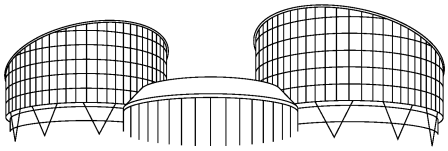

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF KÖNYV-TÁR KFT AND OTHERS v. HUNGARY

(Application no. 21623/13)

JUDGMENT
(*Merits*)

STRASBOURG

16 October 2018

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

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

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

Vincent A. De Gaetano, *President,*
András Sajó,
Nona Tsotsoria,
Paulo Pinto de Albuquerque,
Krzysztof Wojtyczek,
Egidijus Kūris,
Marko Bošnjak, *judges,*
and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 5 January, 28 February and 4 April 2017, 10 January and 12 June 2018;

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

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

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

3. On 17 October 2013 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

5. The applicant companies are schoolbook distributors.

6. The Hungarian school system was entirely reorganised by a series of measures adopted in 2011 and 2012. The formerly decentralised schools became subjected to a centralised State management. On 9 December 2011 and 24 July 2012 respectively, Acts nos. CLXVI of 2011 and CXXV of 2012 (collectively referred to as "the New Regulations") were published in the Official Gazette and contained, *inter alia*, provisions amending Act no. XXXVII of 2001 on the Schoolbook Market. The amendments came into force on 1 October 2012 and were effective from the school year starting in September 2013. The essence of the new legislation was already contained in the first amendment, published in December 2011.

7. The applicant companies submitted that the Hungarian schoolbook distribution market, as a whole, used to involve three groups of market participants: the publishers, the distributors and the schools. Prior to the New Regulations' entry into force, it could be considered a semi-regulated market; in respect of the publishers this meant that the legislator had established the requirements for a book to be qualified as schoolbook, and it often applied certain measures in this context, such as maximised prices or State subsidies based on indigence. However, the schoolbook distribution segment, in itself, was an unregulated market. The schoolbook distributors' clients were the schools who, in an often highly competitive market, were able to select the publisher and the schoolbook distributor, the former for the products it offered and the latter mainly for its reliability, accessibility and for the discounts promoted.

8. The task of distributors included not only the provision of logistical services but the processing of orders, the management of customised billing and the handling of returns. Most of the companies dealing with the distribution of schoolbooks leased warehouses and delivery vehicles for the two-to-four-month period when performing their activities, predominantly seasonal in nature. Besides their regular staff ranging from 3 to 57 employees, they employed an additional 10 to 30 seasonal workers, normally students, for the compilation of school book packages. Bigger market participants generally had their own vehicles and their storage bases where they performed both retail and wholesale activities. These companies bought the books from the publishers and spread them to the smaller distributors. There were well over thirty market-dominant schoolbook distributors operating in the country (six large and about thirty medium-sized distributors).

9. Participants in the market strove to acquire as many schools as possible as clients, in particular those which were located in the area close to the distributors' warehouses, in order to be able to optimise delivery costs. They made continuous efforts to keep their clients, the schools, by

providing flexible and prompt services. The wholesale price margin was generally about 3 to 5 per cent, the operating profit about 1 to 5per cent.

10. The first applicant, Könyv-Tár Kft, distributed educational materials for elementary and secondary schools. In this activity, it had business relationships with some 200 publishers, 60 of them being schoolbook publishers. In 2012 it supplied 126 schools.

11. The second applicant, Suli-Könyv Kft, served directly (i) 90 to 95 per cent of the schools in Komárom-Esztergom County; (ii) 100 per cent of the schools in the western part of Pest County; (iii) 65 to70 per cent) of the schools in the northern part of Pest County; (iv) 95 to 100 per cent of the schools in Győr-Moson-Sopron County; (v) 95 to 100 per cent of the schools in Vas County; (vi) 85 to 90 per cent of the schools in Veszprém County and (vii) 25 to 30 per cent of the schools in Budapest. Moreover, it supplied more than 1,200 schools indirectly via subcontractors dealing exclusively in schoolbook retail, competing with another five big distributors.

12. The third applicant, Tankönyv-ker Bt, supplied about 35 schools in two counties.

13. The New Regulations introduced a new system of schoolbook distribution in Hungary, laying down that "schoolbook supply" comprising the order, purchase and delivery of school textbooks to schools, and the collection of the purchase price from schools – was a public-interest responsibility of the State.

14. According to the reasoning of the relevant bill, the lawmaker's intention was to discharge these duties through a single, State-owned non-profit book distribution company, Könyvtárellátó Kiemelten Közhasznú Nonprofit Kft (Non-profit Library Supplier Limited Liability Company; "Könyvtárellátó"). A description of the objectives pursued gave the following reasons for the decision:

> "to strengthen the schoolbook procurer's position by the uniform and centralised procurement of schoolbooks ... and ... to make schoolbook distribution more transparent by generating competition in a stronger position, that of the procurer".

15. The applicant companies submitted that the New Regulations had centralised and monopolised the schoolbook distribution market with a margin of 20 per cent guaranteed to the State-owned schoolbook distributor, without providing any compensation for former market participants, including themselves. As a consequence, the applicant companies and other schoolbook distributors had effectively been barred from the market (which was either their exclusive or major field of activity), where they had been operating freely prior to the entry into force of the New Regulations.

16. The applicant companies filed a constitutional complaint with the Constitutional Court, requesting that the New Regulations be repealed.

However, in their submissions to the Court, they stated that this was not an effective remedy because even if the Constitutional Court had repealed the New Regulations, they would have needed to reinvest a significant amount of money in order to re-establish their business, and would have been unable to repair the damage they had already sustained.

17. On 14 April 2014 the Constitutional Court terminated the proceedings without an examination of the merits of the applicant companies' complaint. The Constitutional Court noted that subsequent legislation, Act no. CCXXXII of 2013 on Schoolbook Supply in the National Public Education System had been enacted, and had entered into force on 1 January 2014. This legislation repealed Act no. XXXVII of 2001 on the Schoolbook Market entirely, including the impugned New Regulations. The Constitutional Court found that the examination of the provisions' alleged unconstitutionality had thus become redundant.

As of 1 January 2014, Act no. CCXXXII of 2013 had completely removed any schoolbook distribution based on the free-market, and had introduced schoolbook supply, which was entirely State-organised, to the Hungarian public education system.

The applicant companies did not file a constitutional complaint against Act no. CCXXXII of 2013.

II. RELEVANT DOMESTIC LAW

18. The relevant provisions of Act no. XXXVII of 2001 on the Schoolbook Market, as amended by section 14(1) of Act no. CLXVI of 2011 and Act no. CXXV of 2012, and in force between 1 October 2012 and 1 January 2014, provided:

Section 4

"(6) The ordering, purchase and delivery of school textbooks to schools, and the collection of the purchase price from schools (hereinafter 'schoolbook supply') shall be tasks of public interest performed by the State via the Non-profit Library Supplier Limited Liability Company (hereinafter 'Könyvtárellátó') ..."

Section 8

"(13) Other school textbook publishers and distributors or substitute suppliers may, upon agreement with Könyvtárellátó, participate in carrying out the tasks related to schoolbook supply ..."

19. The relevant provisions of Act no. CCXXXII of 2013 on Schoolbook Supply in the National Public Education System, in force as of 1 January 2014, provide:

Section 2

"(2) The nationwide ordering, purchase and delivery of school textbooks to schools, and the collection of the purchase price from schools (hereinafter 'schoolbook supply') shall be tasks of public interest to be performed by a non-profit limited liability company (hereinafter 'Könyvtárellátó') appointed by the State by decree of the Government."

20. The relevant provisions of the Fundamental Law of Hungary provide:

Article M

"(1) The economy of Hungary shall be based upon work as the very foundation of productivity, and upon the freedom of enterprise.

(2) Hungary shall ensure the conditions of fair economic competition, act against the abuse of a dominant economic position and protect the rights of consumers."

Article XI

"(1) Every Hungarian citizen shall have the right to formal and non-formal education.

(2) Hungary shall implement this right through the dissemination of and by providing general access to, community culture, by providing free and compulsory primary schooling, free and universally accessible secondary education, and higher education made available to all on the basis of their ability, as well as by providing financial support as laid down in an act of Parliament to those receiving education.

(3) An act of Parliament may set as a condition for receiving financial aid at a higher educational institution the participation in, for a specific period of time, employment or enterprise that is regulated by Hungarian law."

Article XII

"(1) Everyone shall have the right to freely choose his or her job or profession, and the freedom to conduct a business. Everyone shall have a duty to contribute to the enrichment of the community through his or her work, performed according to his or her abilities and faculties.

(2) Hungary shall endeavour to ensure the possibility of employment to everyone who is able and willing to work."

Article 37

"(1) The Government shall implement the central budget lawfully and efficiently, under the principle of prudence and transparency. ..."

21. Judgment no. Pfv.IV.20.602/2017/5 of the *Kúria* contains the following passages:

"[20] ... Certainly, the Hungarian labour law provisions (paragraph 115 of the Labour Act, as in force in the relevant period) were not in compliance with Article 7 (1) and (2) of Directive 2003/88/EC. The Hungarian rules, at least to some extent, were clearly in conflict with the provisions of the EU directive.

[21] The *Kúria* holds, despite the findings of the final and binding judgment, that the direct consequences of such legislative error (mistake), namely, the claimant's deprivation of paid leave days, had a substantive effect on his private life. ...

[22] ... The relevant case-law of the Court of Justice of the European Union has clarified that it is exclusively the national law that applies to the assessment of the actual damage liability by the national court.

[23] Although there had been a proposal to include provisions into the new Civil Code regarding the legislator's responsibility for damages caused by legislation, that proposal was finally not accepted; and the old Civil Code did not include any such provisions. The court as a law enforcer cannot, at its own discretion, countervail that.

[24] According to section 339 of the old Civil Code, a person who unlawfully causes damage to another person shall be liable for such damage. He shall be relieved of liability if he is able to prove that he has acted in a manner that can generally be expected in the given situation. The *Kúria* finds that this provision cannot be applied to the relationship between the claimant and the defendant in the present case. It is the well-established case-law under the old Civil Code that section 339 was not applicable to damages caused by legislation. Thus, in the absence of any applicable legal provisions, the court correctly dismissed the claimant's damage claims in the final and binding judgment, which is therefore upheld by the *Kúria*."

THE LAW

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

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

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

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

of the legislation was determined by that court, damages could be sought before the ordinary courts in civil proceedings.

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

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

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

27. In respect of a potential action in damages on the basis of breach of EU law, the Court takes into consideration a recent judgment of the *Kúria* (no. Pfv.IV.20.602/2017, see paragraph 21 above) where the latter examined the responsibility of the Hungarian State for wrongful implementation of

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

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

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

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

31. The Court reiterates that the concept of "possessions" in Article 1 of Protocol No. 1 has an autonomous meaning which is certainly not limited to the ownership of physical goods: certain other rights and interests constituting assets can also be regarded as "property rights", and thus "possessions" for the purposes of this provision (see *Iatridis v. Greece* [GC], no. 31107/96, § 54, ECHR 1999II). Rights akin to property rights have

existed in cases where, by dint of their own work, the applicants concerned had built up a clientele. This clientele had, in many respects, the nature of a private right and constituted an asset, and hence a possession within the meaning of the first sentence of Article 1 (see *Van Marle and Others v. the Netherlands*, 26 June 1986, § 41, Series A no. 101, and *Malik v. the United Kingdom*, no. 23780/08, § 89, 13 March 2012). The applicability of Article 1 of Protocol No. 1 extends, among others, to professional practices, their clientele and their goodwill, as these are entities of a certain worth that have in many respects the nature of private rights, and thus constitute assets, being possessions within the meaning of the first sentence of this provision (see *Van Marle and Others*, cited above, § 41; *Döring v. Germany* (dec.), no. 37595/97, ECHR 1999-VIII; *Wendenburg and Others v. Germany* (dec.), no. 71630/01, ECHR 2003-II; *Buzescu v. Romania*, no. 61302/00, § 81, 24 May 2005; and *Oklešen and Pokopališko Pogrebne Storitve Leopold Oklešen S.P. v. Slovenia*, no. 35264/04, § 54, 30 November 2010; compare and contrast *Tipp 24 AG v. Germany* (dec.), no. 21252/09, § 26, 27 November 2012). The Court held, for example, that operating a cinema for eleven years without the interference of the authorities had resulted in the creation of a clientele which constituted an asset (see *Iatridis*, cited above, § 54). The Court also held that an applicant could be said to have an existing possession in respect of providing the funeral services during a period of legal vacuum (see *Oklešen and Pokopališko Pogrebne Storitve Leopold Oklešen S.P.,* cited above, § 58).

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

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

B. Merits

1. The parties' submissions

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

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

36. The Government, however, emphasised that the primary reason for introducing the impugned legislation had been to strengthen the market position of the procurer vis-à-vis the publishers in order to ensure more efficient spending of public funds, rather than addressing any potential market distortions. The Government added that the market had been rather static in that schools had not changed textbooks (publishers) easily but, at

the same time, schools were often ready to change distributors for higher premiums. The Government maintained that the impugned measure was thus justified, since the State could not be compelled to maintain an irrational system of budgetary expenditures.

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

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

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

Regulations, the official, State-owned schoolbook distributor has a guaranteed margin of 20 per cent which in itself undermines the Government's premise that schoolbook distribution in the new regime would be cheaper and more efficient.

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

2. The Court's assessment

(a) Whether there was an interference

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

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

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

(b) Whether the interference was justified

(i) Lawfulness

44. The first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful (see *Iatridis*, cited above, § 58), which presupposes that the applicable provisions of domestic

law be sufficiently accessible, precise and foreseeable (see *Beyeler v. Italy* [GC], no. 33202/96, § 109, ECHR 2000I). In the present case, the Court observes that the measure complained of was based on two statutory amendments duly published. It thus satisfied the lawfulness requirement.

(ii) General interest – legitimate aim

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

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

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

(iii) Proportionality of the measure

48. In order to be compatible with the general rule set forth in the first sentence of the first paragraph of Article 1 of Protocol No. 1, in the light of

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

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

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

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

52. At the outset, the Court notes an attribute inherent in the schoolbook market which is unusual in some aspects. The protagonists who select the products (that is, the schools or the teachers) are not the ones who pay for them (that is, the end-users: the pupils and their parents). For the Court, this

scheme can be explained by the need to ensure that all pupils in a class use the same textbook. This arrangement might however entail some market distortions and a potentially exposed situation of the end-consumers. The latter can be balanced by market regulations, such as maximised prices or State subsidies.

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

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

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

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

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

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

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

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

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

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

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

62. The Court reiterates that Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the grounds of being contrary to the Convention (see, among other authorities, *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, nos. 70945/11 and 8 others, § 124, ECHR 2014 (extracts), and *Paksas v. Lithuania* [GC], no. 34932/04, § 114, ECHR 2011). In the instant case, the applicant companies' complaint under Article 13 is at odds with this principle. Consequently, this complaint is manifestly ill-founded and as such must be declared inadmissible, in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

63. Furthermore, the Court considers that, in the light of its findings concerning Article 1 of Protocol No. 1 (see paragraph 59 above), it is not necessary to examine separately either the admissibility or the merits of the complaints raised under Article 6 of the Convention and Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1 (see,

mutatis mutandis, *Magyar Keresztény Mennonita Egyház and Others*, cited above, §§ 121 and 123).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

64. Article 41 of the Convention provides:

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

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

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

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

67. The Government contested these claims as excessive.

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

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

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the complaint concerning Article 1 of Protocol No. 1 to the Convention admissible;

2. *Declares*, unanimously, the complaint concerning Article 13 of the Convention, read in conjunction with Article 1 of Protocol No. 1, inadmissible;

3. *Holds*, unanimously, that there is no need to examine separately the admissibility or the merits of the complaints under Article 6 § 1 of the Convention and Article 14 read in conjunction with Article 1 of Protocol No. 1;

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

5. *Holds*, by six votes to one, that the question of the application of Article 41 is not ready for decision; and accordingly,
(a) *reserves* the said question in whole;
(b) *invites* the Government and the applicant companies to notify the Court, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, of any agreement that they may reach;
(c) *reserves* the further procedure and delegates to the President of the Chamber the power to fix the same if need be.

Done in English, and notified in writing on 16 October 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli	Vincent A. De Gaetano
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) concurring opinion of Judge Pinto de Albuquerque;
(b) concurring opinion of Judge Kūris;
(c) dissenting opinion of Judge Wojtyczek.

V.D.G.
M.T.

CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE

1. *Könyv-Tár Kft and Others v. Hungary* is a remarkable case for various reasons. It deals for the first time with the creation of a *de facto* State monopoly in a delicate, profitable economic area, that of schoolbook distribution, in the context of successive State interventions in a particularly sensitive social and political area, that of public school management. Ultimately, what is at stake in this case, and remained unnoticed in the majority judgment, is also the freedom of choice for schools and teachers in Hungary to decide what is taught and how it should be taught. This alone would have prompted me to write separately. But there are additional reasons for me to do so, which relate to the nature of the State's intervention in this case and the width of its margin of appreciation.

2. I agree with the majority that the Government's New Regulations[1] amounted to a violation of Article 1 of Protocol No. 1 to the Convention. However, I write separately to argue that this legislation amounted to a calculated measure of deprivation of a possession (the applicant companies' clientele) and not a mere measure of control of the use of their possession. From this perspective, I am of the view that the margin of appreciation afforded to the first of these two forms of State intervention in the economy is narrower than the one accorded to the second, and that the case-law on compensation was directly applicable to the case at hand.

Deprivation or regulation of the use of a possession?

3. Article 1 of Protocol No. 1 provides for two forms of interference with possessions: control and deprivation. Deprivation is the transfer *de jure* or *de facto* of the possession away from its owner to the State or a third party, or its destruction. Control involves no transfer: the owner retains his possession, but is restricted in his use of it.

4. Yet in *Sporrong and Lönnroth* the Court identified a new type of interference: "interference with the substance of ownership"[2], based on the first sentence of Article 1 of the Protocol. This form of interference, said to be of a general nature, allows the Court to review all situations not falling under the other two forms (deprivation or control of use). What qualifies a measure as incompatible with the substance of the right to the peaceful enjoyment of property remains fairly unclear. In any event, the Court has not yet considered that the loss of clientele falls into this category.

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[1] Judgment, paragraph 6.

[2] *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 61, Series A no. 52.

5. According to the case-law of the Court, the concept of deprivation of property implies a transfer of ownership, like expropriation or nationalisation. This does not mean, however, that the applicants have been formally deprived of their property. There are some cases where the Court has characterised *de facto* expropriation[3] as deprivation of a possession. However, in all those cases the good was something tangible. Since a clientele is not something tangible of which the applicant has physical possession, the Court has been reluctant to consider the loss of clientele as a form of deprivation of possessions.

6. The case-law of the Court has not yet precisely defined what constitutes regulation of the use of a possession. But it refers to cases where there was no transfer of ownership and in which the national authorities sought to limit or control the use of the possession, such as restrictions on freedom of contract in respect of tenancies[4]. However, the Court has also considered that confiscation falls under the regulation of the use of property, if it is provided for by law and pursues an aim in the general interest[5].

Loss of clientele as deprivation of a possession

7. The loss of clientele has also been included among the forms of regulation of the use of a possession, for example when it resulted from a prohibition on the possession of handguns[6] or a prohibition on the online intermediation of games of chance[7], from a refusal to register someone as a registered accountant[8], removal from the Bar[9], annulment of registration

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[3] *Sarıca and Dilaver v. Turkey*, no. 11765/05, 27 May 2010.

[4] *Hutten-Czapska v. Poland* [GC], no. 35014/97, ECHR 20006-VIII.

[5] *AGOSI v. the United Kingdom*, 24 October 1986, Series A no. 108; *Raimondo v. Italy*, 22 February 1994, Series A no. 281A; *Air Canada v. the United Kingdom*, 5 May 1995, Series A no. 316A; and *Bowler International Unit v. France*, no. 1946/06, 23 July 2009.

[6] *Ian Edgar* (*Liverpool) Ltd v. the United Kingdom* (dec.), no. 37683/97, ECHR 2000−I, and *Denimark Limited and 11 Others v. the United Kingdom* (dec.), no. 37660/97, 26 September 2000.

[7] *Tipp 24 AG v. Germany* (dec.), no. 21252/09, 27 November 2012.

[8] *Van Marle and Others v. the Netherlands*, 26 June 1986, Series A no. 101.

[9] *Olbertz v. Germany* (dec.), no. 37592/97, ECHR 1999V, and *Döring v. Germany* (dec.), no. 37595/97, ECHR 1999VIII.

with the Bar[10] or annulment of exclusive rights of audience in courts of appeal[11].

8. Basically, these cases refer to dangerous business activities which warrant State licensing (like selling guns or providing games of chance) or professions which require some form of public regulation, like those of lawyer or accountant. Restrictions placed on the registration, licences or permits connected to such businesses or professions are to be considered as forms of State regulation of the economy. This is particularly the case when such measures are designed to promote the "general interest" by structuring a profession that is important to the entire economic sector and by providing the public with guarantees as to the competence of those who carry on that profession[12].

9. The case at hand is different from the above cases. In Hungary, prior to the New Regulations, schools were able to select the publisher and schoolbook distributor in a highly competitive, open market[13]. The schoolbook distributors needed no specific registration, licence or permit to enter and operate in the market of schoolbook distribution, since they were established and operated in accordance with general civil law[14]. The distributors' activity included not only the provision of logistical services but also the execution of the orders, the management of customised billing and the handling of returns of products resulting from over-ordering. Moreover, they also financed the distribution of the schoolbooks as they either purchased the books or obtained them on a consignment basis. In addition, their activity also required them to either own or lease warehouses and delivery vehicles for the purposes of distributing the schoolbooks, and they maintained office premises in order to keep in contact with their upstream and downstream business partners (the schools and the publishers). The applicant companies had, by dint of their continuous work in this unregulated market, gained a clientele. They enjoyed "goodwill" in their professional practice, namely the advantage which had arisen over many years of practice from their own reputation and connections.

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[10] *Buzescu v. Romania*, no. 61302/00, 24 May 2005.

[11] *Wendenburg and Others v. Germany* (dec.), no. 71630/01, ECHR 2003-II.

[12] *Van Marle and Others*, cited above, § 43.

[13] Judgment, paragraph 7.

[14] See the applicants' submissions of 20 March 2014, page 16: "The Applicants did not have a formal licence from any authority, but their 'licence' to carry out their original business derived from the concept of free market." The Government agree: "… the applicants had not provided any services to the public education system solely by virtue of law, their services had been procured under specific civil-law contracts" (submissions of 17 May 2017).

10. The case of *Oklešen and Pokopališko Pogrebne Storitve Leopold Oklešen S.P.*[15] is the closest to the present case. There, the Court found that the applicant company had an existing possession (a clientele) for the provision of funeral services during a period of legal vacuum, but did not have a reasonable expectation of continuing to provide those services after they were entrusted to the municipal enterprise under the 2000 Decree and the 2002 Amendment. Significantly enough, the Court did not qualify the width of the State's margin of appreciation, despite acknowledging that the full nationalisation or municipalisation of funeral services appeared to be a rare occurrence in the member States.

11. There is however a crucial difference between the Slovenian and Hungarian cases. When the Slovenian company obtained its craft licence, the provision of funeral services had already been designated as a public utility, by law. That is why the Court attached decisive importance to the fact, undisputed by the applicant Mr Oklešen, that throughout the entire period during which he provided funeral services, he had been aware that this was only a temporary solution pending the implementation of the national legislation requiring the municipality to regulate the provision of funeral services as a public utility. Nothing of the sort happened in the schoolbook distribution market in Hungary, since the applicant companies started to operate, and continued to operate for over twenty years[16], in an unregulated market which the legislature had not classified as a publicutility sector of the economy. In the Slovenian case the applicant's *de facto* possibility to provide funeral services over the period of seven years, which ceased *de jure* following the implementation of the 2002 Amendment, was from the beginning of an obviously transitional nature. Not so in the Hungarian case, where the applicant companies worked, invested and grew with a legitimate expectation of being able to continue their business activity.

12. In Hungary, the State intervened by way of legislative acts in the schoolbook distribution market, reserving this profitable business for itself. It did so by means of a two-step procedure. First, by way of the 2012 Act[17], the State excluded *de facto* the applicant companies from schoolbook distribution contracts, allowing companies to apply in order to enter into an agreement with the State-run company within the framework of the public procurement procedures, but limiting the tenders to certain partial activities

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[15] *Oklešen and Pokopališko Pogrebne Storitve Leopold Oklešen S.P. v. Slovenia*, no. 35264/04, § 54, 30 November 2010.

[16] See the applicants' submissions of 17 May 2017 (not contested by the Government on this point).

[17] Judgment, paragraph 18.

such as logistics and packaging, to certain parts of Hungary and only to invited participants, which did not include the applicant companies[18]. Afterwards, by way of the 2013 Act[19], it excluded them *de jure* from that market altogether.

13. In the case of *Sporrong and Lönnroth*, cited above, the Court considered that the national authorities had not actually expropriated the applicants' buildings and that there had been no transfer of ownership, but decided to look beyond appearances and analysed the reality of the contentious situation complained of. The Court held that the expropriation permits were not intended to limit or control the use of the property, but since they were an initial step in a procedure that ultimately led to a deprivation of possessions, they would be assessed under the first paragraph of Article 1 of Protocol No. 1. In that case, the Court ultimately found that the interference had not been proportionate.

14. Likewise, in the present case, the Court had a duty to go beyond appearances and evaluate the applicant companies' situation as whole, considering the different steps in a procedure that ultimately led to the loss of their business activity and of their clientele in the schoolbook distribution market. There is no doubt that in the present case the State pursued a deliberate policy to monopolise the schoolbook distribution market from the outset. As of the 2013/14 school year the applicant companies were suffocated by the omnipresent State-run company in the schoolbook distribution market. What this policy did, in effect, was to centralise the profits from the schoolbook distribution market in the hands of the State-run company (with a margin of 20% guaranteed to the State-owned schoolbook distributor[20]).

15. The Court cannot turn a blind eye to the market reality; otherwise, the Convention protection of the right to property would be virtual and ineffective. Given the above considerations, this case amounts to "deprivation of a possession", because the applicants effectively lost their clientele as of the 2013/14 school year, an asset that they had garnered over twenty years of work in an open and unregulated market.

The legitimacy of the purpose of the deprivation measure

16. The Government argue that the purpose of the impugned legislation was "to strengthen the schoolbook procurer's position by the uniform and

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[18] Judgment, paragraphs 38 and 55.

[19] Judgment, paragraph 19.

[20] Judgment, paragraph 15.

centralised procurement of schoolbooks ... and ... to make schoolbook distribution more transparent by generating competition in a stronger position, that of the procurer", because "the centralised procurement of schoolbooks is more appropriate to ensure both efficiency of budgetary spending and prevalence of educational aspects in the selection of schoolbooks"[21]. In their submissions, the Government add that the centralisation measure "served the purpose of ensuring a more efficient spending of public funds (including the purchase price paid by parents)"[22].

17. I share the majority's doubts that the real purpose of the new legislation was to protect the interests of the end-users[23]. I can accept that the New Regulations were aimed at more efficient budgetary spending on schoolbooks in the case of purchases subsidised by the State, which corresponded at the relevant time to a 40% share of end-users according to the Government[24]. But I doubt that the centralised procurement of schoolbooks was aimed at benefitting the non-subsidised end-users. I will return to this point later.

18. I also doubt that the New Regulations could contribute to the "prevalence of educational aspects in the selection of schoolbooks". I fail to see how the monopolisation of schoolbook distribution can pursue educational aims or improve the quality of the public education system. It is not a valid argument to assert that "market distortions were exacerbated by discounts and bonuses provided by publishers and distributors to schools whose decision on the selection of textbooks was therefore, unethically, often influenced by considerations other than professional educational standards (or price sensitivity of end-users)"[25]. Firstly, the Government assume unethical conduct on the part of schools and teachers that is not proven in the file. In fact, such unethical behaviour could even constitute criminal conduct[26]. No evidence was provided that the applicant companies or their representatives or any other schoolbook distributors or their representatives were ever charged, let alone found guilty, of any unlawful or improper conduct with respect to their professional activities in the

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[21] See the Government's submissions of 5 February 2014, page 2.

[22] See the Government's submissions of 5 February 2014, page 9.

[23] Judgment, paragraph 46.

[24] Ibid. The Government later updated that figure, saying that in 2016/17 the percentage of subsidised pupils was now 67% as against 33 % non-subsidised (submissions of 17 May 2017).

[25] See the Government's submissions of 5 February 2014, page 10.

[26] The applicant companies note that the Government portray them as "fraudsters" (see the applicants' submissions of 20 March 2014, page 3).

schoolbook distribution market. More generally, no statistical or other evidence was produced to demonstrate that such a practice existed and, if so, its real impact on the schoolbook distribution market in Hungary. Secondly, the Government's line of reasoning does not exclude the possibility that the same unethical conduct might occur with the State-run company, which might take decisions, or influence the taking of decisions by others, strictly on the basis of a cost-effectiveness analysis and not on the basis of professional educational standards. In other words, the Government's argument is nothing but a scaremongering fallacy, an appeal to fear, without any factual substantiation whatsoever.

19. The applicant companies argue, and the Government do not dispute, that any schoolbook distributed by them had been approved by the Government decision-making body responsible for the quality inspection, approval and registration of all schoolbooks. Obtaining approval from the respondent State's relevant decision-making body is a precondition for the classification of a book as an "official schoolbook" which can then be ordered by the schools. Accordingly, any schoolbook distributed by the applicants was previously inspected and approved by the Government[27]. Since from the Government's perspective all "official schoolbooks" available on the market satisfy educational standards, the argument cannot be made that the schools' and teachers' freedom to select schoolbooks could harm educational standards.

20. More importantly, the monopolisation of the distribution of schoolbooks must be seen against the general background of the Government's wider plan to centralise the management of the national educational system, which includes the monopolisation of the market in both the publishing and distribution of schoolbooks[28]. As the applicant companies argue and the Government do not contest, the New Regulations were part of a policy which included "the designation of one or a very limited number of official schoolbooks which and [*sic*] shall be used by the public schools (as opposed to the several dozens from which teachers and parents may currently choose)"[29].

21. I see a danger here, and it is my duty to name it. The onelineofthought school, which to me closely resembles a feature of an authoritarian regime, is dangerous for Hungarian society, particularly when the Government themselves assert that their centralisation policy is "a means for the State to monitor and control what textbooks are ordered by

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[27] Ibid., page 9.

[28] Ibid., page 3.

[29] Ibid., page 4. See also the applicants' submissions of 16 May 2017, pages 4 and 13.

the schools"[30]. The Government is walking a fine line here. There is a fine line between such a "centralised", "uniform" school management system and entrapping pupils in a governmental *Weltanschauung*. There is an even finer line between such a system of controlling schoolbooks supply (publishing and distribution) and State thought control. I have pleaded in another case for the four university freedoms[31]. Today I am pleading for the freedom of school teachers to choose what they want to teach and how they want to teach it. I am not insensitive to the Government's concern about possible shortcomings in the public education management system that may eventually reinforce social inequalities between pupils coming from well-off and poor families, create regional inequalities between urban and rural areas and hinder mobility in the public education system[32]. The public education system has an important role in levelling the playing field between pupils coming from well-off and poor families and between pupils coming from urban and rural areas. But I do not accept that a management system that affords autonomy to teachers in the determination of the curriculum and the selection and distribution of schoolbooks will necessarily contribute to the reinforcement of social and regional inequalities, as the Government assume[33]. At least in the file of this case, the Government did not put forward any hard evidence of such a correlation, either in general terms or in the specific case of Hungary. I am thus led to conclude that such a correlation is more a political assumption than a scientifically proven fact.

The proportionality of the deprivation measure

22. Even assuming, for the sake of exhaustiveness, that there was a "public interest" in the State intervention and the purpose of the State's intervention was therefore legitimate, it was not proportionate. I agree with the majority's assessment of the proportionality factors[34], but I would like to elaborate further on some particularly important points in this regard.

23. In this context, the test of proportionality has two prongs: the test of necessity and the test of proportionality *strictu sensu*. The test of necessity assesses whether the State interference with the right to property adequately

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[30] See the Government's submissions of 17 May 2017, page 2.

[31] See my opinion in *Tarantino and Others v. Italy*, nos. 25851/09 and 2 others, ECHR 2013.

[32] See the Government's submissions of 5 February 2014, page 1.

[33] Ibid.

[34] Judgment, paragraph 49.

advances the "public interest" pursued and whether it extends no further than necessary in order to meet the said "interest". This means that the Court must ascertain whether there is a "rational connection" between the State interference and the "public interest", by establishing a plausible instrumental relationship between them, and whether there is an equally effective but less restrictive means available by which to further the same "public interest". The test of proportionality *strictu sensu* assesses whether a fair balancing of the right to property and the competing "public interest" has been achieved, whilst ensuring that the essence (or minimum core) of the former is respected[35].

24. In this regard, I would argue that the margin of appreciation afforded to the most intensive form of State intervention in the economy (deprivation of a possession) is narrower than the one accorded to lesser forms of State intervention, encompassed in the regulation of the use of the possession. This idea coalesces with the principle that the scope of the margin of appreciation depends on the extent of the intrusion into the applicant's sphere of interests[36]. This is also in line with the fact that deprivation of a possession is, in the literal terms of Protocol No. 1, prohibited "except in the public interest", while regulation (control of use) measures are not *per se* prohibited, but are a "right of the State to enforce such laws". The strict language of the second sentence of paragraph 1 of Article 1 of Protocol No. 1 indicates clearly that the State does not have *per se* a "right" to deprive people of their possessions. Hence, such highly intrusive State action must be submitted to an enhanced standard of judicial review by this Court. *A fortiori*, the State's margin is even narrower when it intervenes in an unregulated business area, where freedom of enterprise and the right to peaceful enjoyment of one's possessions prevail.

25. In the case at hand, it is questionable that the State interference with the applicant companies' respective clientele adequately advanced the "public interests" pursued, namely less public spending, cheaper books paid for by the parents, more transparency in the schoolbook distribution market, and selection of schoolbooks strictly on the basis of professional educational standards. In fact, it caused the opposite result, since it

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[35] In my separate opinions, I have referred to the specific features of the proportionality test in the context of an Article 2 case (*Lopes de Sousa Fernandes v. Portugal* ([GC], no. 56080/13, 19 December 2017), an Article 8 case (*Szabóet and Vissy v. Hungary*, no. 37138/14, 12 January 2016), and an Article 10 case (*Mouvement Raëlien Suisse v. Switzerland* ([GC], no. 16354/06, ECHR 2012).

[36] *Hatton and others v. the United Kingdom* [GC], no. 36022/97, §§ 103 and 123, ECHR 2003-VIII.

practically closed down the schoolbook distribution market[37] and promoted less transparency, less efficiency and more public spending, to the point where the government even contemplated the possibility of involving the police in the chaotic process that ensued from the radical legal change[38].

26. Furthermore, there is no evidence in the file that the new State monopoly-based distribution policy impacted positively on the selection of schoolbooks, let alone that it benefited the non-subsidised end-users, and in particular that the higher margin guaranteed to the State-run company was used to decrease the purchase price charged to the non-subsidised end-users. In fact, it appears that the net average price of schoolbooks has increased and that the new system even resulted in the first year of operation in an additional cost to the State budget[39].

27. To answer the question whether the State intervention extended no further than necessary in order to meet the said "public interests", it must be taken into consideration that at the time the New Regulations were introduced the Government already had a significant degree of control over the schoolbook market and could deter any price abuse by the publishers and distributors, even in the areas where only one or a limited number of distributors undertook to provide services, because the maximum prices of schoolbooks were set by the Government themselves. Hence, the amount of public spending on subsidised schoolbooks and private spending on non-subsidised schoolbooks was already, to a certain extent, dependent on a decision of the Government themselves.

28. Worse still, no less restrictive means were sought in order to attenuate the negative impact of the interference on the distributors already in the market and no balancing of the right to property and the competing "public interest" was achieved. The applicant companies were not compensated, in any shape or form, for the deprivation of their possessions, in spite of the fact, known to the Government, that it was impossible for them to reconstitute their business outside the sphere of schoolbook distribution, which was their exclusive or major field of activity[40]. The provision of an eighteen-month transitional period is in this regard

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[37] With the negligible exception of children schooled in the private education system and home-schooled children, which constituted an irrelevant, minimal percentage of the entire market.

[38] See the applicants' submissions of 20 March 2014, page 10, and their submissions of 17 May 2017, pages 11 and 12 (both points not contested by the Government).

[39] See the applicants' submissions of 20 March 2014, page 9 (not specifically contested by the Government). The Government's position is that "the volume of public savings resulting specifically therefrom cannot be calculated" (submissions of 17 May 2017, page 4).

[40] Judgment, paragraphs 15 and 59.

manifestly insufficient to enable the applicant companies to change their field of activity entirely and to prevent an individual and excessive burden from being imposed on them. Finally, this is not a case in which special considerations would justify nationalisation of a certain asset without any compensation[41].

29. At this juncture, it is important to note that the proportionality assessment must include the entrepreneurial risk associated with the applicants' business. The Court has considered such risks in the context of businesses dependent on discretionary permits issued by the administrative authorities, in cases concerning matters such as the loss of a construction permit[42] or the revocation of a permit to extract gravel[43]. It has also taken into account the risk inherent in the conclusion of transnational contracts[44] and the risk in transnational activities of penalties being imposed by other jurisdictions[45]. This is not the case here. Since the applicant companies' business activity was limited to the confines of the national market and this was an open, unregulated market, it did not involve any special risk which should be taken into account in the proportionality test.

30. To my mind, a full-blown restriction of entrepreneurial freedom carries with it a strong presumption against its Convention validity. That presumption is even stronger in the field of education. In the instant case, the respondent Government did not satisfy the burden of showing that the imposition of such a drastic change in the schoolbook distribution market, without any remedies and any compensation, was justified.

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[41] See, conversely, *Jahn and Others v. Germany* [GC], nos. 46720/99 and 2 others, § 117, ECHR 2005VI.

[42] *Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, Series A no. 222.

[43] *Fredin v. Sweden (no. 1)*, 18 February 1991, Series A no. 192.

[44] *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, 23 February 1995, Series A no. 306-B.

[45] *Air Canada v. the United Kingdom*, 5 May 1995, Series A no. 316A.

CONCURRING OPINION OF JUDGE KŪRIS

1. In essence, I agree with the arguments expounded in the separate opinion of Judge Wojtyczek, in particular those pertaining to the obscurity of the notion of clientele, as employed in the judgment; the unwillingness of the majority to openly recognise that prior to the adoption of the impugned legislative measures the Hungarian schoolbook market was distorted; and the reproaching of the respondent State for the *de facto* monopolisation of the schoolbook market without acknowledgment of the fact that that market was already – also *de facto* – monopolised by some "players", including the applicant companies (see especially paragraph 11 of the judgment). To give just one example, the judgment states that "the schoolbook market indeed had some special attributes", but then it adds that "these did not yield any special or privileged market situation for the applicant companies which would have justified in itself the impugned State's intervention" (see paragraph 53). "Special attributes" is nothing but a euphemism; it covers not only the "unusual" character of the textbook market as such (see paragraph 52), but also its factual monopolisation by some of the existing "players".

2. The judgment is not only business-friendly (as Judge Wojtyczek points out and rightly welcomes), but is also permeated with unfriendliness towards State regulation of certain markets (and maybe not only the schoolbook market). Some of the expressions used and the flow of reasoning as a whole create an impression that the introduction of State regulation of specific markets is an unwelcome enterprise under the Convention, even where the insufficiency or complete absence of regulation has resulted in market distortion and the factual impossibility for new competitors to enter the market – with all the negative consequences for the end-users. For instance, in paragraph 56 of the judgment, the impugned legislative intervention is held to be not "justified *in itself*" (emphasis added) and "arbitrary"; the latter label is also present in paragraph 59, which concludes the reasoning. In paragraph 58 this intervention is stamped as "drastic". This is much too much. How can one speak of a measure *as such* being "arbitrary" or "drastic", if the situation commands legislative intervention on the part of the State? To continue, in paragraph 59, the majority uncritically accept the applicant companies' assertion that the impugned measures brought no "real benefits for the parents or pupils". On this point, I refer to Judge Wojtyczek's insistence on not ignoring the broader context when introducing an economic rationality analysis into the proportionality assessment under Article 1 of Protocol No. 1.

3. My approach is different from that of my prominent colleague only in so far as I, like the majority, consider that the legislative measures

complained of were rather abrupt and not supported by a proper transitional period and/or certain other "positive" schemes, which would have allowed the applicant companies to adjust to the new regulations. There is no doubt that the Hungarian schoolbook market was distorted before the State intervened, and that the applicant companies benefited from this distortion. However, it was not the companies (or other such "players") who were at the root of that distortion – they only made use (most likely, quite legitimately) of the absence of relevant legal regulation. They should not therefore bear all the burden of the State's intervention, the aim of which, as the Government asserted, was to straighten out something that had become crooked. Consequently, I voted with the majority in favour of finding a violation of Article 1 of Protocol No. 1.

4. The majority state that "[e]ven assuming that [the impugned] reform was aimed at ensuring a more efficient spending of public funds, the Court is not convinced that this aim consisted in protecting the end-users' ... interests, given that the prices of schoolbooks were and remained State-regulated" and magnanimously concede that there *might* have been *some* "legitimate aim pursued by those measures" (see paragraphs 46 and 47 of the judgment). The "even assuming" clause allows the majority to conclude that there is no "need to determine whether the implementation of the impugned reform pursued a legitimate aim" (see paragraph 46). I cannot agree with such an approach. There *is* such a need! And a legitimate aim *was* pursued by the respondent State, even if the measures implemented appeared to be disproportionate. By resourcefully avoiding to acknowledge that there was such an aim, that is to say, that the impugned measures were prompted by the already existing distortion of the schoolbook market, the judgment uses Article 1 of Protocol No. 1 as a tool for favouring one extreme version of economic liberalism against those versions which do not turn a blind eye to markets' social dimension(s). Throughout the whole text of the judgment, the promotion of this approach is not even camouflaged.

5. One last remark – an optimistic one. In paragraph 26 of the judgment it is stated that the Court will not address the "question as to whether in general a constitutional complaint to the Hungarian Constitutional Court is an effective remedy for the purposes of Article 35 § 1 of the Convention". This stance is a step forward from the disdainful disqualification, in a number of the Court's previous (even recent) judgments, of Hungary's Constitutional Court as something not relevant to the protection of human rights (I refer to my dissenting opinion in *Király and Dömötör v. Hungary*, no. 10851/13, 17 January 2017). The instant case was last deliberated on by the Chamber on 12 June 2018, but (for organisational reasons) the time span between the adoption of the judgment and its delivery turned out to be quite lengthy. In the meantime, the Court has delivered its decision in *Mendrei*

v. Hungary ((dec.), no. 54927/15, 19 June 2018), in which it has been acknowledged (at last!) that a complaint to Hungary's Constitutional Court *is* such an effective remedy. I hope that the present judgment is the last one to bear a slight trace of the previous distrust of the most important national constitutional instrument of this particular respondent State.

DISSENTING OPINION OF JUDGE WOJTYCZEK

1. I respectfully disagree with the view of the majority that in the instant case there has been a violation of Article 1 of Protocol No. 1 to the European Convention on Human Rights. The majority made a genuine attempt to develop the interpretation of the Convention in a business-friendly manner. I welcome this general approach but the detailed methodology applied by the majority and expounded in the reasoning prompts a series of objections. In my view, the case reveals all the weakness of the approach adopted by the Court towards economic liberty.

2. Article 1 of Protocol No. 1 guarantees every natural and legal person the "peaceful enjoyment of his possessions" ("*respect de ses biens*"). The Court has explained the meaning of this provision in the following terms:

> "By recognising that everyone has the right to the peaceful enjoyment of his possessions, Article 1 is in substance guaranteeing the right of property. This is the clear impression left by the words 'possessions' and 'use of property' (in French: '*biens*', '*propriété*', '*usage des biens*'); the '*travaux préparatoires*', for their part, confirm this unequivocally: the drafters continually spoke of 'right of property' or 'right to property' to describe the subject-matter of the successive drafts which were the forerunners of the present Article 1. Indeed, the right to dispose of one's property constitutes a traditional and fundamental aspect of the right of property (cf. the Handyside judgment of 7 December 1976, Series A no. 24, p. 29, § 62)." (*Marckx v. Belgium*, 13 June 1979, § 63, Series A no. 31)

The content of the right in question has been summarised as follows:

> "... in addition to possession of the property (*usus*), ownership also implies the right to dispose of the property and receive income from it (*abusus* and *fructus*)." (*Hirschhorn v. Romania*, no. 29294/02, § 57, 26 July 2007; see also *Mosteanu and Others v. Romania*, no. 33176/96, § 61, 26 November 2002)

Moreover, in numerous cases the Court has found that undue restrictions on the ability to use and dispose of possessions amounted to a breach of Article 1 of Protocol No. 1 (see, for instance, *Papamichalopoulos and Others v. Greece*, 24 June 1993, Series A no. 260B). Similarly, in many cases restrictions on the possibility of receiving income from possessions have led to a finding of a violation of Article 1 of Protocol No. 1 (see, for instance, *Hutten-Czapska v. Poland* [GC], no. 35014/97, ECHR 2006VIII).

It is clear that Article 1 of Protocol No. 1, by protecting *ius abutendi* and *ius fruendi*, encompasses the freedom to conclude contracts concerning possessions, that is to say, contractual freedom. By protecting *ius utendi*, it protects *inter alia* the freedom to use possessions for the purpose of developing income-earning activities. More generally, it encompasses the freedom to conduct business activities upon the economic basis of possessions. As a result, the right of ownership enshrined in Article 1 of Protocol No. 1 implies as an inherent element the freedom to conduct business activities.

Economic liberty is indeed a human right of fundamental importance for the enjoyment and protection of all the other rights guaranteed in the Convention. There is neither freedom nor democracy, nor the rule of law, without economic liberty. First and foremost, there is no prosperity without economic liberty. There cannot be meaningful social rights without economic liberty as a *conditio sine qua non* for creating wealth. The freedom to create and conduct one's own business is also an essential element of personal self-fulfilment and happiness. Effective legal protection of economic liberty is particularly important for physical persons conducting business activities individually, for micro-enterprises, for family enterprises and for small enterprises, that is, for the types of businesses which are crucial for economic development but which – unlike big companies – often lack the capacity to successfully lobby for a favourable legislative framework and advantageous administrative measures.

Moreover, economic liberty is part of the "common heritage of political traditions, ideals, freedom and the rule of law" referred to in the Preamble to the Convention. The Charter of Paris for a New Europe, adopted on 21 November 1990 by the States participating in the Conference on Security and Co-operation in Europe – a group of States even broader than the Council of Europe – expressed this common heritage in the following terms:

> "Economic liberty, social justice and environmental responsibility are indispensable for prosperity.
>
> The free will of the individual, exercised in democracy and protected by the rule of law, forms the necessary basis for successful economic and social development. We will promote economic activity which respects and upholds human dignity."

Economic liberty has been reaffirmed several times by the Conference on Security and Co-operation in Europe and, later, by the Organization for Security and Co-operation in Europe, for instance in 1992 in the Helsinki Document and in 1999 in the Istanbul Document.

It is a pity that the Court – for ideological reasons – was and still is reluctant to draw the obvious conclusion from the wording of the Convention and the Protocols thereto by overtly recognising economic liberty as a fundamental human right encompassed by the guarantees of Article 1 of Protocol No. 1. Instead, it has preferred and still prefers to resort to subterfuge to protect certain elements of economic liberty by using the concepts of *clientele* and *goodwill*.

3. It has to be added that Article 1 of Protocol No. 1 empowers States to control the use of property in accordance with the general interest. It is therefore obvious that this provision, while protecting economic freedom, entitles States to set clear rules for business activities, provided that such rules are necessary to protect the general interest. Economic liberty means freedom from unnecessary restrictions. Restrictions on economic liberty

may be justified by the necessity to protect fundamental values such as, in particular, human dignity, the rights and freedoms of others, national security or the environment. The State is also entitled to intervene in order to correct the detrimental effects of market distortions. The higher the level of such distortions, the stronger the entitlement to interfere. The closer the market to the perfect competition pattern, the stronger the justification required for the interference. In exceptional circumstances – in particular, in the case of severe and unavoidable market distortions – the State may decide to establish a State monopoly.

In any event, business activities are carried out in a quickly changing world and require incessant innovation and adaptation to the changing environment. The free market eliminates companies which are not able to adapt and constantly reinvent their business. Furthermore, technical progress and social changes may justify changes to legislation regulating business activities. All those factors limit the legitimacy of the entrepreneurs' expectation that the existing regulations will remain unchanged.

4. The Court, as mentioned above, has often apprehended economic freedom through the notions of *clientele* and *goodwill.*

In the case of *Van Marle and Others v. the Netherlands*, the Court held that "by dint of their own work, the applicants had built up a clientèle; this had in many respects the nature of a private right and constituted an asset and, hence, a possession within the meaning of the first sentence of Article 1" (see *Van Marle and Others v. the Netherlands*, 26 June 1986, § 41, Series A no. 101).

In another case it expressed the following views:

> "The Court has previously considered that rights akin to property rights existed in cases concerning professional practices where by dint of their own work, the applicants concerned had built up a clientele." (*Malik v. the United Kingdom*, no. 23780/08, § 90, 13 March 2012)

> "The Court reiterates that in cases involving professional practices, it has viewed restrictions on applicants' rights to practise the profession concerned as an interference where the restriction significantly affected the conditions of their professional activities and reduced the scope of those activities and where, as a consequence of the restriction, the applicant's income and the value of his clientele and business fell (see paragraph 90 above)." (ibid., § 105)

The approach of the Court has been summarised in the following way:

> "The applicability of Article 1 of Protocol No. 1 ... extends also to professional practices and their clientele, as these are entities of a certain worth that have in many respects the nature of private rights, and thus constitute assets (see among many authorities, *Van Marle and Others v. the Netherlands*, 26 June 1986, § 41, Series A no. 101, and *Buzescu v. Romania*, no. 61302/00, § 81, 24 May 2005)." (*Oklešen and Pokopališko Pogrebne Storitve Leopold Oklešen S.P. v. Slovenia*, no. 35264/04, § 54, 30 November 2010)

The case-law also affirms that *goodwill* is to be protected as a possession within the meaning of Article of Protocol No. 1 (see, for instance, *Buzescu*, cited above, § 83).

5. In the instant case, the Court, following one existing line of case-law, apprehends economic freedom through the concept of clientele. Under this approach, clientele acquired through a business activity is considered a possession protected by Article of Protocol No. 1. It is true that interference with economic liberty often affects an entrepreneur's clientele (in every sense of the word). Loss of clientele may be an important indication of interference with economic liberty. There is therefore no doubt that effects on clientele have to be taken into account for the purpose of assessing the permissibility of measures affecting business activities. However, an approach consisting in using clientele as the main criterion for identifying the existence of interference with possessions in the sphere of economic liberty prompts several objections.

Firstly, the terms "clientele" in English and "*clientèle*" in French may be used in different meanings. In everyday language they usually mean the set of current clients. They may also refer to both current clients and potential future clients. Or they may designate the capacity to attract and retain clients. The Court does not explain the exact meaning of the term "clientele/ *clientèle*" but the reference in the reasoning of certain judgments to the *building up* of clientele over a period of years (see, for instance, *Iatridis v. Greece* [GC], no. 31107/96, § 54, ECHR 1999II) may suggest that it pertains to the current set of regular customers rather than to occasional clients or potential future clients. This raises the question whether protection through the instrument of clientele extends to businesses relying mainly on one-time clients. In any event, in the absence of a clear explanation, no one knows exactly what the Convention protects, what the obligations of the State are or what current and potential entrepreneurs may legitimately expect from the public authorities.

Secondly, the Court has often stressed that a claim may qualify as a possession only if it is sufficiently established to be enforceable (see, for instance, *Polacek and Polackova v. the Czech Republic* (dec.) [GC], no. 38645/97, 10 July 2002). I note in this context that clientele is a matter of fact. It may take years to build up and maintain a clientele, while it may take moments to lose it. Legal scholars have expressed strong scepticism about the idea that clientele may be the object of a subjective right (see, for instance, P. Roubier, *Droits subjectifs et situations juridiques*, Dalloz, Paris 2015, p. 352). In many European States it is neither a subjective right nor a possession. In those systems there is no enforceable claim to have one's clientele protected. The mere assertion in the Court's case-law that clientele "has in many respects the nature of private rights", not based upon any

reasoning, is devoid of any persuasive force. The Court, while admitting that clientele does not have the nature of private rights in all respects, does not explain what the common features of both clientele and private rights are and why the similarities prevail over the differences.

More importantly, the concept of clientele as used by the Court protects the established entrepreneurs who have operated on the market for some time and who might already have not only recovered the sums invested but also made a substantial profit. It leaves outside the scope of protection those who are just about to enter a specific market or have just entered it without having had the time to build up their clientele. Such entrepreneurs might have invested considerable sums over several years preparing to enter an existing market, relying upon the assumption that the existing regulations will be maintained. Yet the recourse to the notion of clientele will leave them outside the scope of any Convention protection. The approach adopted by the Court is therefore fundamentally unjust because it protects only the established market operators, and may even protect those operators to the detriment of newcomers. Under the approach adopted, rent-suppressing and market-restoring measures, which by their very nature affect established clientele, require special justification whereas the opposite should apply: the preservation of existing market distortions should require justification under the Convention. If for instance, a State decides to abolish certain import taxes and this decision affects the clientele of domestic companies, according to the existing case-law the State has to justify this "interference" under the Convention and demonstrate that it complies with the principle of proportionality.

Moreover, clientele may be acquired through different means. Clientele may be acquired through fair competition in an undistorted market. It may be acquired through unfair practices or as result of market distortions. It is highly problematic to protect clientele without looking at the way it was acquired.

By the way, in the instant case, the following inconsistency has to be pointed out. The majority found that the applicant companies were deprived of their clientele, viewing this as a possession (see paragraphs 32 and 43 of the judgment). Yet they characterise the interference not as a deprivation of possessions for the purposes of the second sentence of the first paragraph of Article 1 of Protocol No. 1, but as a control of the use of property referred to in Article 1 § 2 (see paragraph 43 *in fine* of the judgment).

For all the reasons set out above, it would be preferable if the case-law of the Court under Article 1 of Protocol No. 1 in respect of business activities, instead of focusing on the protection of clientele, finally started to recognise economic liberty overtly and to protect it effectively as a fundamental human right.

6. The majority rightly recognise certain specificities of the textbook market (see paragraphs 52-53 of the judgment).

As attending school is an obligation and schoolbooks are indispensable to fulfil this obligation, parents have no other option but to buy the schoolbooks chosen either by the State or by the schools. The parents who pay for the product neither decide whether to buy or not to buy it, nor can they choose between competing products. It may be debatable whether the sum paid by the parents for the schoolbooks is the price of a product or rather a fee for accessing educational services.

The main specificity of the Hungarian schoolbook market was that the main distribution channel was through schools. The schools chose not only the textbooks to be bought by the parents but also their distributors, while the pupils' parents had to pay for the schoolbooks. The final price for the consumer played only a limited role in the choice of the product. However, according to the submissions of the parties, the legislation in force imposed a predetermined price for schoolbooks which was lower than in retail trade in bookshops. At the same time, the mass scale of distribution through schools enabled the providers to generate profits within the economic margin of manoeuvre left by the predetermined price.

In such a market, schoolbook distributors have strong incentives to influence school headteachers and teachers, who in return do not have to bear any economic costs as a result of their choices and therefore do not have any motivation to care about the final price of the products. There is a very strong incentive to offer different types of advantages, not only to the schools as institutions but also to school staff members personally. Such practices, if they develop, further increase the economic burden which ultimately always shifts onto those who pay for the product and indirectly impacts on schoolbook prices, even if they are regulated.

I note in this context that, according to the applicant companies' submissions (document dated 16 May 2017, p. 3, paragraph 8), not only schools as such but also "school referents" were paid a commission for their services (*ibid.*, p. 3, paragraph 9, and p. 8, paragraph 30). Moreover, the owners and managers of the applicant companies have all worked or are still working as teachers (*ibid.*, p. 3, paragraph 8). In any event, the applicant companies recognised that "the competition between the schoolbook distributors ... had no effect on the schoolbook prices" (*ibid.*, p. 6, paragraph 19). It did not contribute to bringing the schoolbook prices down below the maximum price set by the authorities.

7. These features are not the only relevant ones. Firstly, Article 2 of Protocol No. 1 to the Convention provides:

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the

right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

Schoolbooks are an essential instrument of the education provided to children. The State has the obligation to set up a school system providing high-level educational services *in conformity with the religious and philosophical convictions of parents* and to ensure effective access to appropriate textbooks. These aims justify State interference in the schoolbook market even in the absence of any market distortions, provided it respects the right to education in conformity with the parents' religious and philosophical convictions. In particular, the State should create mechanisms ensuring that poor families can have all the schoolbooks necessary for their children.

Secondly, the facts established by the Court show that the textbook market had been monopolised by the second applicant company in six counties or regions (see paragraph 11 of the judgment). The Court has not tried to establish a broader picture of the market, but the fragmentary information shows the formation of regional monopolies which further affected the operation of the market. The sample data available in the instant case constitute a strong indication that such monopolies might also have existed in other regions. The applicant companies stated that "market shares were relatively stable and it was unlikely that a new competitor could successfully enter the market from one day to another" (see the applicant companies' submissions dated 16 May 2017, p. 5, paragraph 16). It appears that the schoolbook market was based more on market sharing than on competition.

Thirdly, even if the conduct of the business was not dependent upon typical public orders placed and financed by public agencies, it was dependent upon the schools' choices of their business partners. The legislature has not only the power but also the duty to regulate such choices for the sake of the common good, striking an appropriate balance between the different private and public interests at stake.

Fourthly, the applicant companies alleged that they conducted only a seasonal business. Their activities slackened off during a substantial portion of the year. In other words, the applicant companies' business capacity was left unexploited for many months during the year. Prima facie, this choice of the companies' respective managers may be seen as surprising. It is not clear why the managers chose not to try to diversify the companies' activities, especially during the low season.

Fifthly, there are numerous other parameters which shape the textbook market, such as the frequency of changes to official school curricula, the frequency with which the publishers released revised editions and, in connection with this, the possibility of working in classes with second-hand

books and their availability to parents. These aspects have not been examined in the proceedings before the Court.

8. There is no doubt that the textbook market was a distorted market. The parties did not submit any evidence as to how those distortions could have affected the number of companies active on the market and their profitability, but it would be difficult to conclude that the broken character of the market and the creation of monopolies in many regions did not contribute to increasing profits (in contrast to the view of the majority as expressed in paragraph 53 of the judgment). Whether the whole situation could be characterised as economic rent is a different question.

Moreover, the clientele of the schoolbook providers was very different from the clientele in other Article 1 of Protocol No. 1 cases decided by the Court. Neither the pupils' parents nor the schools can be regarded as a clientele acquired through free competition on the market. The parents constituted a "captive" clientele acquired not through the attractiveness of the conditions offered to them by the distributors but as a result of choices made by other persons. Is this captive clientele a possession protected under the Convention? Does the Convention entrench this captivity?

Turning to the relations between distributors and schools, one has to stress that the underlying assumption in a democratic State ruled by law is that public institutions will permanently endeavour to lower the economic and social costs of the goods and services they contract. They always have the duty to find alternative, cheaper and better providers or, if the common good so requires, to completely reshape the regulation of the market segment concerned. In a public procurement market, nothing is guaranteed for the future. The distributors could not have had any legitimate expectation that schools would remain their clientele. They had to expect that the public authorities would always try to find better business partners.

In the circumstances explained above, although the entrepreneurs active in the schoolbook market in Hungary could legitimately expect that the existing business regulations would not be changed without sufficient reasons, they should not have been surprised by far-reaching State intervention in this market. In particular, the applicant companies, being aware of market distortions, which are a sufficient justification for changes to market regulations, could not reasonably expect that the State would preserve such distortions.

9. The Hungarian legislation passed in December 2011 and July 2012 (see paragraph 6 of the judgment) obliges schools to order schoolbooks for pupils through the newly created State-owned company. It *de facto* closed the most significant channel of textbook distribution to the applicant companies and guaranteed a privileged position to the official distributor by ensuring its monopoly over this distribution channel. As a result, the new

State-owned distributor seized control of almost the whole textbook market. There can be no doubt that this legislative change adversely affected the conditions in which the applicant companies operated. Such types of legislative reforms may be excluded by bilateral treaties for the protection of foreign investments if they affect entrepreneurs from the other State party to the treaty, even if the measures pertain to distorted markets.

On the other hand, the legislative reforms did not legally close the schoolbook market to the applicant companies. The applicant companies are free to provide schoolbooks to bookshops, parents or private schools and to distribute schoolbooks through any other channels. All those channels of distribution were left untouched, but in the Hungarian context they were of minor economic importance as parents preferred to buy books ordered by the schools.

Moreover, the impugned measures started to produce their effects in September 2013 (see paragraph 6 of the judgment), more than twenty months after their publication. The applicant companies therefore had a relatively long period to adapt and reinvent their business. In particular, they could have used for this purpose the long periods when their activities slowed down. No obstacles to the diversification of their business activities have been demonstrated.

The majority point to the fact that the reform did not envisage any compensation for the companies affected (see paragraphs 51 and 57 of the judgment). In my view, in certain circumstances, past profits made in a distorted market may be seen as anticipated compensation for subsequent changes to legislation adversely affecting business conditions.

10. The majority rely on the data provided by the applicant companies, which allege that their margins were lower that the margin guaranteed legally to the State-owned distributor (see paragraph 46 of the judgment). This is indeed a relevant factor which has to be taken into account. I welcome the fact that the Court decided to introduce an economic rationality analysis as part of the proportionality assessment under Article 1 of Protocol 1. It is a major and positive development in human rights adjudication. Economically irrational interference with economic liberty cannot be justified under the Convention. At the same time, I consider that the concrete argument put forward is not decisive. Firstly, the economic rationality analysis should be carried out in a broader context; otherwise the balancing exercise becomes irrational. The Government argued that the reform measures had resulted in a broader group of parents having access to schoolbooks financed by the State. This element and other elements of the reform seen as a whole should also have been examined by the Court for the purpose of the proportionality assessment. Secondly, it is not clear whether the methodology of determining the maximum schoolbook prices has

changed with the reform. The Court should also have established the actual pricing policy applied by the new distributor, and whether the margin guaranteed by law to the new State-owned distributor was effectively applied in practice or whether the newly created company provided schoolbooks to parents below the maximum price. Thirdly, before the reform the distributors offered a commission to schools in exchange for certain services (see paragraph 39 of the judgment). It is not clear to what extent the reform enabled the schools to get rid of these burdensome tasks and allocate the corresponding resources for educational purposes.

It has to be added here that the Court has established that the books went from the publishers to the parents through at least two distributors (see paragraph 8 *in fine*). According to the submissions of the applicant companies (as summarised in paragraph 39 of the judgment), the publishers granted the distributors a margin of 11 to 16%. It is not clear how this margin was divided between the subsequent distributors of the same product.

It is also important to take into account the following aspect in this context. The higher the margin legally guaranteed to the State-owned company, the greater the possibility for private distributors, operating with a lower margin, to creatively develop alternative channels for the distribution of schoolbooks, outplaying the official distributor.

11. In the instant case – as already mentioned above – the Government have convincingly shown that the schoolbook market in Hungary was distorted, although they have not been able either to present a detailed picture of the way the market operated or to establish the exact impact of those distortions on the business results of the applicant companies. My preference would have been for the Court to establish those elements of its own motion, and to assess the reform as a whole with all its costs and benefits. All those elements are relevant for the assessment of proportionality in the instant case, but they have not been established with sufficient clarity to decide the case. The Court could have commissioned expert opinions on those matters.

12. In conclusion, I would like to underline that protection of economic liberty is essential for preserving freedom as such. I fully share the majority's reluctance to accept State economic monopolies, and I respect their endeavour to give economic liberty a more prominent place in international human rights law. However, in view of the high level of obscurity concerning important factual elements of the instant case, the benefit of the doubt concerning the economic rationality of the reform – considered as a whole – has to be given to the respondent Government, who are, after all, accountable to the nation for the conduct of State economic and social policy.

Although the new legislation adversely affected the conditions in which the applicant companies operated, I do not see any direct interference with the applicant companies' possessions or with any of their legitimate expectations. At the same time, there are no sufficient grounds to conclude that the indirect interference with economic liberty was really disproportionate. The fragmentary factual findings made by the Court do not enable me to conclude that the impugned measures, taken in reaction to market distortions, violated Article 1 of Protocol No. 1 to the Convention.