damage which it had allegedly suffered as a result of the breach of Article 1 of Protocol No. 1, to be broken down as follows:

(a) BGN 4,392,137,000, representing the difference between KTB's own capital on 31 December 2013 and 31 December 2014;

(b) BGN 13,149,880, representing the reduction in the fair market value of KTB's trademark between 31 December 2013 and 31 December 2014;

(c) BGN 14,997,000, representing KTB's profit for the period from January to May 2014;

(d) BGN 887,189,000, representing KTB's loss of profit for the period 2014-20; and

(e) BGN 30,109,201, representing a sum transferred by KTB's special administrators to the Deposit Insurance Fund on 25 June 2014 pursuant to instructions by the BNB.

213. KTB submitted that all these heads of damage had resulted directly from unlawful acts and omissions by the BNB, the Prosecutor's Office and other State authorities, since they had led to the withdrawal of its licence. KTB also pointed out that the withdrawal had caused it to cease to exist as a going concern.

214. KTB requested that any award under this head be made payable to its shareholders (those at the time its licence had been withdrawn) or their successors.

(b) The Government's comments on the claim

215. The Government submitted that there was no causal link between the breach of Article 1 of Protocol No. 1 and the damage allegedly suffered by KTB, since it could not be speculated whether the BNB would have withdrawn its licence even if that decision had been surrounded by sufficient safeguards. The Government hence invited the Court to reject the claim as a whole.

216. In the alternative, the Government submitted that the claim was unsubstantiated and exorbitant, and challenged the evidence adduced by KTB in support of the claim and the methods on the basis of which its various heads had been estimated.

217. The Government further insisted that any award under this head be made payable to KTB itself rather than its shareholders, pointing out that KTB had not ceased to exist as a legal person and that its shareholders were no longer applicants in the proceedings.

2. The Court's assessment

218. The Court cannot speculate what the outcome of the administrative proceedings in which the BNB withdrew KTB's licence and the ensuing judicial proceedings in which KTB was declared insolvent and ordered to be wound up would have been if the breach of Article 1 of Protocol No. 1 found in relation to them had not taken place (see *Capital Bank AD*, § 144; *International Bank for Commerce and Development AD and Others*, § 160; and *Feldman and Slovyanskyy Bank*, § 69, all cited above; see also, *mutatis mutandis*, *Project-Trade d.o.o.*, § 110, and *Pintar and Others*, § 118, both cited above). No award can therefore be made under this head.

B. Costs and expenses

1. KTB's claim and The Government's comments on it

219. KTB sought reimbursement of EUR 270,000, plus 20% in value-added tax (VAT), which it had allegedly incurred for the services of its lawyer in the proceedings before the Court.

It requested that any award under this head be made payable directly to the lawyer's firm. In support of its claim, KTB submitted two fee agreements with the firm, relating to the first and second applications lodged on its behalf. The agreements had been concluded by two of KTB's former executive directors, Mr I. Zafirov and Mr G. Hristov, on its behalf.

220. The Government argued that the wording of the relevant clauses in the two fee agreements did not show that KTB was bound to pay the lawyers' fees whose reimbursement it was seeking. They further submitted that the claim was exorbitant, and that there was no information about the way in which those fees had been calculated. In their view, any award under this head had to take account of domestic legal rates and the standard of living in Bulgaria, and not exceed the awards made in previous similar cases. Lastly, the Government pointed out that two applications had been declared partly inadmissible.

2. The Court's assessment

221. Since the two applications were validly lodged on behalf of KTB by its former executive directors (see paragraphs 111–113 above), any costs and expenses incurred in pursuing those applications are to be reimbursed to them (see *Capital Bank AD*, § 148, and *International Bank for Commerce and Development AD and Others*, § 169, both cited above). It must, however, be established whether the former executive directors did incur any such costs.

222. The only type of costs or expenses for which reimbursement was sought were lawyer's fees. According to the Court's case-law, such fees have been actually incurred if the applicant has paid or is liable to pay them (see *McCann and Others v. the United Kingdom*, 27 September 1995, § 221, Series A no. 324; *Merabishvili v. Georgia* [GC], no. 72508/13, § 371, 28 November 2017; and *B and C v. Switzerland*, nos. 889/19 and 43987/16, § 79, 17 November 2020). In this case, clause III of both fee agreements between KTB and the lawyer retained by its former executive directors to represent it before the Court said that the parties 'agree[d] that the contracted fee [wa]s to be paid directly to the lawyer by the Bulgarian State if and when it [wa]s awarded by [the Court]'. There is hence no evidence that KTB or its former execu-

tive directors have paid or are liable to pay any fees to the lawyer; agreeing that one's representative may seek his or her fees from the opposing party does not amount to actually incurring those fees (compare with the circumstances in *Palfreeman v. Bulgaria* [Committee], no. 840/18, § 107, 8 June 2021).

223. Moreover, a representative cannot seek just satisfaction for him or herself, since he or she is not an 'injured party' within the meaning of Article 41 (former Article 50) of the Convention (see *Luedicke, Belkacem and Koç v. Germany* (Article 50), 10 March 1980, § 15, Series A no. 36; *Airey v. Ireland* (Article 50), 6 February 1981, § 13, Series A no. 41; and *Campbell and Cosans v. the United Kingdom* (Article 50), 22 March 1983, § 14 (a), Series A no. 60).

224. The claim must therefore be rejected in full.

For these reasons, the Court, unanimously,

1. *Joins* the two applications;
2. *Joins* the Government's objection that KTB did not exhaust domestic remedies in respect of its two complaints under Article 6 § 1 of the Convention that it could not obtain judicial review of the BNB's decision to withdraw its licence to the merits of those two complaints, and *rejects* it;
3. *Declares* the complaints on behalf of KTB that (a) it could not obtain judicial review of the withdrawal of its banking licence; (b) in the ensuing proceedings in which the courts decided that it was to be declared insolvent and wound up, it was represented exclusively by persons dependent on its opponent, the BNB; (c) the withdrawal of its licence and the ensuing decision to wind it up were an unlawful and unjustified interference with its possessions admissible;
4. *Holds* that there has been a violation of Article 6 § 1 of the Convention, in that KTB itself did not have a clear and practical possibility, by proper representation, of seeking and obtaining proper judicial review of the BNB's decision to withdraw its licence;
5. *Holds* that there has been a violation of Article 6 § 1 of the Convention, in that KTB's interests were not properly represented in the proceedings relating to the BNB's application for it to be declared insolvent and wound up;
6. *Holds* that there has been a violation of Article 1 of Protocol No. 1, in that the BNB's decision to withdraw KTB's licence, which then led to the judicial decision declaring it insolvent and ordering it to be wound up, was not surrounded by any safeguards against arbitrariness;
7. *Holds* that it is not necessary to examine the admissibility or merits of the complaints under Article 13 of the Convention;
8. *Dismisses* KTB's claim for just satisfaction.

Noot

1. Deze Bulgaarse uitspraak laat nog eens zien dat bij de ontbindingsprocedure ten aanzien van banken de procedurele rechten van betrokkenen (bestuur en/of aandeelhouders) voldoende moeten zijn verzekerd.

2. Wat is er — kort gezegd — aan de hand? Bij de Bulgaarse bank KTB ontstaat een bankrun vanwege liquiditeitsproblemen. De Bulgaarse nationale bank (BNB) grijpt in en trekt de bankvergunning in. De aandeelhouders stelden daar vergeefs beroep tegen in bij de nationale (bestuurs)rechter, nu volgens deze rechter alleen KTB zelf tegen deze intrekking in beroep kon gaan. Vervolgens werd een ontbindingsprocedure gestart waarin de bank alleen vertegenwoordigd mocht worden door afwikkelingsfunctionarissen aangesteld door de BNB. De bestuurders en aandeelhouders van de KTB vroegen ook in deze procedure vergeefs om de KTB te vertegenwoordigen. Dit verzoek werd echter door de hoogste bestuursrechter afgewezen, nu deze slechts de door de BNB aangestelde afwikkelingsfunctionarissen in deze procedure toeliet, zelfs terwijl er een duidelijke belangenverstrengeling bestond tussen laatstgenoemden en de bank en dat zij afhankelijk waren van de nationale bank. Bovendien bestond er volgens het Hof weinig tot geen incentive voor deze functionarissen om het intrekkingsbesluit aan te vechten (vgl. ook de eerdere zaak EHRM 24 november 2005, Capital Bank AD e.a. t. Bulgarije). Bovendien houdt het recht op toegang tot de rechter bij de vaststelling van burgerlijke rechten of verplichtingen in, dat iemand rechtstreeks en onafhankelijk naar de rechter moet kunnen stappen. KTB bevond zich op deze manier in een situatie dat niemand standing en belang had bij het aanvechten van het intrekkingsbesluit. Daarmee is er volgens het Hof een schending van het recht op toegang tot de rechter, zoals beschermd door art. 6, eerste lid EVRM, aan de orde. Ook constateert het Hof een schending van het eigendomsrecht van art. 1 Eerste Protocol EVRM, nu het besluit tot intrekking van de bankvergunning niet met voldoende waarborgen omgeven was.

3. Aldus lijkt het hier te gaan om een zaak die zich vooral toespitst op de Bulgaarse context en wordt veroorzaakt door een meer structureel gebrek in de wetgeving. Tegelijkertijd laat zij ook zien dat de belangen van de bank in een ontbindingsprocedure voldoende moeten worden gewaarborgd. Specifiek voor aandeelhouders zijn daarvoor bijvoorbeeld voorzieningen getroffen in

de zogenaamde Nederlandse Interventiewet (Wet bijzondere maatregelen financiële ondernemingen, *Stb.* 2012/24). Zo kan een aandeelhouder indien hij van mening is dat de door de overnemer te betalen prijs geen volledige vergoeding vormt voor de schade die hij rechtstreeks en noodzakelijk door het verlies van zijn aandeel lijdt, de Ondernemingskamer van het Gerechtshof te Amsterdam verzoeken een aanvullende schadeloosstelling vast te stellen (art. 3:159ab Interventiewet). Zie ook bijvoorbeeld de uitspraak van de Ondernemingskamer inzake schadevergoeding aan sommige SNS-aandeelhouders: Hof Amsterdam 11 februari 2021,
ECLI:NL:GHAMS:2021:316; zie in dit verband ook nader A.J.P. Schild, *De invloed van het EVRM op het ondernemingsrecht* (diss. Leiden) 2012.

4. Bijzonder om op te merken is dat het Hof voor wat betreft het rechtsherstel na de vastgestelde verdragsschendingen expliciet wijst op de optie van heropening van de bestuursrechtelijke procedure(s). Dit zonder dat dit moet leiden tot aantasting van vaststaande rechten in civiele verhoudingen. Nederland kent een dergelijke mogelijkheid niet in het bestuursrecht en het civiele recht. Het strafrecht voorziet daar wel in (art. 357 Sv). Iets om nog een keer over na te denken in Nederland.

T. Barkhuysen & M.L. van Emmerik

AB 2023/91

AFDELING BESTUURSRECHTSPRAAK VAN DE RAAD VAN STATE
22 februari 2023, nr. 202102854/1/A2
(Mrs. E.J. Daalder, J.E.M. Polak, J.Th. Drop)
m.nt. R. Stijnen

Art. 4:17 Awb; art. 12, 14, 35 Awir

NJB 2023/700
ABkort 2023/60
ECLI:NL:RVS:2023:724

Niet tijdig beslissen. Aanvang beslistermijn. De ingebrekestelling is één dag voor het verstrijken van de beslistermijn ontvangen, maar telt toch. De dwangsomregeling uit de Awir is ook van toepassing op besluiten tot herziening van een tegemoetkoming.

Zoals eerder is overwogen (zie bijvoorbeeld de uitspraak van de Afdeling van 22 april 2020, ECLI:NL:RVS:2020:1112), is een ingebrekestelling die is ingediend voordat de beslistermijn is afgelopen, geen ingebrekestelling als bedoeld in art. 4:17 lid 1 Awb. In paragraaf 1.1 van de Circulaire is evenwel onder verwijzing naar de wetsgeschiedenis neergelegd dat een ingebrekestelling die per abuis een dag te vroeg is ingediend, door het bestuursorgaan wel als geldig kan worden beschouwd en de Afdeling volgt die benadering. Dit betekent dat de ingebrekestelling van appellante, die op de laatste dag van de beslistermijn door de dienst is ontvangen, en daarmee een dag te vroeg is ingediend, door de Belastingdienst/Toeslagen ten onrechte als prematuur is beschouwd. De rechtbank heeft dit niet onderkend.

In de uitspraak van de Afdeling van 15 januari 2020, ECLI:NL:RVS:2020:78, is geoordeeld dat de herziening van een definitieve tegemoetkoming voor de toepassing van par. 4.1.3.2 Awb niet op één lijn kan worden gesteld met een definitieve tegemoetkoming, zodat de dwangsomregeling van art. 12 lid 2 Awir niet van toepassing is op een dergelijke herziening.

De Afdeling komt thans tot een andersluidend oordeel. Het besluit waarbij de definitieve tegemoetkoming wordt toegekend is een besluit op een aanvraag als bedoeld in art. 14 Awir en daarmee ook een beschikking tot toekenning van een tegemoetkoming als bedoeld in art. 12 lid 2 Awir. Het besluit tot herziening van deze definitieve tegemoetkoming vervangt dit besluit. Daarmee is het besluit tot herziening van een beschikking op aanvraag een nieuwe beslissing op die aanvraag, ook als het besluit tot herziening ambtshalve wordt genomen. Dit heeft tot gevolg dat een besluit tot herziening van de toekenning van een definitieve tegemoetkoming een besluit is als bedoeld in art. 14 Awir.

De benadering dat het bij het hier genomen ambtshalve besluit gaat om een beschikking op aanvraag sluit aan bij het arrest van de Hoge Raad van 3 februari 2023, ECLI:NL:HR:2023:134. Daarin is immers ten aanzien van een verzoek om een aanslag ambtshalve te verminderen geoordeeld dat art. 4:17 Awb en verder daarop van toepassing is, in de kern omdat het bij dat ambtshalve te nemen besluit op verzoek ook om een beschikking op aanvraag gaat.

Uitspraak als bedoeld in artikel 8:57 van de Algemene wet bestuursrecht (hierna: de Awb) in het geding tussen appellante, tegen de uitspraak van de Rechtbank Noord-Holland van 18 maart 2021 in zaak nr. 20/2152 in het geding tussen:
Appellante,
en
De Belastingdienst/Toeslagen.

Procesverloop

Bij besluit van 14 januari 2020 heeft de Belastingdienst/Toeslagen het verzoek van appellante om