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

FIRST SECTION

CASE OF KÖNYV-TÁR KFT AND OTHERS v. HUNGARY

(Application no. 21623/13)

JUDGMENT
(Just satisfaction)

Art 41 • Just satisfaction • Pecuniary damage • Award for applicant companies' lost opportunities on the market due to legislative interference amounting to a violation of Art 1 P1

STRASBOURG

5 October 2021

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Könyv-Tár Kft and Others v. Hungary,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Krzysztof Wojtyczek, *President,*
Alena Poláčková,
Gilberto Felici,
Erik Wennerström,
Raffaele Sabato,
Lorraine Schembri Orland, *judges,*
Carlo Ranzoni, *ad hoc judge,*
and Renata Degener, *Section Registrar,*

Having deliberated in private on 31 August 2021,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 21623/13) against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Könyv-Tár Kft ("the first applicant company"), Suli-Könyv Kft ("the second applicant company") and Tankönyv-Ker Bt ("the third applicant company") (together: "the applicant companies"), on 26 March 2013.

2. The applicant companies were represented by Mr P. Köves, a lawyer practising in Budapest. The Hungarian Government ("the Government") were represented by Mr Z. Tallódi, Agent, Ministry of Justice.

3. The first applicant company, Könyv-Tár Kft, is a limited liability company with its registered office in Budapest. The second applicant company, Suli-Könyv Kft, is a limited liability company with its registered office in Tata. The third applicant company, Tankönyv-Ker Bt, is a limited partnership company with its registered office in Budapest.

4. The applicant companies are schoolbook distributors.

5. In a judgment delivered on 16 October 2018 ("the principal judgment"), the Court held that there had been a violation of Article 1 of Protocol No. 1 of the Convention on account of measures implemented by the Government introducing a new system of schoolbook distribution ("New Regulations") which led to the *de facto* exclusion of the applicant companies from schoolbook distribution without any measure to protect them from arbitrariness or to offer them redress in terms of compensation. The Court found inadmissible the complaint concerning Article 13 read in conjunction with Article 1 of Protocol No. 1 and held that there was no need to examine separately the admissibility or the merits of the complaints under Article 6 § 1 of Convention and Article 14 read in conjunction with Article 1 of Protocol No. 1.

6. Under Article 41 of the Convention, the applicant companies sought just satisfaction for the pecuniary damage sustained and the costs and expenses incurred before the Court.

7. Since the question of the application of Article 41 of the Convention was not ready for decision, the Court reserved it and invited the Government and the applicant companies to submit, within three months, their written observations on that issue and, in particular, to notify the Court of any agreement they might reach (see §§ 68-69, and point 5 of the operative provisions, of the principal judgment).

8. On 18 March 2019 the panel of the Grand Chamber declined to accept a referral request from the respondent Government. Accordingly, the principal judgment became final on that date.

9. On 17 June 2019 the Government informed the Court that no agreement had been reached on just satisfaction between the Parties.

10. The applicants and the Government each filed observations.

THE LAW

11. 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."

I. DAMAGE

A. The parties' submissions

1. The applicants

12. In their observations of 5 June 2013 and 20 March 2014, the applicant companies claimed pecuniary damage suffered as a result of their *de facto* exclusion from schoolbook distribution. The first applicant company claimed 159,000,000 Hungarian forints (HUF – approximately 521,000 euros (EUR)), the second applicant company claimed HUF 575,000,000 (EUR 1,885,000) and the third applicant company claimed HUF 14,500,000 (EUR 47,500).

13. In the applicants' submissions, these figures represented the decrease of their equity values, as per expert valuation reports, flowing from the violation suffered. The valuations submitted by the applicant companies on 5 June 2013 and 20 March 2014 ("valuation reports") were prepared by a global leading independent valuation consultancy firm that provides expert services, among others, in company valuation.

14. The calculations on the applicant companies' fair market value – from which the damages sustained as a result of the impugned New

Regulations were calculated – were based on three methods of valuation ("discounted-cashflow method", "market multiples method" and "cost approach method"). By applying these calculation methods, the expert valuations determined the applicant companies' equity values on the day after the entry into force of the New Regulations ("Actual scenario") and the applicant companies' hypothetical equity values but for the New Regulations ("But-For scenario"). Primarily in application of the "discounted-cashflow method", the determination of the applicant companies' market values in the But-For scenario was based, *inter alia*, on their historical performance between 2009 and 2012 with a forecast period of four years, i.e. from 2012 until 2016. When describing the characteristics of the schoolbook distribution market, the valuation reports expressly referred to the perpetually and unpredictably changing regulatory environment which caused great uncertainties in this business; nevertheless the valuation reports assumed that the regulatory environment would remain unchanged for the forecast period.

15. The difference between the equity values of the But-For scenario and of the Actual scenario represented the pecuniary damages claimed by the applicant companies.

16. The applicant companies, in their counter-observations of 1 August 2019, maintained their positions held in the principal proceedings before the Court and submitted that the Government's observations dated 17 June 2019 were entirely meritless.

2. The Government

17. The Government, in their observations of 25 March 2014 and 17 June 2019, submitted that the applicant companies' claims for just satisfaction as regards both damages and costs were exaggerated and mostly unsubstantiated. In the first place, they considered that the decrease of the applicant companies' equity values represented the losses of the applicant companies' owners and not of the companies themselves. Because the applicant companies' owners were not applicants in the proceedings before the Court, the Government submitted that the claims for just satisfaction were ill-founded.

18. Moreover, in the Government's view, no causal link existed between the decrease in the applicant companies' equity values and the violation found, since such decrease would have occurred even if the schoolbook acquisition system had been changed in a Convention-compliant manner, because the applicant companies' clients would have concluded contracts with the State-owned entity in any event.

19. In particular, as regards the calculation of pecuniary damages – without relying on an expert valuation of their own or citing the source of the information – the Government submitted that from 2013 to 2018 the annual turnover of schoolbooks had decreased by 20% and the price of the

State-published schoolbooks had dropped by 40%, while the ratio of pupils receiving free schoolbooks had increased from 54% in 2013 to 85% in 2018. Based on these figures, the Government maintained that even in an extended adjustment period, in the period between 2013 and 2018, the applicant companies could have expected only 45-50% of their former turnovers. They also submitted, relying on the applicant companies' pre-tax results between 2011 and 2013, that the applicant companies' profit margins were low; and that, in their view, the applicant companies should be able to claim damages for a period of three years following the entry into force of the New Regulations.

20. In application of those general considerations, the Government invited the Court to establish the amount of just satisfaction, in respect of both pecuniary damage and costs, as follows: with respect to the first applicant company, EUR 45,000; with respect to the second, EUR 210,000 and with respect to the third, EUR 28,000.

B. The Court's assessment

21. The Court first notes the Governments' objection that any loss suffered by the applicant companies was in fact the loss of their owners who are not applicants in the present case; therefore, any just satisfaction claim is ill-founded (see paragraph 17 above).

22. The Court reiterates that a wrong done to the company can indirectly cause prejudice to its shareholders, but this does not imply that both are entitled to claim compensation. Whenever a shareholder's interests are harmed by a measure directed at the company, it is up to the latter to take appropriate action. An act infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected. Such responsibility arises only if the act complained of is aimed at the rights of the shareholder as such (see *Albert and Others v. Hungary* [GC], no. 5294/14, § 126, 7 July 2020). In examining the questions as to what constitutes an act "aimed at the rights of the shareholder as such", the Court has refused to accept the mere loss of value of the shares as the only decisive factor (see *Albert and Others*, cited above, § 127).

23. The Court notes that, in the present case, the applicant companies lost opportunities on the market because of the legislative interference in question. This inevitably entailed a loss of chances for them to make profit. A loss of profits for a company may translate into a decrease of equity value for its shareholders. However, this consideration alone is not sufficient for the Court to disregard the applicant companies' distinct legal personalities and allow shareholders to have brought complaints concerning the rights and the situation of the companies. Such an approach would have been possible only in exceptional circumstances warranting a different treatment (see, *a contrario*, *Credit and Industrial Bank v. the Czech Republic*,

no. 29010/95, § 51, 21 October 2003; *Camberrow MM5 AD v. Bulgaria* (dec.), no. 50357/99, 1 April 2004; *Capital Bank AD v. Bulgaria* (dec.), no. 49429/99, 9 September 2004; and *International Bank for Commerce and Development AD and Others v. Bulgaria*, no. 7031/05, §§ 90-92, 2 June 2016).

24. Furthermore, the Court reiterates that a judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. The Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1). If the nature of the breach allows of restitutio in integrum, it is for the respondent State to effect it, the Court having neither the power nor the practical possibility of doing so itself. If, on the other hand, national law does not allow – or allows only partial – reparation to be made, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate (see, among many authorities, *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 34, Series A no. 330-B; *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, §§ 32-33, ECHR 2000-XI; and *Kurić and Others v. Slovenia* (just satisfaction) [GC], no. 26828/06, § 80, ECHR 2014).

25. The present case concerns a violation of the peaceful enjoyment of possession where the interference with the applicant companies' possession was a control of use rather than a deprivation of possessions (see principal judgment § 56 and, *a contrario*, *Dacia S.R.L. v. Moldova* (just satisfaction), no. 3052/04, § 38, 24 February 2009). The principal judgment concluded that the applicant companies had not been deprived of their properties, rather, the control of use of their possessions was found to be disproportionate due to the lack of transitory or other measures which could have otherwise restored the fair balance (see principal judgment §§ 55-59). Therefore, the case-law on compensation for deprivation of possessions is not directly applicable (see principal judgment § 56).

26. Because the nature of the violation found in the principal judgment does not enable the Court to proceed on the basis of the principle of *restitutio in integrum* (see *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, §§ 20-21, 28 May 2002), it considers that an indemnity is capable of compensating for the alleged loss (see *Anonymos Touristiki Etairia Xenodocheia Kritis v. Greece* (just satisfaction), no. 35332/05, § 18, 2 December 2010).

27. The Court further reiterates that legitimate objectives in the "public interest", such as those pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value (see *Cauchi v. Malta*, no. 14013/19, § 103, 25 March 2021). However, the principal judgment contains no unequivocal conclusion on the point of absence of a legitimate aim (see principal judgment, §§ 45-47).

28. Moreover, there must be a clear causal connection between the damages claimed by the applicants and the violation of the Convention. In appropriate cases, this may include compensation in respect of loss of earnings (see, among other authorities, *Barberà, Messegué and Jabardo v. Spain* (Article 50), 13 June 1994, § 16-20, Series A no. 285-C; and *Kurić*, cited above, § 81).

29. In the present case, the parties adopted very different positions regarding the amount of pecuniary damages. The applicant companies submitted expert valuation reports establishing their respective claims as EUR 521,000, EUR 1,885,000 and EUR 47,500, figures representing their loss of equity value based on potential future profits but for the New Regulations, with a forecast period of four years.

30. The Government, for their part, suggested respectively EUR 45,000, EUR 210,000 and EUR 28,000 in respect of pecuniary damages and costs.

31. The Court is aware of the difficulties in calculating lost profits in circumstances where such profits could fluctuate owing to a variety of unpredictable factors. It notes, however, that the Government's observation dated 17 June 2019 does not include any calculations or other explanations as to the determination of the amount of pecuniary damages and costs (see paragraph 19 above). While they hinted at certain factors, such as potential regulatory changes including changes in the schoolbook acquisition system (which, in their view, would have diminished the applicant companies' profits even without the *de facto* monopolisation of the schoolbook distribution sector) and the applicant companies' low pre-tax profits (see paragraph 19 above), they did not offer an alternative manner of calculation to counter that of the applicants.

32. The Court notes that the applicant companies submitted expert valuation reports applying three different methods of valuation. According to the valuation reports, the pecuniary damage suffered by the applicant companies as a result of the violation found correspond to the difference between the calculations under the But-For and Actual scenarios.

33. Despite the applicant companies' elaborate arguments, the Court agrees with the general tenor of the Government's submissions to the effect that potential changes of the regulatory environment should be taken into account when calculating the loss of the applicant companies' equity values. In the principal judgment it was not held that the applicant companies had had a legitimate expectation of an unchanged regulatory environment,

instead, the Court held that "the applicant companies were not expected to assume that their business would be *de facto* monopolised" (see principal judgment, § 58). Such regulatory risks, however, were not assumed by the expert valuations when calculating the pecuniary damages, although the valuation reports themselves – when describing the market characteristics of the school book market – referred to the perpetually and unpredictably changing regulatory environment which might cause great uncertainties (see paragraph 14 above). The Court therefore considers that the circumstances of the case do not lend themselves to a precise assessment of pecuniary damage, since this type of damage involves many uncertain factors – such as regulatory risks unaccounted for by the valuation reports submitted by the applicant companies.

34. Without speculating on the profits and the corresponding equity value which the applicant companies would have achieved if the violations of the Convention had not occurred and if they had been able to continue their normal operations, the Court observes that the applicant companies suffered a real loss of opportunities (see paragraph 23 above).

35. Having regard to the above elements, the Court considers it appropriate to award lump sums, which include any accrued interests, in compensation for the losses resulting from the violation found. It considers it reasonable to award the first applicant company an aggregate sum of EUR 160,000, the second applicant company EUR 570,000 and the third applicant company EUR 28,000.

II. COSTS AND EXPENSES

36. The applicant companies altogether claimed EUR 25,000 plus VAT for legal fees, without further itemisation. Furthermore, the first applicant company claimed EUR 3,125 plus VAT, the second applicant company claimed EUR 5,750 plus VAT, and the third applicant company claimed HUF 590,551 (approximately EUR 1,700) plus VAT for expert fees. The applicant companies submitted invoices to substantiate their claims.

37. The Government contested these claims as excessive and considered that the expert opinions were unnecessary.

38. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to their quantum. Regard being had to the documents submitted by the parties and the above criteria, the Court considers it reasonable to award to the applicant companies, jointly, the total sum of EUR 25,000 to cover all costs and expenses incurred.

III. DEFAULT INTEREST

39. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds*, by six votes to one,
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 160,000 (one hundred sixty thousand euros), EUR 570,000 (five hundred seventy thousand euros) and EUR 28,000 (twenty-eight thousand euros), plus any tax that may be chargeable, in respect of pecuniary damage, to the first, the second and the third applicant companies, respectively;
      (ii) to the applicant companies jointly, EUR 25,000 (twenty-five thousand euros), plus any tax that may be chargeable to the applicants, 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;

2. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 5 October 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener
Registrar

Krzysztof Wojtyczek
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Wojtyczek is annexed to this judgment.

K.W.O.
R.D.

DISSENTING OPINION OF JUDGE WOJTYCZEK

1. In my view, the respondent State has observed its obligations under Article 1 of Protocol No. 1 in the instant case. As a result, I have voted against finding a violation of that provision and I have explained my approach in detail in the dissenting opinion appended to the judgment on the merits in *Könyv-Tár Kft and Others v. Hungary* (no. 21623/13, 16 October 2018). In these circumstances, I do not see sufficient reasons to award compensation for the material damage alleged by the applicant companies.

2. In my dissenting opinion, I drew attention to a certain number of features of the textbook market in Hungary. This market was not only a so-called “broken market” with a captive clientele, but the available evidence also showed the formation of regional monopolies or oligopolies. The applicant companies had profited from these market distortions in the past. When determining the award to be made in respect of material damage, it is necessary to take into account, *inter alia*, undue advantages obtained in previous years. The majority overlook this important aspect of the case.