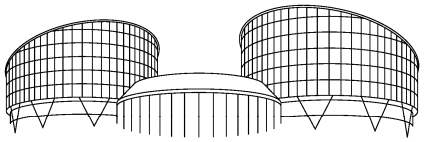

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF AKTIVA DOO v. SERBIA

(Application no. 23079/11)

JUDGMENT

Art 1 P 1 • Peaceful enjoyment of possessions • Disproportionate confiscation and sale of goods, imported legally by the applicant company, but in breach of recording regulations • Parallel misdemeanour proceedings terminated due to expiry of prescription period, without finding applicant company guilty • Goods imported lawfully, in distinction to other cases before the Court • No consideration given to whether alternative measures, such as a fine, could have could have been sufficient

STRASBOURG

19 January 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 Aktiva DOO v. Serbia,

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

Jon Fridrik Kjølbro, *President,*
Marko Bošnjak,
Valeriu Griţco,
Egidijus Kūris,
Branko Lubarda,
Carlo Ranzoni,
Saadet Yüksel, *judges,*
and Hasan Bakirci, *Deputy Section Registrar*,

Having regard to:

the application (no. 23079/11) against the Republic of Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Serbian company, Aktiva DOO ("the applicant company"), on 28 March 2011;

the decision to give notice of the application to the Serbian Government ("the Government");

the parties' observations;

Having deliberated in private on 1 December 2020,

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

INTRODUCTION

1. The application concerns the seizure and sale of goods owned by the applicant company which were imported legally but were allegedly traded in contravention of the regulations on recording trade in goods and services.

THE FACTS

2. The applicant company is a limited liability company which has its registered office in Belgrade. It was represented by Mr R. Kojić, a lawyer practising in Belgrade.

3. The Government were initially represented by their Agent at the time, Ms N. Plavšić, and subsequently by their current Agent, Ms Z. Jadrijević Mladar.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. INSPECTION CHECKS

5. In the period between 12 November and 25 December 2004, the applicant company imported 650,740 kg of smooth iron rods for use in reinforced concrete (*glatko betonsko gvožđe*) and 252,800 kg of corrugated

iron rods for use in reinforced concrete (*rebrasto betonsko gvožđe u šipkama*) from Ukraine. They were imported lawfully and the applicant company paid the requisite taxes and customs duties. The goods were stored in two warehouses, in Pančevo and Smederevo, owned by other companies.

6. In the period between 26 and 31 January 2005, the Smederevo Sector Market Inspectorate of the Ministry of Trade, Tourism and Services of the Republic of Serbia ("the Inspectorate") carried out an inspection of the warehouses in Pančevo and Smederevo and the applicant company's accounting records.

7. In the course of the inspection, the Inspectorate established that the applicant company had failed to comply with the regulations on record-keeping, contrary to Rules 5, 10 and 11 of the Rules on recording trade in goods and services (see paragraphs 55-57 below). It also determined that the applicant company had sold goods which had not been properly recorded, contrary to Article 16 of the Law on the conditions for trade in goods, the provision of services, and inspections ("the Law", see paragraphs 40-42 below). It held that these actions and omissions on the part of the applicant company and its managing director amounted to a misdemeanour prescribed and punishable under the Law.

8. As a consequence, by two separate decisions delivered on 28 and 31 January 2005 (see paragraphs 9 and 27 below), the Inspectorate seized the goods from the two warehouses and lodged a request to initiate misdemeanour proceedings against the applicant company and its managing director (see paragraph 20 below).

II. SEIZURE DECISION OF 28 JANUARY 2005

9. On 28 January 2005 the Inspectorate delivered a decision on the seizure of 205,670 kg of corrugated iron rods stored in a warehouse in Pančevo. The Inspectorate seized the goods pursuant to Article 45 § 1 (7) of the Law (see paragraph 46 below), on the ground that they were being traded without having been properly recorded in the Book of records of trade in goods and services (*Knjiga o evidenciji prometa robe i usluga*, "the KEPU"). The decision further indicated that the seizure was temporary, that it represented a protective measure in the context of misdemeanour proceedings and that it was being carried out under Article 44 § 1 (6) of the Law (see paragraph 45 below). The Inspectorate also issued a receipt/confirmation concerning the temporary seizure of the goods. The applicant company appealed even though the appeal had no suspensive effect.

10. On 7 February 2005 the Ministry of Trade, Tourism and Services ("the Ministry") upheld the decision of 28 January 2005.

11. On 16 February 2005 the Inspectorate sold the goods seized from the Pančevo warehouse to a third-party company for 4,936,080 Serbian dinars

(RSD) (EUR 61,600). Neither the sale invoice nor the delivery note for the goods states the reasons or legal grounds for the sale.

12. On 29 March 2005 the applicant company initiated proceedings for judicial review before the Supreme Court of Serbia, seeking annulment of the decision of 7 February 2005 (see paragraph 10 above). On 11 November 2005 the Supreme Court quashed the decision of 7 February 2005, requesting that the applicant company's bookkeeping be inspected and the facts fully determined. Subsequently, on 1 March 2006 the Ministry annulled the decision of 28 January 2005 (see paragraph 9 above) and remitted the case to the Inspectorate.

13. On 7 June 2006, following a repeat inspection, the Inspectorate delivered a second decision on the seizure of the goods stored in the Pančevo warehouse, on the sole basis of Article 45 § 1 (7) of the Law (see paragraph 46 below). The applicant company appealed, but on 1 August 2006 the Ministry upheld the decision of the Inspectorate. On 20 September 2006 the applicant company initiated proceedings for judicial review before the Supreme Court, seeking the annulment of the decision of 1 August 2006.

14. On 28 February 2007 the Supreme Court quashed the decision of 1 August 2006 for procedural reasons. On 3 July 2007, upon remittal, the Ministry annulled the decision of 7 June 2006 (see paragraph 13 above) and remitted the case to the Inspectorate for the third time, requesting that the facts be fully determined through inspection of the applicant company's records at its registered office in Leskovac.

15. On 25 July 2007 the Ministry removed two acting inspectors in the applicant company's case from the pending inspection proceedings, on the ground that there were separate investigations pending into their participation in the seizure and sale of the goods. A new inspector was appointed.

16. Between 17 and 30 August 2007 a repeat inspection was carried out by the Inspectorate at the applicant company's registered office, which at the relevant time was in Leskovac. The Inspectorate was presented with the KEPUs for 2004 and 2005, the decision on the formation of the inventory commission, and the inventory of the stock until the end of 2004 for the warehouses in Pančevo and Smederevo.

17. On 12 September 2007 the Inspectorate delivered a third decision ordering the seizure of the goods stored in the Pančevo warehouse. It expressed its suspicions as to possible postdating (*antidatiranje*) of the documents presented by the applicant company and the possibly belated inventory of the stock (see paragraph 16 above). The applicant company appealed, but the decision was upheld by the Ministry on 8 November 2007. In response to the applicant company's argument that its responsibility had not been proved in the misdemeanour proceedings, the Ministry held that those proceedings had been terminated not because the applicant company's responsibility had not been proved, but because the statutory limitation period

had expired (see paragraph 22 below). The applicant company initiated judicial review proceedings against that decision.

18. On 5 March 2009 the Supreme Court upheld the decision of the Ministry.

19. On 20 May 2010 the applicant company lodged an appeal with the Constitutional Court against this decision (see paragraph 23 below).

III. MISDEMEANOUR PROCEEDINGS

20. On 8 February 2005 the Inspectorate lodged a request to initiate misdemeanour proceedings against the applicant company and its managing director for the sale of goods that had not been properly recorded. The Inspectorate also proposed, as a protective measure, that the goods stored in the Pančevo and Smederevo warehouses be seized.

21. On 3 January 2006 a judge of the Smederevo Misdemeanour Court found the applicant company and its managing director guilty of a violation of Article 16 of the Law and fined them RSD 25,000 (EUR 300) and RSD 4,000 (EUR 50) under Article 53 §§ 1 and 2 of the Law respectively (see paragraph 49 below) for the offence with which they had been charged. It also adopted a protective measure comprising the seizure of the goods in accordance with Article 53 § 3 of the Law (see paragraph 50 below). The applicant company and its managing director appealed against that decision.

22. On 8 February 2007 a bench of the Smederevo Misdemeanour Court reversed the decision of 3 January 2006 and acquitted the applicant company and its managing director on the grounds that the offence in question had become statute-barred in the meantime.

IV. PROCEEDINGS BEFORE THE CONSTITUTIONAL COURT

23. On 20 May 2010 the applicant company lodged an appeal with the Constitutional Court in respect of the seizure decision of 28 January 2005 (see paragraph 9 above). Using the form for an appeal provided by the Constitutional Court, the applicant company invoked Article 32 § 1 and Articles 33, 34 and 58 of the Constitution (see paragraphs 35-37 below). These provisions correspond to Articles 6 and 7 of the Convention and Article 1 of Protocol No. 1, which the applicant company also expressly invoked. In the second section of the appeal, where the decision being challenged is to be indicated, the applicant company noted the judgment of the Supreme Court (see paragraph 18 above). In the fourth section of the constitutional complaint, in which details of the alleged violation of constitutional rights are to be indicated, the applicant company provided the factual background to the case and complained, *inter alia*, that the seizure of the goods stored in the Pančevo warehouse had been carried out following an unlawful procedure and was disproportionate to the aims allegedly pursued. In the fifth section of

the appeal, requiring details of the claim on which the Constitutional Court is being asked to decide, the applicant company indicated that the Constitutional Court should "quash the entire procedure conducted against it" and order the erasure of all its consequences, thus ordering the return of the seized goods or payment of their value in the amount of RSD 6,462,151, plus interest from the moment of their seizure.

24. On 29 June 2010 the Constitutional Court, relying on Article 85 § 1 of the Law on the Constitutional Court (see paragraph 39 below), found the applicant company's appeal to be incomplete and ordered it to provide additional information (*urediti*). In particular, it asked the applicant company to indicate precisely which individual decision was being challenged and to provide details of the claim on which the court was being asked to decide. Moreover, it ordered the applicant company to indicate "clear legal reasons under the Constitution" for its complaints.

25. On 20 July 2010 the applicant company, in response to the request from the Constitutional Court, specified that it was challenging the judgment of the Supreme Court (see paragraph 18 above) and all the decisions that had preceded it, and listed them. As to the claim on which the court should decide, the applicant company again cited the relevant part of the fifth section of its initial constitutional complaint (see paragraph 23 above). As to the reasons on which it had based its complaints, the applicant company cited the text of the two pages of the fourth section of its original complaint (ibid.)

26. On 8 November 2011 the Constitutional Court rejected the applicant company's appeal, finding that it had merely reiterated the claims made in its original appeal and that it had failed to respond properly to the court's request of 29 June 2010 (see paragraph 24 above).

V. SEIZURE DECISION OF 31 JANUARY 2005

27. On 31 January 2005 the Inspectorate delivered a decision on the seizure of 460,760 kg of smooth iron rods and 23,530 kg of corrugated iron rods stored in a warehouse in Smederevo, as well as a receipt/confirmation concerning the temporary seizure of the goods. The seizure was carried out on the same legal basis and for the same reasons as for the goods stored in the Pančevo warehouse (see paragraph 9 above), and the goods were also subsequently sold to a third-party company. The applicant company appealed against this decision as well.

28. The procedural history concerning the litigation against this seizure decision was essentially the same as that concerning the seizure decision of 28 January 2015, until the stage of the third appeal to the Supreme Court (see paragraphs 10-17 above), which in this case upheld the applicant company's appeal on 25 September 2009, quashed the second-instance decision of the Ministry, and ordered the re-examination of the case for the purpose of correctly determining the facts.

29. After several remittals, on 16 April 2013 the Administrative Court held, *inter alia*, that in circumstances where it was determined that goods had been sold that had not been properly recorded, the Inspectorate was bound to apply the heavier penalty, namely the seizure of goods, and could not apply the more lenient one pursuant to Article 42 § 1 (8) of the Law (see paragraph 43 below).

30. On 11 June 2013 the applicant company lodged an appeal with the Constitutional Court. Using the form for a constitutional appeal provided by the Constitutional Court, it invoked Articles 32, 36 and 58 of the Constitution, and also relied on the corresponding provisions of the Convention, namely Articles 6 and 13 and Article 1 of Protocol No. 1. It requested that the judgment of the Administrative Court be quashed and that the case be remitted for fresh examination.

31. On 15 May 2014 the Constitutional Court quashed the decision of the Administrative Court of 16 April 2013 and remitted the case for a fresh examination.

32. After several remittals, on 17 December 2015 the Administrative Court ordered the goods seized from the applicant company on 31 January 2015 to be returned to it. On 31 May 2015 the value of those goods was paid back to the applicant company in enforcement proceedings. Nevertheless, the Ministry lodged an appeal on points of law (*zahtev za preispitivanje pravosnažne presude*) against the judgment of the Administrative Court of 17 December 2015. On 9 February 2017 the Supreme Court of Cassation quashed this judgment and remitted the case to administrative authorities for a repeated procedure. According to the latest information provided by the applicant company on 30 April 2019, the proceedings concerning the seizure decision of 31 January 2005 were still pending after several further remittals.

RELEVANT LEGAL FRAMEWORK

I. CONSTITUTION OF THE REPUBLIC OF SERBIA (PUBLISHED IN THE OFFICIAL GAZETTE OF THE REPUBLIC OF SERBIA (OG RS) NO. 98/06)

33. Article 16 § 2 provides, *inter alia*, that "ratified international treaties are an integral part of the [Serbian] legal system" and "shall be directly applicable".

34. The relevant parts of Article 18 provide:

> "2. The Constitution shall guarantee ... the direct implementation of human and minority rights secured by the generally accepted rules of international law ... [and] ... ratified international treaties ...
>
> 3. Provisions on human and minority rights shall be interpreted ... in accordance with valid international standards on human and minority rights, as well as the practice of international institutions which supervise their implementation."

35. Article 32 provides for a right to a fair trial in general, while Article 33 provides for the specific rights of the accused in criminal proceedings.

36. Article 34 § 1 provides:

> "No person may be held guilty for any act which did not constitute a criminal offence under law or any other regulation based on the law at the time when it was committed, nor shall a penalty be imposed which was not prescribed for this act."

37. Article 58 guarantees, *inter alia*, "peaceful enjoyment of personal property and other property rights acquired by law".

38. Article 170 provides:

> "A constitutional appeal may be lodged against individual decisions or actions of State bodies or organisations exercising delegated public powers which violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have already been exhausted or have not been prescribed."

II. LAW ON THE CONSTITUTIONAL COURT (OG RS NOS. 109/07, 99/11, 18/13 AND 40/15)

39. Article 85 § 1 provides that a constitutional appeal must contain, *inter alia*, the number and date of the decision against which the appeal is being lodged and the name of the authority that issued it, details of the human or minority right or freedom guaranteed by the Constitution that has allegedly been violated, the Constitutional provision guaranteeing such a right or freedom, the reasons and claims as to what constituted the alleged violation or infringement, and the claim on which the court should decide.

III. LAW ON THE CONDITIONS FOR TRADE IN GOODS, THE PROVISION OF SERVICES, AND INSPECTIONS (ZAKON O USLOVIMA ZA OBAVLJANJE PROMETA ROBE, VRŠENJE USLUGA U PROMETU ROBE I INSPEKCIJSKOM NADZORU, OG RS NOS. 39/96, 20/97 AND 46/98), AS IN FORCE AT THE MATERIAL TIME

40. Article 16 § 1 provided that companies and entrepreneurs who were engaged in trading in goods and in the provision of services in commerce were obliged to keep records of the sale of goods and the delivery of goods and services, and to provide access to such records.

41. Article 16 § 3 provided that the records were to be based on documents concerning production, the procurement of goods and services and the sale of goods, and on other documents containing the amount and value of the goods sold.

42. Article 16 § 5 provided that the companies and entrepreneurs referred to in paragraph 1 could not undertake to either transport or sell goods or to provide services for which they did not have the correct documentation or which had not been properly recorded.

43. Article 42 § 1 (8) provided that during inspections the Inspectorate had a right and a duty to temporarily prohibit the performance of the activities of a legal entity, a natural person or an entrepreneur by closing the premises where the activity was performed or in another appropriate manner if, *inter alia*, the prescribed records were not being kept at all or were not being kept in the prescribed manner, or the sale of goods was not being recorded in accordance with the regulations.

44. Article 44 § 1 (1) provided that the inspector was authorised to order the correction of any irregularities if he or she determined during the inspection that the regulations were not being applied or were being applied incorrectly, and to set the deadlines for such actions.

45. Article 44 § 1 (6) provided that the inspector was authorised to temporarily seize the items that were being used for, were intended to be used for or had resulted from the commission of a misdemeanour (*prekršaja*), an economic offence (*prestupa*) or a crime, and to issue a receipt/confirmation for the seized items.

46. Article 45 § 1 (7) provided that the inspector was, by a decision, to seize goods when it had been established that the goods concerned were being traded but had not been properly recorded.

47. Article 46 § 1 provided that the sale of the goods referred to in Article 44 § 1 (6) was to be carried out on completion of the relevant judicial proceedings on the basis of an enforceable court decision, whereas the goods referred to in Article 45 were to be sold after completion of the administrative procedure.

48. Article 46 § 2 provided that goods that were at risk of spoilage, or storage of which necessitated disproportionately high costs, were to be sold immediately.

49. Article 53 § 1 (10) provided that a fine of between 3,000 and 30,000 "new dinars" could be imposed on a legal entity which was performing activities contrary to the provisions of Article 16 (see paragraphs 40-42 above). Article 53 § 2 provided that the persons in charge of such legal entities could be fined between 2,000 and 5,000 new dinars.

50. Article 53 § 3 provided that the punishment under Article 53 § 1 (10) was to be accompanied by the adoption of a protective measure comprising seizure of the items with which the misdemeanour had been committed, and that any proceeds were to be confiscated.

IV. LAW ON COMMERCE (ZAKON O TRGOVINI, OG RS NOS. 53/10, 10/13 AND 44/18)

51. This statute, which came into force in 2010, replaced the Law on the conditions for trade in goods, the provision of services, and inspections (see paragraphs 40-50 above). It no longer contained a provision stating that the Inspectorate was authorised to seize goods when it had been established that

they were being traded but had not been properly recorded, or stating that the fines for such a misdemeanour were to be accompanied by the protective measure of seizure of the items.

52. The 2010 Law on commerce was replaced in 2019 by the new Law on commerce (OG RS no. 52/19), which did not alter the rules concerning the sale of goods that had not been properly recorded.

V. OBLIGATIONS ACT (ZAKON O OBLIGACIONIM ODNOSIMA, PUBLISHED IN THE OFFICIAL GAZETTE OF THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA NOS. 29/78, 39/85, 45/89, 57/89 AND THE OFFICIAL GAZETTE OF THE FEDERAL REPUBLIC OF YUGOSLAVIA NO. 31/93)

53. Article 172 § 1 provides that a legal entity (*pravno lice*), which includes the State, is liable for any damage caused by one of "its bodies" to a "third person".

VI. RULES ON RECORDING TRADE IN GOODS AND SERVICES (PRAVILNIK O EVIDENCIJI PROMETA ROBE I USLUGA, OG RS NOS. 45/96, 48/96, 9/97 AND 6/99)

54. Paragraphs 2 and 3 of Rule 1 provide that companies and entrepreneurs which trade in goods and services must record in the KEPU any goods and services that have been received, sold or delivered, and that records must be kept at every business premises or place where trade is carried out.

55. Rule 5 provides that business changes concerning trade in goods and services are to be registered in the KEPU no later than the following day.

56. Paragraph 1 of Rule 10 provides that goods in stock are to be registered in accordance with the accounting and tax regulations.

57. Rule 11 provides that every company and entrepreneur must finalise (*zaključivanje*) the KEPU at the end of every year, after all the records have been inserted for that year. The closing balance represents the value of the goods carried forward as the opening balance for the following year. Finalisation of the KEPU is done on the last page of the final entry for the current business year, and the KEPU is signed by the person responsible and stamped with the official stamp.

THE LAW

I. SCOPE OF THE CASE

58. In response to observations submitted by the Government, the applicant company raised additional complaints under Article 6 of the

Convention and Article 1 of Protocol No. 1 concerning the seizure decision of 31 January 2005 (see paragraph 27 above).

59. The Court notes that the Government were not notified of the complaints concerning the proceedings in respect of that seizure decision, which are still pending at the domestic level (see paragraph 32 above). Those complaints therefore fall outside the scope of this case.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROCOTOL NO. 1

60. The applicant company complained that the seizure of its goods pursuant to the decision of 28 January 2005 and their subsequent sale had violated its rights as provided for in Article 1 of Protocol No. 1, which reads as follows:

> "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

1. Exhaustion of domestic remedies

(a) Constitutional appeal

61. The Government submitted that the applicant company had failed to properly exhaust domestic remedies. Specifically, they claimed that the applicant company's constitutional appeal had been rejected for not complying with the formal requirements under Article 85 § 1 of the Law on the Constitutional Court (see paragraph 39 above). They referred to the Court's judgment in *Šaćirović and Others v. Serbia* (nos. 54001/15 and 3 others, 20 February 2018 [Committee]), where the Court had dismissed a non-exhaustion objection of the Government, noting that the applicants in that case had properly complained before the Constitutional Court and that, exceptionally, if the Constitutional Court needed any additional information or documents from the applicants, it could have made their provision mandatory, which it had failed to do. The Government submitted that in the present case the applicant company had failed to comply with the instructions of the Constitutional Court in that respect (see paragraph 26 above). Finally, they argued that the applicant company's constitutional appeal concerning the seizure decision of 31 January 2005 had been more detailed and had complied with the formal requirements (see paragraphs 30-31 above), which had resulted in it being considered by the Constitutional Court.

62. The applicant company contested the Government's objection and maintained that they had complained before the Constitutional Court in the proper manner and in accordance with the formal requirements.

63. The Court reiterates that complaints intended to be made subsequently before it should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used. Where an applicant has failed to comply with these requirements, his or her application should in principle be declared inadmissible for failure to exhaust domestic remedies (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 72, 25 March 2014). The Court has, however, also frequently emphasised the need to apply the exhaustion rule with some degree of flexibility and without excessive formalism (ibid., § 76).

64. Turning to the present case, the Court has carefully examined the applicant company's constitutional appeal, from which it appears that the applicant company (i) prepared the appeal on the official form; (ii) expressly invoked the relevant provisions of the Constitution and the Convention; (iii) identified the decision that it was challenging; (iv) provided reasons for its complaints; and (v) identified the claim on which the Constitutional Court should decide (see paragraph 23 above). The Court further notes that in its appeal the applicant company complained, *inter alia*, about the violation of its rights to a fair trial and to the peaceful enjoyment of its possessions and requested that its seized goods be returned, or that their value in the amount of RSD 6,462,151, plus interest from the moment of their seizure, be paid to them (contrast *Vučković and Others*, cited above, § 82, in which the applicants did not raise their discrimination complaint before the Constitutional Court, either expressly or in substance). It follows that the applicant company provided the national authorities with the opportunity which is in principle intended to be afforded to Contracting States by Article 35 § 1 of the Convention, namely of putting right the violations alleged against them (see, among many other authorities, *Muršić v. Croatia* [GC], no. 7334/13, § 72, ECHR 2016). The Court notes that the applicant company's second constitutional appeal was more detailed, which was also as a result of the different procedural history (see paragraph 28 above), but that it followed a similar structure (see paragraph 30 above).

65. Even though it appears that the applicant company's initial constitutional appeal fully complied with Article 85 § 1 of the Law on the Constitutional Court (see paragraph 39 above), the Constitutional Court still requested further clarifications, which the applicant company provided in a timely manner (see paragraph 25 above). Nevertheless, the Constitutional Court ultimately rejected the appeal for failure to comply with the formal requirements. In view of the above, the Court must conclude that the relevant provision regulating the formal requirements for constitutional appeals was

applied with excessive formalism in the present case (see, *mutatis mutandis*, *Dakir v. Belgium*, no. 4619/12, §§ 80-81, 11 July 2017).

66. The Court thus finds that the applicant company properly availed itself of this domestic remedy.

(b) Civil proceedings

67. The Government submitted that the applicant company had failed to make use of a civil claim under Article 172 of the Obligations Act, through which it could have sought compensation for the damage suffered as a result of the seizure and sale of its goods (see paragraphs 52 above). Even though they admitted that the courts in the administrative proceedings had held that the seizure and sale of the applicant company's goods stored in the Pančevo warehouse had been lawful, the applicant company had still had the possibility of arguing otherwise in civil proceedings, and should have done so.

68. The applicant company maintained that the remedy cited would not have been effective in its case, as it would have required it to prove that the seizure and sale of its goods had been unlawful despite the rulings to the contrary given by the courts in the administrative proceedings.

69. The Court notes that the Government have not provided any case-law to support their contention that the remedy cited would have been effective in the applicant company's case. Furthermore, having already made use of the constitutional appeal procedure, in which violations could be found and compensation awarded by the Constitutional Court, the applicant company was clearly not required to pursue yet another avenue of potential redress, civil or otherwise, after that.

70. In these circumstances, the Court considers that the Government's objection to the effect that the applicant failed to exhaust domestic remedies, within the meaning of Article 35 § 1 of the Convention, must be dismissed.

2. Conclusion

71. The Court considers that the applicant company's complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

72. The applicant company complained that the seizure and sale of its property had been unlawful and had amounted to a deprivation of its property. The Inspectorate had not had the right to permanently seize its goods and, in any case, the applicant's responsibility in the misdemeanour proceedings had

never been finally determined, as they had been terminated owing to the expiry of the statutory prescription period. It considered incomprehensible the speed with which its goods had been sold – for a sum significantly lower than their market value – after their seizure; that sale had also been unlawful as it had been carried out before the end of the administrative proceedings. Moreover, the applicant company submitted that the conditions for the application of Article 46 § 2 of the Law (see paragraph 48 above) had not been met, as its goods had not been at risk of spoilage and their storage would not have necessitated disproportionate costs.

73. The applicant company furthermore challenged the legitimate aim put forward by the Government as unsubstantiated (see paragraph 75 below), given that no possible damage resulting from the applicant company's actions had been determined at any stage. It added that in any case the seizure had not been proportionate to such an aim. It pointed out that the importation of the goods had been lawful, that it had paid all the relevant taxes and customs duties, and that the only possible responsibility on its part was for negligence, which had in any case not been finally determined in the misdemeanour proceedings. The minor nature of the misdemeanour offence with which it had been charged could be seen in the fact that the absolute prescription period for the offence was just two years.

74. The Government did not contest that the measure at issue in the present case had constituted an interference with the applicant company's peaceful enjoyment of its property. They submitted, nevertheless, that the seizure of the applicant company's goods had fully complied with the substantive and procedural provisions of domestic law. Article 45 § 1 (7) of the Law (see paragraph 46 above) had provided a clear legal basis for the seizure of the goods, and had moreover been mandatory for the Inspectorate, which had not had any discretion to act otherwise when the relevant conditions for seizure had been met. No other more lenient or less stringent measures had been available or applicable to the applicant company's situation. The measure in Article 42 § 8 (10) (see paragraph 43 above) had been applicable only to companies that had their own warehouses, while the imposition of a fine as set out in Article 53 (see paragraph 51 above) had not been an alternative to seizure, as the latter measure had been of a protective character. Since the seized goods had required special storage conditions which would have been costly, their sale had also had a basis in domestic law, namely Article 46 § 2 of the Law (see paragraph 48 above).

75. The Government further argued that the seizure of the goods had pursued a legitimate aim, namely protecting against the unauthorised and unregistered sale of goods, which could have led to grave economic consequences for the State budget. Lastly, they held that when the goods had been seized, a fair balance had been achieved between the general interest and the interests of the applicant company.

2. The Court's assessment

76. The Court reiterates that Article 1 of Protocol No. 1 guarantees in substance the right of property and comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of the peaceful enjoyment of possessions. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, among other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to the peaceful enjoyment of property, are to be construed in the light of the general principle laid down in the first rule (see, among other authorities, *Lekić v. Slovenia* [GC], no. 36480/07, § 92, 11 December 2018).

77. The Court notes that it is not in dispute between the parties that there has been an interference with the applicant company's right to the peaceful enjoyment of its possessions. The applicant company argued that the interference had amounted to a deprivation of its property, while the Government did not submit any comments in that regard.

78. As regards the question under which rule of Article 1 of Protocol No. 1 the impugned interference should be examined, the Court reiterates its case-law that a confiscation measure, even though it does involve a deprivation of possessions, constitutes nevertheless control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1 (see *Air Canada v. the United Kingdom*, 5 May 1995, § 34, Series A no. 316-A, § 34; *Silickienė v. Lithuania*, no. 20496/02, § 62, 10 April 2012, § 62; *S.A. Bio d'Ardennes v. Belgium*, no. 44457/11, § 48, 12 November 2019, § 48; and, most recently, *Markus v. Latvia*, no. 17483/10, § 70, 11 June 2020). However, in some cases, where the confiscation involved a permanent transfer of ownership and the applicant had no realistic possibility of recovering its possessions, the Court considered that the measures in question amounted to a deprivation of property (see, for example, *Andonoski v. the former Yugoslav Republic of Macedonia*, no. 16225/08, § 30, 17 September 2015, where the confiscation of the applicant's car used in committing a criminal offence was considered to have entailed a conclusive transfer of ownership, without the possibility of recover, and thus amounted to a deprivation of property; and *B.K.M. Lojistik Tasimacilik Ticaret Limited Sirketi v. Slovenia*, no. 42079/12, § 38, 17 January 2017, where the confiscation involved a permanent transfer of ownership and the applicant company had no realistic possibility of recovering its lorry used in drug trafficking). In the instant case, the Court notes that the seizure decision was delivered on 28 January 2005 (see paragraph 79 below), and on 16 February 2005 the applicant company's goods were sold to a third-party company (see paragraph 11 above). The Government have not argued that the applicant

company had a realistic possibility of recovering its goods. Nevertheless, the Court decides to leave this question open as it is unnecessary to decide it in the present case, for the reasons set out below.

79. As regards the lawfulness of the measure, the Court notes that in its initial seizure decision the Inspectorate invoked both Article 45 § 1 (7) of the Law, which provided for the mandatory seizure of goods when it was established that they were being traded despite not having been properly recorded, and Article 44 § 1 (6), which provided for the temporary seizure of goods in the context of misdemeanour proceedings, and that the Inspectorate had also issued a receipt/confirmation concerning the temporary seizure of the goods (see paragraphs 9 and 45-46 above). Ordinarily the difference in the legal basis for the seizure decision would consist in the point at which the seized goods could be lawfully sold (see paragraph 47 above). Since the sale of the goods in the present case was effected on 16 February 2005 (see paragraph 10 above), it was done before the end of the misdemeanour proceedings (see paragraph 22 above). However, the Government claimed that the sale had been effected on the basis of Article 46 § 2 of the Law (see paragraph 48 above), which constituted an exception to both of the above provisions. The Government argued that the special storage conditions required by the seized goods would have been costly (see paragraph 74 above), an assertion which was disputed by the applicant company. In this respect the Court notes that the Government have not provided any details as to the special storage conditions required or any information concerning the storage costs which could substantiate their claim that such a rapid sale of the applicant company's goods had been necessary and had thus complied with Article 46 § 2 of the Law. Likewise, this information was not contained in the sale invoice or the delivery note for the goods sold to the third party (see paragraph 11 above).

80. The Government further argued that the seizure of the goods had pursued a legitimate aim, namely protecting against the unauthorised and unregistered sale of goods, which could have led to grave economic consequences for the State budget. The applicant company challenged this legitimate aim as unsubstantiated, given that no possible damage resulting from the applicant company's actions had been determined at any stage. In this connection, the Court notes that the statutes which replaced the Law no longer provide for goods to be seized simply because some of them were being traded without having been properly recorded (see paragraphs 51-52 above), a fact which raises doubts as to the alleged grave economic consequences of such an omission.

81. Notwithstanding its doubts as to the lawfulness of the interference and the stated legitimate aim of the measure, the Court leaves these questions open, as in the present case the central issue is the proportionality of the interference in question (see, *mutatis mutandis*, *Doğan and Others v. Turkey*, nos. 8803/02 and 14 others, § 149, ECHR 2004-VI (extracts)). Possible

deficiencies in the applicable domestic regulatory framework will, however, be addressed in relation to the proportionality of the interference.

82. Accordingly, the remaining question for the Court to determine is whether there was a reasonable relationship of proportionality between the means employed by the authorities to achieve the stated legitimate aim and the protection of the applicant company's right to the peaceful enjoyment of its possessions. The Court must examine in particular whether the interference struck the requisite fair balance between the demands of the general interest of the public and the requirements of the protection of the applicant company's right to the peaceful enjoyment of its possessions. The requisite balance will not be achieved if the applicant company has had to bear an individual and excessive burden (see, in general, *Depalle v. France* [GC], no. 34044/02, § 83, ECHR 2010, and *Perdigão v. Portugal* [GC], no. 24768/06, § 67, 16 November 2010).

83. The Court notes that the misdemeanour proceedings against the applicant company were terminated on the basis of the expiry of the applicable prescription period, without it having been found guilty of any misdemeanour (see paragraph 22 above). Nevertheless, the applicant company's goods stored in the Pančevo warehouse had been seized and shortly thereafter sold to a third-party company, as it was held in the parallel administrative proceedings that the applicant company had engaged in trade of those goods without them having been properly recorded (see paragraph 17 above). It is important to note that the goods in issue in the present case had been imported lawfully (see paragraph 5 above). This fact distinguishes the instant case from certain other cases in which the confiscation measure applied to goods of which importation was prohibited (see *AGOSI v. the United Kingdom*, 24 October 1986, § 51, Series A no. 108), which were deemed to have been unlawfully acquired (see *Riela and Others v. Italy* (dec.), no. 52439/99, 4 September 2001, and *Raimondo v. Italy*, 22 February 1994, § 29, Series A no. 281-A), or which were intended for use in illegal activities (see *Butler v. the United Kingdom* (dec.), no. 41661/98, 27 June 2002), or where confiscation orders had been made in the context of criminal proceedings concerning charges of serious or organised crime and where there was a strong suspicion or certainty confirmed by a judicial decision that the confiscated assets were the proceeds of an offence (see *Phillips v. the United Kingdom*, no. 41087/98, §§ 9-18, ECHR 2001-VII). Moreover, the Court notes that, despite the seizure of the applicant company's goods, the authorities did not bring any criminal activities against the applicant company or its managing director other than misdemeanour proceedings which resulted in their acquittal.

84. The Court notes that since the applicant company did not store its goods in its own warehouses, no consideration was given in the administrative proceedings to whether the respondent State's legitimate aim could have been achieved by some other means. The Government argued that

it had not been possible to impose a fine on the applicant company and its managing director as an alternative to seizure of the goods, as the latter had been a mandatory measure under the legal framework in force at the relevant time (see paragraph 74 above). In this regard the Court reiterates that, in order to be proportionate, the interference should correspond to the severity of the infringement, and the sanction to the gravity of the offence it is designed to punish – in the instant case the failure to comply with the proper recording requirement – rather than to the gravity of any presumed infringement which has not actually been established, such as an offence that could have had "grave economic consequences for the State budget" (see, *mutatis mutandis*, *Boljević v. Croatia*, no. 43492/11, § 44, 31 January 2017).

85. In the present case, there is no indication that the seizure measure in question was intended as compensation for any pecuniary damage caused by the applicant company's failure to comply with the regulations; it appears rather to have been deterrent and punitive in its purpose. It has not been convincingly shown or indeed argued by the Government that the fine alone would not have been sufficient to achieve the desired deterrent and punitive effect and to prevent future breaches of the recording requirement. Indeed, the Court notes that subsequent statutes do not even provide for goods to be seized for this breach of the regulations (see paragraphs 51-52 above).

86. In these circumstances the confiscation in issue was, in the Court's view, disproportionate, in that it imposed an excessive burden on the applicant company.

87. There has accordingly been a violation of Article 1 of Protocol No. 1.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

88. The applicant company complained that the proceedings as a result of which its goods had been seized and sold had not been fair. It relied on Article 6 § 1 of the Convention, the relevant part of which provides as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

89. Having regard to the facts of the case, the submissions of the parties and its findings under Article 1 of Protocol No. 1, the Court considers that it is not necessary to examine either the admissibility or the merits of the complaint under Article 6 (see *Kaos GL v. Turkey*, no. 4982/07, § 65, 22 November 2016, and *Ghiulfer Predescu v. Romania*, no. 29751/09, § 67, 27 June 2017).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

90. 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

91. The applicant company claimed a total of 309,781 euros (EUR) in respect of pecuniary damage: EUR 143,336 for actual damage and EUR 166,445 for loss of profit. It also claimed EUR 8,000 in respect of non-pecuniary damage.

92. The Government contested these claims, noting that they were unsubstantiated, not directly connected to the alleged violation, and/or excessive.

93. In the circumstances of the case, the Court considers that the exact amount to be awarded in respect of pecuniary damage is not ready for decision. It is therefore necessary to reserve the matter, due regard being had to the possibility of an agreement between the respondent State and the applicant company (Rule 75 §§ 1 and 4 of the Rules of Court). Accordingly, the Court reserves this question and invites the Government and the applicant company to submit, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on the amount of pecuniary damage to be awarded to the applicant company and, in particular, to notify the Court of any agreement that they may reach.

94. As regards the non-pecuniary damage, the Court considers that, given the applicant company's direct contribution to the situation which gave rise to the finding of a violation of Article 1 of Protocol No. 1 as a result of its failure to comply with the regulations on record-keeping (see paragraph 7 above), the finding of a violation of the aforementioned provision constitutes in itself sufficient just satisfaction (see, *mutatis mutandis*, *Boljević v. Croatia*, no. 43492/11, § 54, 31 January 2017).

B. Costs and expenses

95. The applicant company also claimed EUR 2,288 for the costs and expenses incurred before the Court.

96. The Government contested this claim.

97. 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. In the present case, regard being had to the documents submitted

by the parties and the above criteria, the Court considers it reasonable to award the sum of EUR 1,200 to the applicant company, covering costs under all heads.

C. Default interest

98. 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, UNANIMOUSLY,

1. *Declares* the complaint under Article 1 of Protocol No. 1 admissible;

2. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

3. *Holds* that there is no need to examine the admissibility or the merits of the complaint under Article 6 of the Convention;

4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant company;

5. *Holds* that the respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,200 (one thousand two hundred euros), plus any tax that may be chargeable to the applicant company, in respect of costs and expenses, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

6. *Holds* that the question of the application of Article 41 in so far as pecuniary damage is concerned is not ready for decision, and accordingly:
   (a) reserves the said question;
   (b) *invites* the Government and the applicant company to submit, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on the matter and to notify the Court of any agreement that they may reach;
   (c) reserves the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be;

7. *Dismisses* the remainder of the applicant company's claim for just satisfaction.

Done in English, and notified in writing on 19 January 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakirci	Jon Fridrik Kjølbro
Deputy Registrar	President