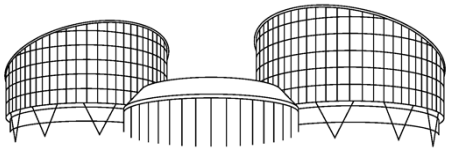

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF B.K.M. LOJISTIK TASIMACILIK TICARET LIMITED SIRKETI v. SLOVENIA

(Application no. 42079/12)

JUDGMENT

STRASBOURG

17 January 2017

FINAL

17/04/2017

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of B.K.M. Lojistik Tasimacilik Ticaret Limited Sirketi v. Slovenia,

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

András Sajó, *President,*
Vincent A. De Gaetano,
Nona Tsotsoria,
Paulo Pinto de Albuquerque,
Egidijus Kūris,
Gabriele Kucsko-Stadlmayer,
Marko Bošnjak, *judges,*

and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 6 December 2016,

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

PROCEDURE

1. The case originated in an application (no. 42079/12) against the Republic of Slovenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish company, B.K.M. Lojistik Tasimacilik Ticaret Limited Sirketi ("the applicant company"), on 12 April 2012.

2. The applicant company was represented by Mr S. Duran, a lawyer practising in Istanbul. The Slovenian Government ("the Government") were represented by their Agent, Mr L. Bembič, State Attorney.

3. The applicant company alleged that the confiscation of its lorry in criminal proceedings amounted to an unlawful and disproportionate interference with its possessions under Article 1 of Protocol No. 1.

4. On 30 August 2013 the application was communicated to the Government.

5. In accordance with Article 36 § 1 of the Convention and Rule 44 of the Rules of Court, the Turkish Government were informed of their right to submit written comments. They did not avail themselves of this right.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant company B.K.M. Lojistik Tasimacilik Ticaret Limited Sirketi has its registered office in Istanbul.

7. On 13 November 2008 customs officers stopped and checked the applicant company's lorry, in which they found packages of unknown content. A preliminary test of the content revealed that the packages contained heroin. The customs officers informed the police accordingly.

8. On 14 November 2008 the police inspected the lorry and its trailer and found 105 kg of heroin. The driver, a Turkish citizen, was arrested and detained. The lorry was seized and the trailer and its goods became the object of a customs procedure. On an unspecified date the applicant company received documents enabling the goods contained in the trailer to be delivered to their destination. The trailer was returned to the applicant company. Subsequently, the police filed a criminal complaint against the driver with the Ptuj District State Prosecutor's Office.

9. On 15 November 2008 the Ptuj District State Prosecutor's Office charged the driver with the production and trafficking of illegal drugs under Section 186(1) of the Criminal Code. The District State Prosecutor further requested that the applicant company's lorry be confiscated under Section 186(5) of the Criminal Code since it had been used for the transportation of illegal narcotic drugs.

10. On 25 November 2008 the applicant company asked the Ptuj District Court to provide it with the case-file concerning the charges against the driver. It also enquired when it would be able to retake possession of the seized lorry. On 8 December 2008 the court informed the applicant company of the charges against the driver. It further informed the applicant company that the lorry had been seized in accordance with Section 220 of the Criminal Procedure Act read in conjunction with Section 186(5) of the Criminal Code and that no decision could be made on the return or confiscation of the lorry until a decision on the merits had been issued. On 23 December 2008 the applicant company informed the court that it opposed the District State Prosecutor's request for confiscation of the lorry.

11. On 29 December 2008 the Ptuj District Court found the driver guilty of drug trafficking and sentenced him to nine years' imprisonment. It ordered that the lorry be returned to the applicant company. It held that confiscation was possible only if one of the conditions set out in the second paragraph of Section 73 of the Criminal Code were met, namely the existence of reasons of general security or morality. The District Court considered that that condition had not been met, taking into account the fact that there was no indication that the applicant company knew about the transportation of the illegal material.

12. Both the driver and the Higher State Prosecutor appealed. On 21 May 2009 the Maribor Higher Court modified the first-instance judgment and, relying on Sections 73(3) and 186(5) of the Criminal Code, ordered the confiscation of the lorry. It held that the legislative framework provided for mandatory confiscation in cases of drug-related criminal offences since the nature of their commission, their magnitude and the

dangerous consequences thereof called for the extension of coercive measures to persons who were not the perpetrators of the criminal offence, irrespective of whether or not the owners of the vehicle knew what the perpetrator had been transporting. The Higher Court explained that in accordance with Section 73(2) of the Criminal Code, objects used in the commission of a criminal offence could be confiscated even when they did not belong to the perpetrator, in so far as the third party's right to claim damages from the perpetrator was not thereby affected. Moreover, Section 73(3) provided for the possibility of mandatory confiscation in cases provided for by the statute. Thus, Section 186(5) of the Criminal Code implemented those two provisions by providing mandatory confiscation of the means of transport used for transportation and storage of illegal substances.

13. On 17 July 2009 the applicant company lodged a constitutional complaint against the aforementioned decision and an initiative for review of the constitutionality of Section 186(5) of the Criminal Code, alleging a violation of its property rights. It complained in particular that it had not known that the lorry was being used for illegal purposes, adding that the first-instance court had explicitly established its non-involvement in the commission of the criminal offence at issue. Claiming that it had not had an effective possibility to prevent the abuse of its property for criminal purposes, the applicant company stressed that the lorry had been subject to regular controls concerning possible vehicle modifications and hidden compartments. Thus, according to the applicant company, the measure complained of constituted a punishment and an unjustified and disproportionate interference with its property and that it had not had the opportunity to participate in the criminal proceedings.

14. On 29 September 2011 the Constitutional Court dismissed both the constitutional complaint and the initiative. In reviewing the contested legislation, the Constitutional Court confirmed the Higher Court's view that Section 186 of the Criminal Code provided for mandatory confiscation of vehicles used for the transportation and storage of drugs or illegal substances in sport, regardless of their ownership. According to the Constitutional Court, drug-related criminal offences sanctioned under Section 186 of the Criminal Code represented a great evil and an extremely high degree of threat not only from the perspective of the individual, but also from the perspective of society as a whole; the purpose of the impugned measure was to prevent the commission of such criminal offences in the future and thus to protect important legal values in society, such as health and life – especially of young people. The Constitutional Court stressed that the nature of the criminal offences in question, the manner in which they were committed and their consequences justified the interference with the ownership rights of all owners of the means of transport used for drug-trafficking, regardless of their potential involvement

in the criminal activities at issue, adding that a different regulation governing the confiscation of goods would diminish considerably the possibilities for effectively preventing the criminal offences in question.

15. Balancing the general interests in question with the property rights of the applicant company, the Constitutional Court held that the measure complained of did not amount to an excessive interference despite the fact that the applicant company had had no effective possibility for preventing the misuse of its property for criminal purposes and had not participated in the commission of the criminal offence. In this connection, the Constitutional Court pointed out that legal certainty required that every instance of legally recognised damage be adequately protected. Thus, by virtue of Section 73(2) of the Criminal Code, the confiscation did not affect the right of third parties to claim compensation from the offender. Under the general rules of tort law, the injured owner had the possibility and the right to exact compensation from the person responsible for the damage. The Constitutional Court added that it was for the regular courts to establish in each individual case whether all the elements required for recognition of the alleged damage and thus for payment of compensation were fulfilled.

16. Meanwhile, on 29 June 2009 the Ptuj District Court informed the applicant company that the lorry was to be sold at a public auction and that it could submit written comments in this respect. On 6 July 2009 the applicant company replied that it was willing to buy the confiscated lorry. On 20 October 2011 the court ordered the sale of the lorry and informed the applicant company thereof. On 30 November 2011 the lorry was sold at public auction for 12,000 euros ("EUR"). According to the Government the lorry was sold to the applicant company. In this regard, they submitted a document stating that the lorry had been sold to "B.K.M. LOJISTIK, TAS.VE TIC.LTD.STI", a company from Istanbul. However, the applicant company contested that statement, alleging that it was another company that had purchased the lorry. The Government did not reply to this submission.

II. RELEVANT DOMESTIC LAW AND PRACTICE

17. Pursuant to Article 33 of the Constitution of the Republic of Slovenia (hereinafter: "the Constitution") the right to private property and inheritance is guaranteed. Under the second paragraph of Article 15 of the Constitution, the manner in which human rights and fundamental freedoms are exercised may be regulated by law whenever the Constitution so provides or where this is necessary due to the particular nature of an individual right or freedom. According to Article 67(1) of the Constitution, the manner in which property is acquired and enjoyed is established by law so as to ensure its economic, social and environmental function.

18. The relevant provisions of the Criminal Code, as applicable at the material time, laying down the conditions under which, as a safety measure, the confiscation of items may be imposed, read as follows:

Conditions for Application of Safety Measures

Section 70

"(1) The court may apply one or more safety measures in respect of the perpetrator of a criminal offence providing the statutory conditions for the application thereof are met.

(2) The revocation of the perpetrator's driving licence and the confiscation of objects may be ordered if a prison sentence, a suspended sentence, or a judicial warning has been imposed on him, or in case of the remission of a sentence.

..."

Confiscation of Objects

Section 73

"(1) Objects used or intended to be used, or gained through the committing of a criminal offence may be confiscated if they belong to the perpetrator.

(2) Objects under the preceding paragraph may be confiscated even when they do not belong to the perpetrator if that is required for reasons of general security or morality and if the rights of other persons to claim damages from the perpetrator are not thereby affected.

(3) Mandatory confiscation of objects may be provided for by the statute even if the objects in question do not belong to the perpetrator.

... "

Unlawful Manufacture and Trade of Narcotic Drugs, Illegal Substances in Sport and Precursors to Manufacture Narcotic Drugs

Section 186

"...

(5) Narcotic drugs or illegal substances in sport and the means of their manufacture and means of transport used for the transportation and storage of drugs or illegal substances in sport shall be seized."

19. Under paragraph 1 of Section 220 of the Criminal Procedure Act, items which are to be seized in accordance with the Criminal Code or which may prove to constitute evidence in criminal proceedings must be seized and delivered to the court for safekeeping or secured in some other way. Under the fourth paragraph of Section 220, police officers may seize these items during the investigation if proceeding under Sections 148 and 164 of the Criminal Procedure Act. In accordance with Section 224 of that Act, items seized during criminal proceedings must be returned to the owner or

current holder if the proceedings are discontinued and there are no grounds for them to be confiscated.

20. The management of the items seized during or in connection with criminal proceedings is regulated by the Decree on the Management of Seized Items, Property and Bail (hereinafter: "the Decree"). Pursuant to Section 9 of the Decree, seized items may be returned to the owner as soon as the grounds for their seizure cease to exist. If it is not possible or permitted to return the items to the owner, the items must be sold. If it is not possible to sell the items, the court must order their destruction or donation for the public good. Prior to issuing a decision on the sale, destruction or donation of the items, the court shall obtain the opinion of the owner of those items. Under the first paragraph of Section 11 of the Decree, the sale must be conducted pursuant to the provisions of the regulations that apply to judicial enforcement proceedings.

21. Under paragraph 1 of Section 55 of the Private International Law and Procedure Act, courts in the Republic of Slovenia have jurisdiction in disputes concerning non-contractual liability for damages in cases where the harmful act was committed on the territory of the Republic of Slovenia. In such cases Slovenian law shall apply (Section 30(1) of that Act).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

22. The applicant company complained that the confiscation of its lorry amounted to an unlawful and disproportionate interference with its possessions under of Article 1 of Protocol No. 1 which reads:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

23. The Government objected that the applicant company had failed to exhaust the domestic remedies as it had not brought an action for

compensation against the driver under Section 73 of the Criminal Code and Sections 30 and 50 of the Private International Law and Procedure Act.

24. The applicant company contested that argument.

25. The Court points out that the general principles concerning the exhaustion of domestic remedies have recently been set out in *Chiragov and Others v. Armenia* ([GC], no. 13216/05, §§ 115-116, ECHR 2015). The Court observes in particular that it is for the applicant to select which legal remedy to pursue for the purpose of obtaining redress for the alleged breaches where there is a choice of remedies available to the applicant in respect of redress for an alleged violation of the Convention. Article 35 of the Convention must be applied in a manner corresponding to the reality of the applicant's situation in order to guarantee the effective protection of the rights and freedoms in the Convention (see, among other authorities, *Airey v. Ireland*, 9 October 1979, § 23, Series A no. 32, and *R.B. v. Hungary*, no. 64602/12 § 60, 12 April 2016).

26. In the present case, the Court finds that the question of whether an action for compensation against the driver may be considered as relating to the alleged violation and as capable of offering an effective remedy within the meaning of Article 35 § 1 of the Convention is closely linked to the substance of the applicant company's complaint. Accordingly, it should be joined to the merits.

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

B. Merits

1. The parties' submissions

(a) The applicant company

28. The applicant company complained that the confiscation of the lorry belonging to it was unlawful, that it did not pursue any public interest and that it was disproportionate. It argued that the domestic courts had applied the domestic law arbitrarily and without taking into account its good faith and its property rights. It stressed that it had not participated in the commission of the criminal offence and that there were no bars to returning the lorry. The Criminal Code should have been interpreted as requiring confiscation only in cases where a lorry has been adapted for the commission of the relevant criminal offence. In the applicant company's view, the confiscation of the lorry amounted to a penalty for the effective fight against drug-related criminal offences. Finally, the applicant company alleged that lorry had been sold to another company at auction.

(b) The Government

29. The Government acknowledged that the seizure and confiscation of the lorry constituted an interference with the applicant company's possessions. During the period of seizure the applicant company had not been able to use it and, therefore, its property had been controlled. When the court's confiscation decision became final, the applicant company had lost its title to the lorry. However, it had regained this right by purchasing the lorry at auction.

30. The Government further argued that the lorry had been confiscated pursuant to Section 186(5) of the Criminal Code as applicable at the relevant time. Under that provision, vehicles used for the transportation of narcotic drugs had to be seized irrespective of who the owner of the vehicle was or whether the owner of the vehicle had acted in good faith or whether the vehicle had contained any hidden compartments for the transportation of drugs. The applicant company's argument that the lorry should have been confiscated only if it had had a specially adapted space for the transportation and storage of drugs was therefore not correct. Moreover, the confiscation had been carried out in accordance with the procedural rules of the Criminal Procedure Act and the applicant company had not alleged that any of the procedural rules had been violated.

31. The Government noted that criminal offences under Section 186 of the Criminal Code were punishable by one to ten years' imprisonment. In the present case, the perpetrator was sentenced to nine years' imprisonment, almost the maximum sentence. He had been transporting approximately 100 kg of heroin in the lorry concerned. The Government stressed that the criminal offences referred to in Section 186 of the Criminal Code constituted a great evil posing an extremely serious threat to the health and life of individuals. It was in the public interest to prevent the commission of this type of criminal offence by enacting effective measures. With the measure at issue the legislator wanted to prevent the commission of this type of criminal offence in order to reduce the threat to the most important values in society – human health and life. The perpetrators of such criminal offences were not discouraged by the fact that they did not own the means of transport that they used in order to conceal illegal drugs. An interference with the property of third persons inevitably formed part of the fight against organised crime to protect the highest values and goods of human society. The nature of such criminal offences, the manner in which they were committed and the consequences they had for people's health and lives justified the mandatory confiscation of means of transport, regardless of the ownership of the vehicle(s) concerned. It could reasonably be expected that any regulatory arrangement (e.g. mandatory confiscation only if the means of transport was owned by the perpetrator) different from that applied would considerably have reduced the possibilities for effectively preventing these criminal offences.

32. The Government stressed that only those means of transport which were indispensable for the commission of the criminal offence could be subject to mandatory confiscation. In the present case the trailer was not subject to confiscation, and the applicant company was able to recover it some days after the event. Soon afterwards, it also received documents enabling the goods contained in the trailer to be delivered to their destination.

33. According to the Government, a third party who had suffered damage because of the measure at issue could claim compensation for such damage from the perpetrator under Section 73(2) of the Criminal Code.

34. Finally, the Government argued that in November 2011 the applicant company had bought back the confiscated lorry at auction, paying EUR 12,000. It had therefore had an opportunity to recover the lorry and made use of it.

2. The Court's assessment

(a) The applicable rule

35. The Government argued that at a preliminary stage the seizure of the lorry had constituted a control of the use of property and, later, following the confiscation decision, the applicant company had in fact been deprived of its title to the lorry. Moreover, according to the Government the applicant company had later repurchased the lorry at auction, an allegation which was contested by the applicant company.

36. The Court points out that Article 1 of Protocol No. 1 comprises three distinct rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers the deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. The three rules are not, however, "distinct" in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, among many authorities, *AGOSI v. the United Kingdom*, 24 October 1986, § 48, Series A no. 108, and *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 185, ECHR 2012).

37. The Court has on several occasions examined issues arising from confiscation measures implemented in relation to a possession which has been used unlawfully and aimed at preventing its further unlawful use. Some of those cases involved confiscation of the proceeds of a criminal

offence (*productum sceleris*) (see, for example, *Frizen v. Russia*, no. 58254/00, § 31, 24 March 2005, and the references cited therein), others concerned confiscation of the things which had been the object of the offence (*objectum sceleris*) (see, for example, *AGOSI*, cited above, § 51, and, more recently, *Sulejmani v. the former Yugoslav Republic of Macedonia*, no. 74681/11, § 40, 28 April 2016), and yet others confiscation of things by means of which the offence had been committed (*instrumentum sceleris*). The present case falls into the latter category, as it concerns legislation providing for mandatory confiscation of *instrumenta sceleris* for the purpose of prevention of further commission of crime.

38. As regards the question under which rule of Article 1 of Protocol No. 1 such measures should be examined, the Court has in most cases involving *instrumenta sceleris* found that even though the measure in question had resulted in a deprivation of a possession, it was taken in the interest of a public policy, such as preventing drug trafficking. Therefore, it constituted an instance of control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1, which authorises States to enact "such laws as [they deem] necessary to control the use of property in accordance with the general interest" (see, for example, *Air Canada v. the United Kingdom*, 5 May 1995, §§ 33 and 34, Series A no. 316-A, and *Yildirim v. Italy* ((dec.), no. 38602/02, 10 April 2003). However, it is noted that those judgments concerned temporary restrictions on the use of property (see *Air Canada*, cited above, § 33), or a possibility of restitution of ownership (see *Yildirim*, cited above). By contrast, in the present case the confiscation involved a permanent transfer of ownership and the applicant company had no realistic possibility of recovering its lorry. In this connection, the Court considers that confiscation of an instrument for the commission of criminal offences from a third party does not involve the same level of urgency as confiscation of proceeds or objects of a criminal offence, viewed from the perspective of policy responses in the general interest. Thus, it may in certain circumstances be examined under the second sentence of the first paragraph of Article 1 of Protocol No. 1 which covers deprivation of property. In fact, in a similar case of *Andonoski v. the former Yugoslav Republic of Macedonia* (no. 16225/08, § 12, 17 September 2015), which included the confiscation of the applicant's car used in committing a criminal offence, the Court decided that the permanent nature of the measure which entailed a conclusive transfer of ownership, without the possibility of recovery, amounted to a deprivation of property (ibid., § 30). The Court considers that the same approach should be adopted in the present case.

(b) Compliance with the requirements of the second paragraph

39. The Court must further examine whether the interference with the applicant company's property rights was justified under the second

paragraph of Article 1 of Protocol No. 1. According to the Court's case-law, an interference for the purposes of that paragraph must be prescribed by law and must pursue one or more legitimate aims; in addition, there must be a reasonable relationship of proportionality between the means employed and the aim or aims sought to be realised. In other words, the Court must determine whether a balance was struck between the demands of the general interest and the interest of the individual or individuals concerned (see *Sporrong and Lönnroth v. Sweden*, 23 September 1982, §§ 69 and 73, Series A no. 52, and *James and Others v. the United Kingdom*, 21 February 1986, § 50, Series A no. 98). In doing so it leaves the State a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question (see *AGOSI,* cited above, § 52, and *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, § 109, 25 October 2012).

40. As regards the fight against illegal drug trade, the Court is acutely aware of the problems confronting Contracting States in their efforts to combat the harm caused to their societies through the supply of drugs from abroad. Therefore, recognising the need for effective strategies to reduce drug trafficking, the Court accepts that they may involve adverse consequences for the property of third persons (see *Air Canada*, cited above, §§ 41-42, and *C.M. v. France* (dec.), no. 28078/95, ECHR 2001-VII).

41. Firstly, the parties disagreed on whether the confiscation of the lorry was prescribed by law, the applicant company arguing that the interpretation of the relevant legislation given by the domestic courts was arbitrary. In this connection, the Court notes that the Higher Court and Constitutional Court both considered that the then applicable legislation, notably sections 73(3) and 186(5) of the Criminal Code provided for mandatory confiscation of the means of transport used for the transport of drugs (see paragraphs 11 and 13 above). In its decision, the Constitutional Court expressly confirmed that transporting illegal drugs resulted in mandatory confiscation of a vehicle in which the drugs were found (see paragraph 14 above), and found the measure to be consistent with the Constitution. Indeed, in the Court's opinion, the provision of Section 186(5) of the Criminal Code, as applicable at the material time, read in conjunction with Section 73(3) which allowed for mandatory confiscation of objects used in the commission of a criminal offence (see paragraph 18 above), does not support the applicant company's allegation that the confiscation of its lorry was tainted by arbitrariness (see, *mutatis mutandis*, *Beyeler v. Italy* [GC], no. 33202/96, § 108, ECHR 2000-I). The interference was thus in accordance with the domestic law of the respondent State.

42. Moreover, the Court accepts that the interference complained of pursued the legitimate aim of preventing drug-related offences which pose a

serious threat to individuals' health and life, an aim which serves the general interest (see *Air Canada*, cited above, § 34; and *C.M. v. France*, cited above).

43. As regards, further, the striking of a fair balance between the means employed by the domestic authorities for the purpose of preventing drug trafficking and the protection of the applicant company's property rights, the Court reiterates that such balance depends on many factors, and the behaviour of the owner of the property is one element of the entirety of circumstances which should be taken into account (see *AGOSI*, cited above, § 54). The Court must consider whether the applicable procedures in the present case were such as to enable reasonable account to be taken of the degree of fault or care attributable to the applicant company or, at least, of the relationship between the company's conduct and the breach of the law which undoubtedly occurred; and also whether the procedures in question afforded the applicant company a reasonable opportunity of putting its case to the responsible authorities (ibid. § 55). In ascertaining whether these conditions were satisfied, a comprehensive view must be taken of the applicable procedures (ibid.).

44. The Court has previously examined similar cases involving seizure and/or confiscation of means of transport used for illegal purposes and in most cases found no violation of Article 1 of Protocol No. 1 on the grounds that the applicants had had sufficient opportunity to put their cases to the competent national authorities and to recover the goods seized, reasonable account having been taken of their behaviour (see *Air Canada*, cited above, §§ 44-47, *C.M. v. France*, cited above, and *Yildirim,* cited above).

45. In the present case the applicant company sought to recover its lorry and, to this end, challenged its confiscation before the Constitutional Court after the initial decision by the first-instance court to return it was overturned pursuant to the appeal lodged by the Higher State Prosecutor. However, contrary to the above-mentioned cases, the higher instances interpreted the relevant domestic legislation as entailing mandatory confiscation of any vehicle used for drug trafficking, regardless of the diligence and good faith displayed by the owner. As a result, even though there was no indication that the applicant company had been involved in the commission of the alleged criminal offence or that it had any knowledge about the illegal activities of its driver or that it had failed to carry out regular controls of the vehicle, it did not have any effective possibility of securing the return of its lorry (see paragraphs 11-15 above). The relevant domestic legislation (Section 186(5) of the Criminal Code, read in conjunction with Section 73(3)) thus took no account of the relationship between the applicant company's conduct and the offence (see *Vasilevski v. the former Yugoslav Republic of Macedonia*, no. 22653/08, § 57, 28 April 2016).

46. The Government argued that the impugned strictness of the national regulation was justified by the seriousness of drug-related criminal offences. In their view the nature of such criminal offences, the manner in which they were committed and the consequences they had for people's health and lives justified the mandatory confiscation of the means of transport, regardless of ownership, and any other regulatory arrangement would considerably diminish the possibility of effectively preventing these criminal offences.

47. In the Court's opinion, there can be no doubt that the protection of human health and life – the grounds cited as justification for the measure – requires decisive action on the part of the Contracting States to reduce drug related criminal offences. That said, the confiscation of property used in the commission of such offences may, as in the present case, impose a significant burden on the third parties to whom the property belongs. The exercise of balancing the general interests of crime prevention and the protection of the affected individual's rights (see paragraph 39 above and *Air Canada*, cited above, § 36) in these circumstances thus means that imposing such a burden on the owner of the property concerned can be justified only if his interest in having the property returned to him is outweighed by the risk that its return would facilitate drug trafficking and undermine the fight against organised crime.

48. In this connection, it does not appear that the lorry was adapted for smuggling drugs, nor were there any previous incidents caused by a failure on the part of the applicant company to prevent illegal shipments from being transported by its vehicles which would raise the question of the applicant company's own responsibility for the commission of the criminal offence in question (see, by contrast, *Air Canada*, cited above, §§ 6 and 44). This, coupled with the fact that the lorry driver was convicted of drug trafficking and sentenced to nine years' imprisonment (see paragraph 11 above), hardly allows for the conclusion that the lorry might be used again for transporting illegal substances (see, *mutatis mutandis*, *Vasilevski*, cited above, § 58). In the light of the above, the Court fails to see what adverse effects might be expected to result from the return of the lorry to its owner. This is particularly true if, as argued by the Government, the applicant company was in any event able to buy the lorry back at public auction. Also, assuming that it was indeed the applicant company that bought the lorry at the auction, the Court would point out that this cannot be considered to have remedied the damage caused to it by the confiscation because the reacquisition of the vehicle was contingent on the payment of the price attained at auction.

49. Therefore, notwithstanding the wide margin of appreciation left to the Contracting States in the choice of means aimed at combating the illegal trade in drugs, the Court cannot accept that the indiscriminate nature of the measure at issue was justified by the circumstances of the present case.

50. Moreover, relying on Section 73(2) of the Criminal Code, the Government maintained that the domestic legislation provided the applicant company with an effective opportunity to obtain compensation for its pecuniary loss by seeking it from the driver convicted of drug trafficking, who was the party responsible for the damage the company sustained. However, in a similar situation the Court has previously held that a compensation claim of this nature entailed further uncertainty for a *bona fide* owner of confiscated property because the offender might be found to be insolvent. The compensation claim was not held to offer *bona fide* owners sufficient opportunity for bringing their cases before the competent national authorities (see *Bowler International Unit v. France*, no. 1946/06, §§ 44-45, 23 July 2009, and, *mutatis mutandis*, *Vasilevski*, cited above, § 59). The general nature of the argument adduced by the Government does not provide a sufficient basis for the Court to depart from its above-mentioned findings.

51. Finally, as already stated, the applicant company's overriding objective was the recovery of the vehicle. In this connection, it does not appear that at the time that the complaint was lodged, which is approximately eight months after the new Criminal Code became applicable, there was established domestic case-law on the question of whether in cases of drug trafficking, also the means of transport belonging to third parties were to be mandatorily confiscated. It rather seems that the applicant company's constitutional complaint provided the first opportunity for the Constitutional Court to rule on the issue and clarify the scope of the third-party owners' options with regard to confiscation of their vehicles in the criminal proceedings involving drug trafficking. The Court, reiterating that the only remedies which an applicant is required to exhaust are those that relate to the breaches alleged and which are at the same time available and sufficient (see *Aquilina v. Malta* [GC], no. 25642/94, § 39, ECHR 1999-III), thus takes the view that the applicant company's choice of legal remedies was reasonable. This being so, the Court considers it excessive to require the applicant company to embark on another set of proceedings against the driver of the confiscated lorry with the aim of recovering a loss that resulted from the actions of the domestic authorities. Therefore, the Government's objection of non-exhaustion of domestic remedies must be dismissed.

52. In the light of the above considerations, the Court takes the view that mandatory confiscation of the applicant company's vehicle, coupled with the lack of a realistic opportunity to obtain compensation for its loss, did not take sufficient account of the applicant company's interests. The Court therefore finds that in the present case a fair balance has not been struck between the demands of the general interests of the public and the applicant company's right to peaceful enjoyment of its possessions and that the burden placed on the applicant company was excessive.

53. It follows that there has been a violation of Article 1 of Protocol No. 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. 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. Damage

55. The applicant company claimed in respect of pecuniary damage:

(i) 7,500 Turkish liras (TRY), equivalent to EUR 2.490 for the vehicle tax paid;

(ii) TRY 131,900.50, equivalent to EUR 43,791 for the cost of the vehicle plus interest at a commercial rate;

(iii) EUR 60,000 for the loss of profit because it was unable to use the vehicle.

56. The Government contested this claim without providing any arguments.

57. 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 (see, for example, *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 19, ECHR 2001-I, and *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 32, ECHR 2000-XI).

58. 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 for *restitutio in integrum*, it is for the respondent State to effect it. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate (see *Brumărescu*, cited above, § 20).

59. The Court enjoys certain discretion in the exercise of the power conferred by Article 41, as is borne out by the adjective "just" and the phrase "if necessary" in its text (see *Guzzardi v. Italy*, 6 November 1980, § 114, Series A no. 39). In order to determine just satisfaction, it has regard

to the particular features of each case, which may call for an award of less than the value of the actual damage sustained or the costs and expenses actually incurred, or even for no award at all.

60. Moreover, there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention (see, amongst others, *Stretch v. the United Kingdom*, no. 44277/98, § 47, 24 June 2003). Thus, for an award to be made in respect of pecuniary damage, the applicant must demonstrate that there is a causal link between the violation and any financial loss alleged (see, for example, *Družstevní záložna Pria and Others v. the Czech Republic* (just satisfaction), no. 72034/01, § 9, 21 January 2010).

61. Turning to the present case, the Court accepts that the applicant company suffered damage as a result of disproportionate interference by the authorities with its rights under Article 1 of Protocol No. 1 (see paragraph 52 above).

62. However, the Court does not agree with the applicant company's approach that it should be compensated with the cost of a new lorry (see, *mutatis mutandis*, *East West Alliance Limited v. Ukraine,* no. 19336/04, § 258, 23 January 2014). The Court notes that the lorry of which the applicant company was dispossessed was not new. It was purchased in 2007 and was sold at a public auction in 2011 for the price of EUR 12,000 (see paragraph 16 above).

63. The Court further notes that the applicant company submitted the bank transfer slips concerning the payment of the vehicle tax. The Government did not contest this evidence.

64. In the light of the foregoing considerations, in particular having regard to all the evidential materials in its possession and in the absence of any specific arguments from the Government, the Court considers it reasonable to award the applicant company the sum of EUR 14,490 covering the cost of the vehicle as determined at the public auction and the vehicle tax, plus any tax that may be chargeable on that amount.

65. As regards the alleged lost profit, the Court is aware of the difficulties in calculating the loss in circumstances where such profit could fluctuate owing to a variety of unpredictable factors. In the present case, the applicant company estimated the loss at EUR 60,000, but submitted no evidence indicating how its business operations were affected by the confiscation of its lorry. In this connection, the Court observes that the applicant company continued its business after the confiscation of the lorry in question, thus it should not be too difficult to show any potential decrease in the profit achieved in the period after the confiscation of its lorry in relation to the period achieved before it. In the absence of any documents such as tax returns or precise calculations showing that the applicant company's profit decreased as a result of the measure complained of, the Court is unable to make any award under this head.

B. Costs and expenses

66. The applicant company also claimed EUR 5,222 for costs and expenses incurred before the domestic courts and TRY 24,400, equivalent to EUR 8,100.80 for those incurred before the Court.

67. The Government did not provide any submissions in this respect.

68. 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 have been actually and necessarily incurred and are reasonable as to quantum.

69. With regard to the costs incurred in the domestic proceedings, the Court observes that, before applying to the Convention institutions, the applicant company had exhausted the domestic remedies available to it under domestic law, since it had participated in the criminal proceedings. The Court therefore accepts that the applicant company incurred expenses in seeking redress for the violations of the Convention through the domestic legal system (see, *Centro Europa 7 S.r.l. and Di Stefano*, cited above, § 224).

70. The Court further notes that the applicant company concluded an agreement with its attorney for representation before the Court according to which TLR 24,400 will be paid to the lawyer by way of fee.

71. Having regard to the material in its possession and its relevant practice, the Court considers it reasonable to award the applicant company an aggregate sum of EUR 7,000 in respect of all costs and expenses.

C. Default interest

72. 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. *Joins to the merits*, unanimously, the Government's objection of failure to exhaust domestic remedies and *rejects* it;

2. *Holds*, by six votes to one, that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

3. *Holds*, by six votes to one,

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

(i) EUR 14,490 (fourteen thousand four hundred and ninety euros), plus any tax that may be chargeable, in respect of pecuniary damage;

(ii) EUR 7,000 (seven thousand euros), plus any tax that may be chargeable to the applicant, 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;

4. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 January 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli	András Sajó
Registrar	President

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

A.S.
M.T.

DISSENTING OPINION OF JUDGE KŪRIS

1. Had this case been the first one in which the Court had to examine the issue of mandatory confiscation of crime-related property belonging to a third person, it would have been quite easy to support the finding of a violation of Article 1 of Protocol No. 1 to the Convention as the logical result of an exercise in "pure" legal theory. Had it been the first one.

However, it is not.

It has to be said that the Court's case-law on this issue calls for greater consistency and refinement. This judgment does not appear to be in line with that part of the Court's case-law which – in my opinion quite reasonably – allows a wider margin of appreciation to be left to the member States as to the choice of means aimed at combating the most dangerous criminal activities such as drug trafficking.

2. In paragraph 50, the majority rightly point out that "a compensation claim of this nature entailed further uncertainty for a *bona fide* owner of confiscated property because the offender might be found to be insolvent" and that *in some cases* such a possibility of compensation "was not held to offer *bona fide* owners sufficient opportunity for bringing their cases before the competent national authorities".

In some cases, but *not in all*.

Some of these cases (most notably *Air Canada v. the United Kingdom* (5 May 1995, Series A no. 316-A) and *AGOSI v. the United Kingdom* (24 October 1986, Series A no. 108)) are referred to in the judgment. But there is also other case-law which deserves greater attention than it has received in this judgment. I shall mention only a few of the much greater number of cases.

3. In *Waldemar Nowakowski v. Poland* (no. 55167/11, 24 July 2012), which is not referred to at all in the present judgment (indeed, there are important factual differences between that case and the instant one), a violation of Article 1 of Protocol No. 1 was found because the applicant was deprived of his property, which in that case was a collection of arms "of considerable historical and presumably also financial value", "in its entirety". Moreover, the courts took measures to ensure that a public museum acquired the collection for free, but failed to consider "any alternative measures which could have been taken in order to alleviate the burden imposed on the applicant, including by way of seeking registration of the collection" (§§ 56 and 57).

In the present case the confiscation of the objects in the applicant's possession that were initially seized by the authorities was by no means as indiscriminate (see paragraph 8 of the present judgment regarding the return to the applicant company of the trailer and the goods contained in it). A lorry is a lorry. It cannot be confiscated other than "in its entirety". It may,

according to the law, either be confiscated as *instrumentum sceleris* (to use the term employed in the judgment) or not.

4. In *Sulejmani v. the former Yugoslav Republic of Macedonia* (no. 74681/11, § 41, 28 April 2016), to which the majority refer only in the context of the categorisation of confiscated objects as *objectum sceleris* (see paragraph 37 of the present judgment), the Court did not find the mandatory confiscation of the applicant's property to have violated Article 1 of Protocol No. 1. The Court was satisfied that the applicant had had at his disposal a judicial remedy in the form of a civil claim for compensation against the person responsible for the damage sustained. The applicant "did not explain his failure to lodge such a claim" and "did not argue that there were any impediments to him resorting to that avenue or any particulars ... which would have rendered it ineffective in the circumstances of the case". Thus, the mandatory confiscation of the item in question, as such, was upheld by the Court. The issue as to whether the confiscated item was to be categorised as *objectum sceleris* or *instrumentum sceleris*, although given some prominence by the Chamber in the instant case (see paragraph 37 of the present judgment), did not appear to be of any relevance in *Sulejmani*.

What *is* relevant in *Sulejmani*, from the perspective of the instant case, is that the applicant in the instant case, like the one in *Sulejmani*, had the possibility of lodging a claim for compensation against the offender, in this case a (convicted) drug trafficker. But, like the applicant in *Sulejmani*, the applicant company did not explain its failure to lodge such a claim. I have no great difficulty in conceding and agreeing with the majority that that possibility, which would have required the applicant company to "embark on another set of proceedings", does not (at least, not strongly) support the Government's submissions as to the non-exhaustion of domestic remedies available to the applicant company (see paragraph 51 of the judgment; compare *Sulejmani*, §§ 26 and 27). But this is clearly not a sufficient basis for finding a violation of Article 1 of Protocol No. 1 in the present case.

Moreover, *Sulejmani* did not concern anything even close to drug trafficking.

5. In *Andonoski v. the former Yugoslav Republic of Macedonia* (no. 16225/08, 17 September 2015), to which the majority refer only in the context of the "applicable rule" (see paragraph 38 of the present judgment), a violation of Article 1 of Protocol No. 1 was found because of the decisive circumstance ("[i]n such circumstances", as explicitly stated in paragraph 40 of that judgment) that the domestic legislation "did not provide for the possibility to claim compensation" for the mandatory confiscation of *instrumentum sceleris* (again, to use the term employed in the judgment); in addition, the Court took note that the Government "did not provide any illustration of domestic practice that would demonstrate that a compensation claim ... was available, let alone effective, in similar circumstances to the applicant's case" (§ 39).

In the present case, however, the opportunity for the applicant to claim compensation from the offender, that is, the driver convicted of drug trafficking, was *obvious*. In accordance with the interpretation of the Slovenian legislation by the Constitutional Court of that State, the confiscation of the lorry "did not affect" the applicant company's right to claim such compensation. What is more, the applicant company had not only the right but also the possibility – hence the effective opportunity – to exact compensation from the person responsible for the damage sustained (see paragraph 15 of the judgment).

6. In *Vasilevski v. the former Yugoslav Republic of Macedonia* (no. 22653/08, 28 April 2016) a violation of Article 1 of Protocol No. 1 was also found because of the ineffectiveness, *in practice*, of the claim for compensation which the applicant could have lodged against the persons whose actions had caused the damage he sustained. I am afraid that the parallel between the instant case and *Vasilevski*, as drawn in the judgment, is misleading. Prominence is given to the fact that, like in *Vasilevski*, "[t]he relevant domestic legislation ... took no account of the relationship between the applicant company's conduct and the offence", as well as to the fact that, like in *Vasilevski*, it was not likely "that the [confiscated] lorry might be used again for transporting illegal substances" had it been returned to the applicant company (see paragraphs 45 and 48 of the judgment). Also, *Vasilevski* is relied upon by the majority in so far as "[t]he compensation claim was not held to offer *bona fide* owners sufficient opportunity for bringing their cases before the competent national authorities"; the majority state that "[t]he general nature of the argument adduced by the Government does not provide a sufficient basis for the Court to depart from its above-mentioned findings" (see paragraph 50).

However, what is relevant in *Vasilevski* for the instant case is not some ostensible parallel but the decisive *factual difference* between the two cases. In *Vasilevski*, the possibility for the applicant to claim compensation from either a physical person or a company responsible for the damage sustained was illusory. The "particular circumstances of the ... case" rendered that possibility ineffective. The physical person against whom such claims could be lodged "had died ... before the lorry was confiscated from the applicant", "no information was available as to the whereabouts of his heirs and whether they could be held responsible under the applicable rules", and the Government had not presented the Court with "any illustration of domestic practice that showed that a claim against heirs of a deceased seller ... had been effective in similar circumstances to the applicant's case". As to the company against whom the claims could be lodged, it "had ceased to exist before the [object in question] had been confiscated from [the applicant]" (§§ 59 and 60).

Nothing of this sort is apparent from the file in the instant case. In order to rebut the presumption of the availability of compensation from the actual

offender and to conclude that the opportunity for the applicant company to claim compensation from the (convicted) drug trafficker was not "sufficient" (see paragraph 50), the majority should have examined whether the alleged "further uncertainty" indeed stemmed from the facts of the case. No such consideration is found in the judgment. Instead, the Chamber is satisfied with the fact-insensitive "blanket" statement that "[t]he general nature of the argument adduced by the Government does not provide a sufficient basis for the Court to depart from its above-mentioned findings" (ibid.).

7. In paragraph 43, the majority cite *AGOSI* (cited above, §§ 54 and 55) and reiterates that the "fair balance between the means employed by the domestic authorities for the purpose of preventing drug trafficking and the protection of the applicant company's property rights ... depends on many factors, and the behaviour of the owner of the property is one element of the entirety of circumstances which should be taken into account", along with consideration of "whether the applicable procedures in the present case were such as to enable reasonable account to be taken of the degree of fault or *care attributable to the applicant company* or, at least, of the relationship between the company's conduct and the breach of the law which undoubtedly occurred" and "whether the procedures in question afforded the applicant company *a reasonable opportunity of putting its case to the responsible authorities*" (emphasis added). The majority reiterate that "[i]n ascertaining whether these conditions were satisfied, a comprehensive view must be taken of the applicable procedures".

As a matter of principle, I could not agree more. Without speculating as to the "care" (not the "degree of fault"!) attributable to the applicant company, and confining myself to the "reasonable opportunity of putting [the case] to the responsible authorities", I can only note that such "reasonable opportunity", in the instant case, encompassed the avenue of lodging a civil claim for compensation against the person responsible for the damage sustained by the applicant company. It has not been established (unlike in *Vasilevski,* cited above, see paragraph 6 above) that this avenue was futile.

8. Mandatory confiscation of crime-related property belonging to a third person is indeed a problematic tool. When the interests of such a third person are balanced against the public interest, this tool is not uncontroversial. It is indeed somewhat borderline. Nevertheless, in previous cases the Court did not rule out the use of this tool if there were, prima facie, realistic possibilities for the third person to obtain compensation for the damage sustained. Where a violation of Article 1 of Protocol No. 1 was found in such cases, that finding was (almost) always fact-specific. This stance did not obstruct member States' efforts to combat criminal activities such as drug trafficking.

None of us judges would like the present judgment – which may be a prime example of law as contemplated in the quiet confines of a legal library – to be one more tool which, *in real life*, could and would effectively run counter to these efforts and, by extension, to the public good.

Will this prove to be the case?