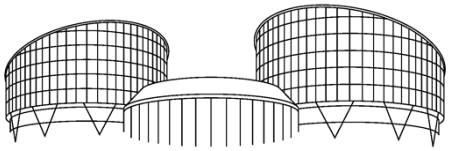

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF KURBAN v. TURKEY

(Application no. 75414/10)

JUDGMENT

Art 1 P1 • Peaceful enjoyment of possessions • Disproportionate character of *ex tunc* annulment of contract and retention of guarantee awarded by mistake due to belated notification about criminal proceedings against procurer • Award of and action under procurement contract constituting a legitimate expectation of a claim and property rights thereunder • Wide margin of appreciation in this area overstepped • Automatic and permanent annulment with no measures alleviating the financial burden placed on the applicant • Requirement that no individual and excessive burden is imposed when procurement authorities correct their mistakes in the interests of the public
Art 6 § 2 • Presumption of innocence • No implication of or comment on applicant's criminal guilt by domestic courts handling contractual dispute

STRASBOURG

24 November 2020

FINAL

19/04/2021

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

In the case of Kurban v. Turkey,

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

Jon Fridrik Kjølbro, *President,*
Marko Bošnjak,
Valeriu Griţco,
Egidijus Kūris,
Pauliine Koskelo,
Arnfinn Bårdsen,
Saadet Yüksel, *judges,*
and Stanley Naismith, *Section Registrar,*

Having regard to:

the application against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Dursun Ali Kurban ("the applicant"), on 22 September 2010;

the decision to give notice to the Turkish Government ("the Government") of the complaints concerning Article 6 § 2 and Article 1 of Protocol No. 1 to the Convention and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 13 October 2020,

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

INTRODUCTION

1. The case concerns the annulment of the applicant's public procurement contract and forfeiture of his guarantee on the grounds that an indictment against him had been filed with a criminal court in relation to an offence concerning previous public procurements.

THE FACTS

2. The applicant was born in 1947 and lives in Trabzon. He was represented by Mr Y. Kurban, a lawyer practising in Istanbul.

3. The Government were represented by their Agent.

4. The facts of the case, as submitted by the parties, and as they appear from the documents submitted by them, may be summarised as follows.

I. CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

5. On 15 March 2006 the applicant was questioned by the police on suspicion of having been involved in manipulating several public procurement processes. The applicant was released the same day after his

questioning. The applicant submitted that a legal aid lawyer, A.B., had been appointed to be present during his police questioning. The Government did not contest this fact.

6. It appears that on 10 July 2006 the public prosecutor filed an indictment with the Trabzon Assize Court, accusing the applicant and others of organised crime in relation to the corruption of six public procurement processes. The dates of the tenders in respect of each of those procurement processes were 11 November, 12, 26 and 30 December 2005, and 4 and 30 January 2006. The applicant was accused of bid-rigging in the tenders held on 12 and 30 December 2005 and 4 January 2006.

7. On 24 July 2006 the Trabzon Criminal Assize Court issued a decision on jurisdiction, holding that the Erzurum Criminal Assize Court was competent to examine the case. This decision counted as the formal indictment.

8. The indictment and the notice of proceedings were served on the legal aid lawyer, A.B., on 26 July 2006.

9. The applicant submitted that he had never been notified of the proceedings himself and that he had become aware of the criminal proceedings only when his public procurement contract was annulled (see paragraph 17 below).

10. At the time of the parties' submissions to the Court, the criminal proceedings were still pending before the domestic courts.

II. TENDER AND PROCUREMENT CONTRACT

11. On 19 September 2006 the Trabzon Regional Directorate of the State Hydropower Works ("the Trabzon Directorate") put out to public tender the construction of a flood-prevention scheme for a local river basin.

12. The applicant participated in the tender jointly with his partner, İ.Ç., who was designated as the lead contractor.

13. The applicant and İ.Ç. signed a public procurement contract on 31 October 2006 when it was announced that they had won the tender. Under the terms of the contract, the contractors were required to deposit a guarantee equivalent to 6% of the value of the contract, which was 5,924,905,58 Turkish liras (TRY – approximately 3,202,651 euros (EUR)) at the time), to ensure the contract would be fulfilled. Thus, at the signing of the contract, the applicant and his partner paid approximately the amounts of TRY 160,000 and 200,000 respectively as guarantees (approximately EUR 87,484 and 110,000 at the time). Under the terms of the contract, the guarantees would be returned to the applicant and his partner on the successful completion of the contract and provided that social security payments and taxes arising from the carrying out of the contract had been fully paid.

14. On 8 November 2006 the construction began in the local basin. During the construction, the applicant and his partner issued three construction progress reports[1], demonstrating the progress achieved in the project and the corresponding amounts they were entitled to recover from the Directorate. These were accepted and signed off by the procurement authority.

15. On 15 January 2007 the Erzurum Criminal Assize Court notified the Trabzon Governor's Office of the names of the people and the dates on which the indictment had been served in connection with public procurement offences. The applicant's name and the date on which the indictment had been served on A.B., (see paragraph 8 above) were on that list. A.B. was indicated as the applicant's lawyer.

16. On 25 January 2007 the Trabzon Governor's Office forwarded the information of 15 January 2007 to the Directorate and notified it that individuals who were being prosecuted in relation to public procurement offences were prohibited from participating in public tenders until the criminal proceedings were over.

17. When the Trabzon Directorate was informed of the charges against the applicant, it annulled the contract of 31 October 2006 by a decision of 25 January 2007 and informed the applicant and his partner of the decision to retain the guarantees indefinitely. In its decision, it referred to the relevant sections of the Public Procurement Act (Law no. 4734) and the Public Procurement Contracts Act (Law no. 4765) as well as the practice direction for the application of Law no. 4734 (*tebliğ*).

III. PROCEEDINGS BEFORE THE TRABZON COMMERCIAL COURT

18. On 14 February 2007 the applicant and his partner lodged an action with the Trabzon Commercial Court, challenging the annulment of their contract and seeking the return of their guarantee. The applicant argued that the annulment of the contract and forfeiture of his guarantee solely on the basis that he had been charged with a criminal offence and in the absence of a final judgment establishing his guilt was not compatible with the principle of presumption of his innocence. He further argued that he had not been made aware of the criminal proceedings brought against him. He submitted in that connection that the indictment had not been served on him despite what was provided by Article 176 of the Criminal Procedure Act. Had he been apprised of the proceedings against him, he argued that he would have considered not participating in the public tender of 19 September 2006. He

[1] The term "progress report" (*hakediş raporu*) is used in Turkish law to describe interim statements sent by a contractor or service provider to its client as the work progresses and entitling it to instalment payments.

also asked the Trabzon Commercial Court to refer the matter to the Constitutional Court to test the constitutionality of sections 58 and 59 of Law no. 4734 and section 21 of Law no. 4735.

19. On 16 May 2007 the Trabzon Commercial Court decided to refer the matter to the Constitutional Court to test the constitutionality of sections 58 and 59 of Law no. 4734 and section 21 of Law no. 4735, noting that there were serious doubts as to the compatibility of those provisions with the rule of law, equality and the principle of presumption of innocence and the Convention.

20. However, as the Constitutional Court did not examine the questions referred to it by the Trabzon Commercial Court within the time-limits provided by law, the Trabzon Commercial Court decided to resume its examination of the case on the basis of the impugned provisions.

21. Thus, on 27 January 2009 the Trabzon Commercial Court dismissed the action brought by the applicant but granted his partner's claims in respect of the latter's guarantee, holding that the applicable law and regulations at the time justified the exclusion of the applicant from the procurement process and the forfeiture of his guarantee to the authorities. The court noted that the applicable provisions did not allow for an exception from the rules when a contractor did not know that a criminal case had been brought against him before he had entered into a procurement contract. According to that court, when it became apparent that a person was being prosecuted for charges relating to a procurement offence, the procurement authorities were obliged to annul the contract and keep the guarantee. As regards the applicant's argument that he had been unaware of the criminal charges against him before his participation in the procurement process, the court held that the applicant had been questioned by the police in the presence of a lawyer in relation to those charges prior to the bidding process and that therefore he could have acted prudently and refrained from participating in the tender. In that connection, it reasoned that the applicant, who was in the business of participating in public tenders frequently, could have taken into account the possibility that a criminal case could be brought against him.

22. One of the sitting judges wrote a dissenting opinion, expressing his view that the conclusion with respect to the applicant was contrary to Article 6 § 2 of the Convention.

23. On 11 March 2009 the applicant appealed against the decision, submitting, *inter alia*, that he had not been notified of the indictment and notice of proceedings against him and that the serving of those documents on the legal aid lawyer appointed during his police questioning had been unlawful. He further drew attention to the fact that the prosecution authorities had not acted diligently and quickly enough to notify the procurement authorities of the charges against him; as a result, he submitted

that he had been penalised through no fault of his own and in contravention of Article 6 § 2 of the Convention.

24. On 26 June 2010 the Court of Cassation dismissed the applicant's appeal without responding to his arguments, holding that the Trabzon Commercial Court's decision had been in accordance with law and procedure.

IV. CONSTITUTIONAL COURT'S DECISION OF 14 JANUARY 2010

25. In its decision of 14 January 2010, published in the Official Gazette on 28 April 2010, the Constitutional Court dismissed an objection concerning the constitutionality of section 59 of Law no. 4734 by nine votes to two and unanimously in respect of section 21 of Law no. 4735.

26. The scope of the Constitutional Court's examination was limited to the part in section 59(2) of Law no.4734 that read "in respect of those persons against whom a criminal case has been brought on account of a criminal investigation in the scope of procurement processes within the scope of this Law ..." and to section 21(1) of Law no. 4735.

27. As regards the impugned provision set out in section 59(2) of Law no. 4734, the majority held that prohibiting a person from participating in a public tender on account of pending criminal proceedings against him or her was a preventive administrative measure and did not constitute a penalty or go against the principle of presumption of innocence. The Constitutional Court noted that the preventive measure pursued the legitimate aim of preserving public order and in particular ensuring the security and integrity of the procurement process. Having regard to the temporary nature of the administrative measure, which was equal to the duration of the criminal proceedings in question, the majority took the view that it was not disproportionately restrictive. One of the dissenting judges took the view that the preventive measure, while being characterised as an administrative measure, did not grant any discretion to the administration in its application since it was laid out by the legislature and therefore excluded its judicial review and for that reason was incompatible with the rule that all acts of the administration would be amenable to judicial review. Secondly, in view of the reality that criminal proceedings took a long time, it could not be said that the measure was proportionate. The other dissenting judge expressed the view that the measure was a penalty, which was attached to the fact that criminal proceedings had been lodged. In consequence it was, in his view, incompatible with the presumption of innocence.

28. As regards section 21(1) of Law no. 4735, the Constitutional Court unanimously held that the retention of the guarantee by the administration when it had become known that the participant had engaged in prohibited

acts or behaviour during the procurement process had been lawful since such acts and behaviour had rendered the contract void. The fact that it had not been possible to detect the said acts or behaviour before the signing of the contract had not bestowed an acquired right on the contractors for the contract to be upheld. In a concurring opinion, one member of the Constitutional Court agreed with the bench's conclusion on separate grounds. According to him, the retention of the guarantee had not been unconstitutional as long as there had been a judicial decision showing that the participant had engaged in prohibited acts or behaviour. Subsequent to a judicial decision, and only as a consequence of conviction, keeping of the guarantee would be a consequence of conviction which was compatible with the general principles of criminal law.

I. RELEVANT LEGAL FRAMEWORK AND PRACTICE

A. Domestic law and practice

1. Public procurement regulations

29. The relevant provisions of the Public Procurement Act (Law no. 4734) as in force at the time read as follows:

> Section 11 – Ineligibility to participate in the procurement
>
> "The following persons are prohibited from directly or indirectly participating in the procurement process on their own behalf or on behalf of others:
>
> a) Those who have been prohibited by [an administrative decision] or by a court decision from participating in public procurement processes on a temporary or permanent basis in accordance with a provision of this Law or another
>
> ...
>
> Bidders who participate in the procurement process despite these prohibitions shall be disqualified and their guarantee shall be registered as revenue. Moreover, where a contract is awarded to such a bidder and where his or her ineligibility has not been discovered during the evaluation process, the procurement shall be annulled and the guarantee shall be retained and registered as revenue."
>
> Section 14 – Joint ventures
>
> "A joint venture in the form of a consortium or partnership may be created by more than one real or legal person ... Partners in a partnership shall accomplish the work together whereas the members of a consortium may each be responsible for the accomplishment of a specific task ... In the case of a partnership, the partnership agreement must provide for joint and several responsibility of all the partners for the completion of the business venture."
>
> Section 17 – Prohibited acts and behaviours
>
> "The following acts and behaviours are prohibited:
>
> a) manipulating or attempting to manipulate the procurement process by fraudulent, coercive or collusive practices, including bribery and conspiracy.

b) Influencing or preventing bidders from participating in the procurement, bid-rigging and other behaviour to influence competition or the procurement decision.

c) Use or attempted use of forged documents or guarantee agreements (*teminat*).

d) Except for the allowed practice of alternative bidding, making more than one offer directly or indirectly, on his or her or others' behalf.

e) Participating in the procurement process despite the prohibitions listed in section 11."

Section 30 – Preparation of Offers and Bids

"...

Once an offer has been submitted [to the procurement authority] ... it may not be retracted or modified expect where the conditions of tender have been modified by the procurement authority [*zeyilname*]."

Section 40 – Awarding the tender and approval

"

...

Before approving the decision to award the tender to the bidder, the bidding authority shall verify whether the bidder is subject to any prohibition to participate in the tender within the scope of Section 58 and annex this verification to the decision to award the tender."

Section 43 – Non-provisional guarantee

"A guarantee equivalent to 6% of the tender value shall be required from the winning bidder in order to secure the carrying out of the contract and its conditions ..."

Section 44 – Obligation to sign the contract

"The winning bidder is under an obligation to sign the contract and secure it with the required guarantee set out in sections 42 and 43.

In the event of a failure to sign the contract or meet its conditions, the provisional guarantee shall be retained without any additional action on the part of the [responsible authority].

..."

Section 46 – Procurement leading to the procurement contract

"The procurement process shall lead to the conclusion of a contract. All contracts shall be prepared by the [relevant authority] and signed by the contractor and the procurement authority. If the contractor party is a joint venture, all partners must sign the contract ..."

Section 58 – Decision to ban bidders from participating in public procurement

"Those who are found to have engaged in the prohibited acts or behaviour listed in section 17 of this Law shall be banned from participating in public procurement processes for a period of no less than one year and up to two years depending on the nature of the committed acts or behaviour. Those who won a public contract but failed to sign it, excepting in the case of *force majeure*, shall be banned from procurement for a period of no less than six months and up to a year.

...

In the event where it is discovered during or after the procurement process that a person has engaged in prohibited acts and behaviour, he or she shall neither be allowed to participate in that procurement nor ... allowed to participate in another tender put out by the same procurement authority until the decision to ban them from the procurement process has taken effect.

The decision to ban a person from procurement processes shall be given no later than forty-five days from the date when the prohibited act or behaviour has been discovered. This decision shall be forwarded within fifteen days for publication to the Official Gazette and shall take effect from the date of its publication.

..."

Section 59 – Criminal liability

"A request to initiate a criminal investigation should be lodged with the competent public prosecutors in respect of real or legal persons who have engaged in the prohibited acts and behaviour listed in section 17 that constitute a criminal offence, even in cases where procurement has been completed by the contractor. In addition to the penalty [following conviction], such persons shall [also] be excluded from participating in any procurement processes for no less than one year and up to three years from the date following the administration's decision to ban the persons temporarily from procurement processes in accordance with section 58 of this Law.

Persons against whom a criminal case has been brought on account of a criminal investigation in the scope of procurement processes within the scope this law following the request filed with the public prosecutor under paragraph 1, ... cannot participate in procurement processes.

Public prosecutors shall notify the Central Procurement Authority and the relevant professional organisation of the persons who are banned from participating in procurement processes by a court order.

..."

30. Section 21 under law on Public Procurement Contracts (Law no. 4735) as in force at the time provided as follows:

"In the event that it is discovered after the signing of the contract that the contractor has engaged in a prohibited act or behaviour set out in Law no. 4734, the contract shall be annulled and wound up in accordance with general provisions and the guarantee registered as revenue.

Provided that 80% of the contract has been completed and there exists a public benefit in its completion, and one of the following conditions below are fulfilled

a) due to the urgency and lack of sufficient time to start the procurement process anew

b) impossibility to assign the procurement to another contractor

c) the prohibited act or behaviour manifested by the contractor is not of a nature to prevent the contract from being completed,

the [relevant authority] may ask the contractor to finish the contract. In this case ... the contractor shall be subject to a penalty equal to the amount of the guarantee and a supplementary guarantee."

31. Section XV of the Public Procurement Circular, issued by the Ministry of Finance and published in the Official Gazette on 25 July 2005 in respect of the application of Law no. 4734 provided, in so far as relevant, as follows:

> "I.
>
> 2. ...
>
> In order for the procurement authority to comply with the verification requirement in the last paragraph of section 40 of Law no. 4734, public prosecutors must communicate to the procurement authority without delay the names of persons against whom a criminal case has been brought or those that have been banned from participation in procurement processes by a court order by dispatching the indictment and the court order respectively.
>
> ..."

2. Relevant judicial practice

32. In a case involving an administrative decision to exclude an economic operator from procurement processes for a period of two years on account of him having knowingly participated in a tender despite the fact that he was being prosecuted for a procurement-related offence at the time, the Supreme Administrative Court's General Assembly of Administrative Proceedings Divisions (*Danıştay İdari Dava Daireleri Genel Kurulu*) held that the administrative decision had been unlawful since the economic operator had not known of the prosecution at the time he had participated in the tender (decision of 13 February 2013, E. 2008/3128; K. 2013/480). The General Assembly held in that connection that the economic operator had not been notified of the criminal proceedings against him and that therefore he could not be held accountable under section 59(2) of Law no. 4734. The General Assembly also dismissed the relevant authority's argument that the economic operator should have been aware of the criminal proceedings against him since he had been asked for a statement in the course of the criminal investigation because, in the General Assembly's reasoning, not all criminal investigations led to a suspect's being indicted.

3. Code of Criminal Procedure

33. Relevant provisions of the Code of Criminal Procedure ("the CPP") provide as follows:

Article 150

> "(1) The suspect or the accused shall be asked to choose defence counsel to act on his or her behalf. In cases where the suspect or accused declares that he or she is not able to choose defence counsel, ... counsel shall be appointed on his or her behalf, if he or she so requests.
>
> (2) If the suspect or the accused who does not have defence counsel is a minor, or an individual who is disabled to the extent that he or she cannot provide his or her

own defence, or is deaf or mute, then defence counsel shall be appointed whether or not he or she has requested representation.

(3) During the investigation or prosecution of offences entailing a sentence of more than five years' imprisonment, the provision in paragraph 2 shall also be applied.

..."

Article 175

"(1) With the admission of the indictment, the prosecution begins and the criminal case is brought.

(2) The court sets a date for a hearing after the admission of the indictment and summons the individuals who are to be present at the hearing"

Article 176

"(1) The bill of indictment shall be notified to the accused along with a summons to appear before the court.

..."

34. The Regulation on the assignment of defence counsel in accordance with Article 150 of the CPP provides as follows:

Section 5 – Assignment of defence counsel

"...

(2) If ... the suspect or the accused is being investigated or prosecuted for an offence entailing a sentence of more than five years' imprisonment, the Bar Association shall be asked to appoint defence counsel irrespective of whether the suspect or the accused has requested such assistance and provided that the suspect or the accused does not already have counsel.

...

(6) Appointment of defence counsel from the Bar Association shall be requested by the authority or the judge in charge of the investigation during the investigation stage and by the courts in the prosecution stage.

Section 6 – Principles governing appointments

(1) The defence counsel who has been appointed in the investigation shall preferably be appointed at the prosecution stage.

..."

Section – End of mandate

"(1) The mandate of defence counsel shall come to an end:

(a) at the investigation stage, with the decision not to prosecute becoming final, with the pronouncement of the decision on lack of competence or jurisdiction, or in the case of bringing a criminal case, with the acceptance of the indictment [by the criminal court].

b) at the prosecution stage with the decision on lack of competence or jurisdiction, with the decision on the merits becoming final or with the decision to transfer the case [to another jurisdiction].

c) with the death of the defence counsel or the suspect or the accused.

ç) with the voluntary appointment of other defence counsel.

(2) Where assistance by defence counsel is mandatory, such defence counsel may not be dismissed."

4. Compensation Commission

35. The Compensation Commission was set up in accordance with Law no. 6384 in order to provide for the settlement, by means of compensation, of applications lodged with the Court concerning length of judicial proceedings and non-enforcement or delayed enforcement of judicial decisions. A full description of the relevant domestic law may be found in *Turgut and Others v. Turkey* ((dec.), no. 4860/09, §§ 19-26, 26 March 2013).

36. The Compensation Commission's competence was extended by the presidential decree no. 809 of 7 March 2019, published in the National Gazette on 8 March 2019. Accordingly, the Compensation Commission is now entitled to examine and grant compensation to applicants in cases where the Court has found a violation of Article 1 of Protocol No. 1 without rendering a decision on compensation or in cases where it has reserved the question under Article 41 of the Convention (see *Kaynar and Others v. Turkey*, nos. 21104/06 and 2 others, § 24, 7 May 2019).

B. International law

1. European Union Law

37. European Union Directive 2014/24/EU ("the Directive") lays down general rules applicable on the award of public procurement contracts. It repealed the previous procurement directive (2004/18/EU) and came into force on 26 February 2014.

The Directive contains, *inter alia*, rules on mandatory and facultative grounds to exclude an economic operator from participating in a procurement procedure.

38. The following recitals of the Directive are relevant:

"...

(100) Public contracts should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests, terrorist offences, money laundering or terrorist financing.

...

(101) Contracting authorities should further be given the possibility to exclude economic operators which have proven unreliable, for instance because of ... grave professional misconduct, such as violations of competition rules ...

Bearing in mind that the contracting authority will be responsible for the consequences of its possible erroneous decision, contracting authorities should also remain free to consider that there has been grave professional misconduct, where, before a final and binding decision on the presence of mandatory exclusion grounds has been rendered, they can demonstrate by any appropriate means that the economic operator has violated its obligations ...

...

In applying facultative grounds for exclusion, contracting authorities should pay particular attention to the principle of proportionality. Minor irregularities should only in exceptional circumstances lead to the exclusion of an economic operator.

...

(102) Allowance should, however, be made for the possibility that economic operators can adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour. Those measures might consist in particular of personnel and organisational measures such as the severance of all links with persons or organisations involved in the misbehaviour, appropriate staff reorganisation measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules. Where such measures offer sufficient guarantees, the economic operator in question should no longer be excluded on those grounds alone. Economic operators should have the possibility to request that compliance measures taken with a view to possible admission to the procurement procedure be examined."

39. Articles of the Directive 2014/24/EU read, in their relevant parts, as follows:

"Article 57

Exclusion grounds

1. Contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with Articles 59, 60 and 61, or are otherwise aware that that economic operator has been the subject of a conviction by final judgment for one of the following reasons:

(a) participation in a criminal organisation, as defined in Article 2 of Council Framework Decision 2008/841/JHA (32);

(b) corruption, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of member States of the European Union (33) and Article 2(1) of Council Framework Decision 2003/568/JHA (34) as well as corruption as defined in the national law of the contracting authority or the economic operator;

(c) fraud within the meaning of Article 1 of the Convention on the protection of the European Communities' financial interests (35);

...

4. Contracting authorities may exclude or may be required by member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

...

(c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;

(d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;

...

Article 73

Termination of contracts

Member States shall ensure that contracting authorities have the possibility, at least under the following circumstances and under the conditions determined by the applicable national law, to terminate a public contract during its term, where:

...

(b) the contractor has, at the time of contract award, been in one of the situations referred to in Article 57(1) and should therefore have been excluded from the procurement procedure;

..."

2. OECD Recommendation

40. The OECD Recommendation on Public Procurement, which was adopted by the OECD Council on 18 February 2015, provides, in so far as relevant, as follows:

"III. RECOMMENDS that Adherents preserve the integrity of the public procurement system through general standards and procurement-specific safeguards.

To this end, Adherents should:

...

iv) Develop requirements for internal controls, compliance measures and anti-corruption programmes for suppliers, including appropriate monitoring. Public procurement contracts should contain "no corruption" warranties and measures should be implemented to verify the truthfulness of suppliers' warranties that they have not and will not engage in corruption in connection with the contract. Such programmes should also require appropriate supply-chain transparency to fight corruption in subcontracts, and integrity training requirements for supplier personnel.

...

XII. RECOMMENDS that Adherents apply oversight and control mechanisms to support accountability throughout the public procurement cycle, including appropriate complaint and sanctions processes.

To this end, Adherents should:

...

ii) Develop a system of effective and enforceable sanctions for government and private-sector procurement participants, in proportion to the degree of wrong-doing to provide adequate deterrence without creating undue fear of consequences or risk-aversion in the procurement workforce or supplier community."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

41. The applicant complained in substance under Article 6 § 2 of the Convention about the annulment of the contract of 31 October 2006 and the forfeiture of his guarantee. Notably, he alleged that those measures had been unlawful and contrary to the principle of presumption of innocence.

42. Article 6 § 2 provides as follows:

> "2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

C. Admissibility

1. The parties' submissions

43. The Government considered that Article 6 § 2 of the Convention had not applied to the proceedings before the Trabzon Commercial Court. In their view, those proceedings had not given rise to a "criminal charge" as they had been solely concerned with the question of whether the conditions of the annulment of the applicant's contract and of the retention of the guarantee had been realised. They furthermore considered the impugned measures to have been preventive in nature irrespective of a finding of guilt. The Government also considered inapplicable the second aspect of the presumption of innocence, which became relevant when proceedings subsequent to criminal proceedings had a link with the latter so as to make the protection enjoyed under Article 6 § 2 relevant in those other proceedings. According to the Government, neither the Trabzon Commercial Court's decision nor its reasoning had contained an opinion on the applicant's liability in respect of criminal law. For these reasons, the Government considered that Article 6 § 2 had not been applicable to the proceedings before the Trabzon Commercial Court.

44. The applicant argued that the authorities had sanctioned him only because a criminal case had been brought against him. In his view, the annulment of his contract and the retention of his guarantee had been a penalty that had derived from the sole fact of his being accused in criminal proceedings. Such a harsh consequence did not coincide with the principle that an accused should be presumed innocent until proved guilty.

Furthermore, the applicant considered that his situation had been exacerbated because he had not even known that a criminal case had been lodged against him until the Directorate's decision of 25 January 2007.

2. The Court's assessment

45. Article 6 § 2 safeguards the right to be "presumed innocent until proved guilty according to law". The Court has acknowledged in its case-law the existence of two aspects to the protection afforded by the presumption of innocence: a procedural aspect relating to the conduct of the criminal trial, and a second aspect which aims to ensure respect for the applicant's established innocence in the context of subsequent proceedings where there is a link with the criminal proceedings which have ended with a result other than a conviction (see, generally, *Allen v. the United Kingdom* [GC], no. 25424/09, §§ 93-94, ECHR 2013). Under its first aspect, the principle of presumption of innocence prohibits public officials from making premature statements about the defendant's guilt and acts as a procedural guarantee to ensure the fairness of the criminal trial itself. However, it is not limited to a procedural safeguard in criminal matters: its scope is broader and requires that no representative of the State should say that a person is guilty of an offence before his guilt has been established by a court (*Konstas v. Greece*, no. 53466/07, § 32, 24 May 2011). In that connection, the Court reiterates that Article 6 § 2 applies where a court decision, rendered in proceedings which were not directed against the person concerned in his or her capacity as an "accused" but nevertheless concerned and had a link with criminal proceedings simultaneously pending against him or her, may have implied a premature assessment of the person's guilt (see *El Kaada v. Germany*, no. 2130/10, § 37, 12 November 2015 with further references).

46. As to the period of time during which the presumption of innocence is applicable, the Court reiterates that Article 6 § 2 applies to everyone "charged with a criminal offence" within the autonomous meaning of this notion in the Convention, that is to say as of the official notification given to an individual by the competent authority of an allegation that he or she has committed a criminal offence (see *Bikas v. Germany*, no. 76607/13, § 30, 25 January 2018) or from the point at which his or her situation has been substantially affected by actions taken by the authorities as a result of a suspicion against her or him (see *Simeonovi v. Bulgaria* [GC], no. 21980/04, §§ 110-11, 12 May 2017 and the case-law cited therein).

47. Turning to the circumstances of the present case, the Court notes that the applicant was charged with manipulating several procurement processes in the bill of indictment deposited with the criminal court on 10 July 2006. Following the notification of the criminal proceedings to the procurement authorities, the applicant's contract was annulled on the grounds that he had been indicted before the criminal courts for procurement-related offences. In the proceedings before the Trabzon Commercial Court in which the applicant sought to challenge the annulment of his contract and the retention of his guarantee, that court upheld the actions of the administration solely on the grounds that the applicant had been indicted. The domestic court

itself questioned the compatibility of the applicable domestic law with the Constitution and in particular the principle of presumption of innocence which the applicant enjoyed as a result of being prosecuted. That being so, it upheld the annulment of the applicant's contract while the criminal proceedings were pending and in the absence of a final conviction. The Court therefore can assess under Article 6 § 2 of the Convention whether the applicant, without having been proved guilty according to law of the charges in the criminal proceedings, was regarded as guilty by the Trabzon Commercial Court in its impugned decision, including the reasoning and language used therein. As a result, Article 6 § 2 is applicable in the context of the civil proceedings at issue. The application is therefore not incompatible *ratione materiae* with the provisions of the Convention.

48. Lastly, the Court notes that this complaint is not manifestly ill‑founded within the meaning of Article 35 § 3 of the Convention nor is it inadmissible on any other grounds. It must therefore be declared admissible.

3. Merits

(a) The parties' submissions

49. The applicant argued that the presumption of innocence guaranteed by Article 6 § 2 of the Convention had been violated in the proceedings before the Trabzon Commercial Court in that the fact that he had been indicted at the time of the tender had been the sole factor in that court's decision. In the applicant's view, the domestic courts had presumed him guilty in the absence of a conviction.

50. The Government argued that the Trabzon Commercial Court's reasoning did not imply that that court had regarded the applicant as guilty of the charges for which he had been indicted. That court only reviewed whether the grounds invoked by the procurement authority had complied with domestic law. Lastly, the Government considered that the language employed by the Trabzon Commercial Court had not breached the applicant's right to be presumed innocent in respect of the criminal proceedings.

(b) The Court's assessment

51. The principle of presumption of innocence will be violated if a judicial decision concerning a person charged with a criminal offence reflects an opinion that she or he is guilty before she or he has been proved guilty "according to law". It suffices, even in the absence of any formal finding, for there to be some reasoning suggesting that the court or the official regards the accused as guilty (see, *inter alia*, *Allenet de Ribemont v. France*, no. 15175/89, § 35, Series A no. 308; *Daktaras v. Lithuania*, no. 42095/98, § 41, ECHR 2000-X; and *El Kaada,* cited above, § 52).

52. A fundamental distinction must be made between a statement that someone is merely suspected of having committed a crime and a clear declaration – in the absence of a final conviction – that an individual has committed the crime in question (see *Güç v. Turkey*, no. 15374/11, § 38, 23 January 2018). The latter violates the principle of presumption of innocence while the former has repeatedly been considered as complying with Article 6 (ibid., and *El Kaada*, cited above, § 54).

53. The Court is therefore called upon to determine whether in the present case the Trabzon Commercial Court through its reasoning or the language it used allowed doubt to be cast on the applicant's innocence, despite the fact that he had not been proved guilty by a criminal court.

54. The Court notes at the outset that the subject matter of the dispute before the Trabzon Commercial Court was limited to whether the annulment of the applicant's procurement contract had complied with the legal conditions set out in domestic law. In that connection, the Court agrees with the Government that the examination carried out by the Trabzon Commercial Court did not go beyond determining whether the applicant had been charged with a procurement-related offence at the time of his participation in the tender. There is no statement or reasoning used by the domestic court that implies that the court regarded him as being guilty of the charges when it upheld the annulment of the contract. Similarly, the domestic court did not comment on whether the applicant was or should be found guilty on the charges in the criminal proceedings (see, *mutatis mutandis*, *Güç*, cited above, § 42).

55. Having regard to the foregoing, the Court considers that the applicant's right to be presumed innocent has not been violated in the present case.

There has accordingly been no breach of Article 6 § 2 of the Convention in this connection.

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

56. The applicant argued that his right to peaceful enjoyment of his possessions had been violated in that his procurement contract had been annulled and the guarantee for the carrying out of the contract had been retained indefinitely by the authorities. He considered the impugned measure to be unlawful and in any event disproportionate.

57. Article 1 of Protocol No. 1 to the Convention provides as follows:

Article 1 of Protocol No. 1

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

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

A. Admissibility

1. The parties' submissions

58. The Government considered that the proceedings before the Trabzon Commercial Court had not come within the purview of Article 1 of Protocol No. 1 of the Convention because of the private law aspects of the dispute. In the Government's view, the parties to the procurement contract should be regarded as merchants and the procurement contract as a freely negotiated document to which Article 1 of Protocol No. 1 had not applied.

59. The applicant did not submit separate arguments concerning the admissibility of his complaint.

2. The Court's assessment

60. The first question which arises in the present case is whether the matter complained of by the applicant comes within the scope of Article 1 of Protocol No. 1 to the Convention. The Court notes in this respect that the Government have contested the applicability of this provision solely because they considered that the dispute was of a private law nature. On the other hand, they have not disputed that the applicant's procurement contract and the retention of his guarantee constituted "possessions" within the meaning of the Protocol. The Court considers that in examining the applicability of Article 1 of Protocol No. 1 to the dispute, it also has to address the latter question on its own motion.

61. It recalls in this connection that questions relating to the applicability of qualified rights under the Convention and the existence of an interference, the latter forming part of the merits of the relevant complaints, are often inextricably linked (see, *mutatis mutandis*, as regards the approach in examining the applicability of Article 10, *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, §§ 71 and 117, 8 November 2016, and also, as regards the applicability of Article 8 of the Convention, *Denisov v. Ukraine* [GC], no. 76639/11, § 92, 25 September 2018). As it previously explained in the latter case concerning Article 8, since the question of applicability is an issue of the Court's jurisdiction *ratione materiae*, as a general rule the relevant analysis should be carried out at the admissibility stage, unless there is a particular reason to join this question to the merits (ibid., § 93). As no such particular reason appears to exist in the present case, the Court will first examine under admissibility whether the applicant had a "possession", and if so, it will next examine whether the dispute can

be characterised as a civil law dispute between private parties in order to determine the extent of State's responsibility in this matter.

(a) Whether the applicant had a possession

62. The Court reiterates that, according to the established case-law of the Convention organs, "possessions" can be "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right (see, *Kopecký v. Slovakia* [GC], no. 44912/98, § 35, ECHR 2004-IX).

63. Where the proprietary interest takes the form of a claim, the Court has taken the view that it may be regarded as an "asset" only where it has a sufficient basis in domestic law (see *Chorbov v. Bulgaria*, no. 39942/13, § 35, 25 January 2018 with further references), or where the applicants had "a claim which was sufficiently established to be enforceable" (see *Gratzinger and Gratzingerova v. the Czech Republic* (dec.), no. 39794/98, § 74, ECHR 2002-VII) or where the persons concerned were entitled to rely on the fact that a specific legal act would not be retrospectively invalidated to their detriment (see *Kopecký*, cited above, § 47, and *Noreikienė and Noreika v. Lithuania*, no. 17285/08, § 36, 24 November 2015) and where such legal acts could consist of a contract, for example (see *Stretch v. the United Kingdo*m, no. 44277/98, § 35, 24 June 2003, and *Fedorenko v. Ukraine*, no. 25921/02, §§ 23-24, 1 June 2006).

64. In the present case, the applicant was awarded the procurement contract with his partner after the relevant procurement authorities announced that he and his partner had qualified for and won the tender of 19 September 2006. Under the terms of the procurement contract the applicant was jointly and severally responsible for finishing the construction project within the budget of TRY 5,924,905,58. He also gave an assurance that the contract would be carried out by giving a guarantee of TRY 160,000 (see paragraph 13 above). When the procurement authorities were informed of the criminal prosecution against the applicant, they annulled the contract and kept the guarantee. However, the Court observes that when the applicant was awarded the procurement contract, neither the procurement authority nor the applicant himself was aware of the criminal prosecution against the latter (the Court will come back to whether the notification of the indictment complied with domestic law below). Furthermore, after the signing of the contract, the applicant and his partner began developing the construction site and billed the administration for the progress they had made. This contract until its annulment by the contracting authority was sufficiently enforceable under domestic law and therefore constituted an asset protected under Article 1 of Protocol No. 1. It is true that the domestic courts subsequently upheld the annulment of the applicant's contract and the forfeiture of his guarantee; however, this fact is not decisive from the point

of view of determining whether at the time the applicant signed the contract and lodged the guarantee he could entertain a legitimate expectation that his presumed entitlement to the contract would not be capable of being called into question retrospectively (see, *mutatis mutandis*, *Čakarević v. Croatia*, no. 48921/13, §§ 54-65, 26 April 2018, with further references).

65. The Court therefore considers in the specific circumstances of this case that the applicant must be regarded as having had at least a legitimate expectation of being able to rely on the contract and complete it and expect the return of his guarantee, and this may be regarded, for the purposes of Article 1 of Protocol No. 1, as attached to the property rights granted to the applicant under the contract.

(b) Nature of the dispute and the scope of Court's review

66. In the Government's view, the present dispute concerned a civil law dispute between private parties since the procurement authority had acted in a commercial context as a private law actor.

67. In this connection, the Court first reiterates that such disputes do not themselves engage the responsibility of the State under Article 1 of Protocol No. 1 to the Convention (see *Zagrebačka banka d.d. v. Croatia*, no. 39544/05, § 250, 12 December 2013, and case-law cited therein), that is because domestic court decisions in accordance with the rules of private law cannot be seen as an unjustified State interference with the property rights of one of the parties (see, for example, *Balakchiev and Others v. Bulgaria* (dec.), no. 65187/10, § 90, 18 June 2013). However, this does not mean that the Article in question is inapplicable to that type of dispute (see *Vukušić v. Croatia*, no. 69735/11, § 39, 31 May 2016). A conclusion that the dispute concerns civil law rights between private parties could only affect the scope of the Court's review but does not exclude the applicability of Article 1 of Protocol No. 1. If court decisions in such disputes are arbitrary or otherwise manifestly unreasonable they would constitute a violation of Article 1 of Protocol No. 1 (ibid., and see also *Dzirnis v. Latvia*, no. 25082/05, § 55, 26 January 2017). If they are not, then those decisions do not amount to an interference with the right to peaceful enjoyment of possessions (see Zagrebačka banka d.d., cited above, § 252, the case-law cited therein).

68. Furthermore, in certain circumstances it may regard a dispute between the State or a municipality and an individual as a civil law matter, as it did in the case of *S.Ö., A.K., Ar.K. and Y.S.P.E.H.V. v. Turkey* ((dec.), no. 31138/96, 14 September 1999). In that case, the litigation concerned a succession dispute to which the State Treasury was a party as one of the contending heirs. The Court concluded that the Treasury's standing in these proceedings had been equal to that of an individual heir. It therefore decided that the domestic courts had gone no further than applying the rules of private law to a civil dispute, and, having noted that the impugned proceedings had not been arbitrary or unfair, declared the complaint under

Article 1 of Protocol No. 1 to the Convention inadmissible (see also *Gladysheva v. Russia*, no. 7097/10, § 54, 6 December 2011).

69. In the present case, the Court cannot describe the dispute strictly as a private law matter or the alleged interference as having stemmed solely from the court decisions settling a private law matter, for the following reasons.

The Court notes that the annulment of the applicant's contract resulted in the loss of the sums paid as a guarantee. While the Court does not lose sight of the contractual nature of the applicant's business relationship with the relevant State authority, the annulment of his contract, which resulted in him losing both his entitlements under the contract and the guarantee, stemmed directly from the application of a mandatory provision of domestic law. In other words, the dispute did not arise out of the interpretation of the contract in accordance with the principles of private law but was a direct consequence following from the applicant's being prosecuted for a procurement-related offence. It therefore follows that Article 1 of Protocol No. 1 applies to the dispute and the scope of the Court's review is not therefore limited only to whether the domestic court's judgments can be considered as arbitrary or otherwise manifestly unreasonable.

(c) Conclusion as to admissibility

70. The Court further finds 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

71. The applicant maintained that he had not been notified personally of the indictment and as a result he had not known of the prosecution when he had participated in the tender of 19 September 2006. He further submitted that when he had participated in the tender he had had no criminal record and there had been no official decision excluding him from public procurement. In that connection, he argued that the prosecution had not acted quickly enough to notify the procurement authorities of the criminal prosecution against him. The prosecution had only notified the procurement authorities of the charges against him six months after the date of the indictment. In the applicant's view, therefore, the delay of the authorities in coordinating the information amongst themselves coupled with his own ignorance of the fact that he had been indicted, had led to the outcome of him bearing the entire burden.

72. The Government submitted that the applicant had been charged in criminal proceedings with a procurement-related offence before the date of the tender in question and that fact had been sufficient for the procurement authorities to annul the contract. According to their submissions, the interference had therefore had a basis in procurement law and had been foreseeable and accessible for the applicant, who was a businessman familiar with procurement laws and regulations. The Government also argued that domestic law had not allowed for the authorities who had put the contract out to tender to continue with that contract once they had been notified of the criminal prosecution of the applicant. In that connection, the Government argued that both the procurement authority and therefore the public had suffered harm as a result of the annulment of the contract and the subsequent need to reinitiate the tender procedure. Thus, the retention of the guarantee, the purpose of which had been to secure the carrying out of the contract in the first place, had been a proportionate and lawful response.

2. The Court's assessment

(a) Whether there has been an interference

73. The parties did not dispute that the procurement authority's decision to annul the contract and to retain the applicant's guarantee as subsequently confirmed by the domestic courts constituted an interference with the applicant's property rights. The Court sees no reason to hold otherwise.

74. As for the applicable rule, the Court refers to its established case-law with regard to the structure of Article 1 of Protocol No. 1 and the three rules contained therein (see, among many other authorities, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, § 98, ECHR 2014).

75. Having regard to the complexity of the legal and factual issues involved in the present case, the Court considers that the alleged violation of the right of property resulting from the annulment of the applicant's procurement contract cannot be classified in a precise category. The case should therefore more appropriately be examined in the light of the general rule laid down in the first sentence of the first paragraph of Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Broniowski v. Poland* [GC], no. 31443/96, § 136, ECHR 2004-V).

(b) Whether the interference was justified

76. The Court reiterates that 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. The rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see *Lekić v. Slovenia* [GC], no. 36480/07, § 94, 11 December 2018). The principle of lawfulness also presupposes that

the applicable provisions of domestic law are sufficiently accessible, precise and foreseeable in their application (see *Broniowski*, cited above, § 147). In this regard, the Court reiterates that the principle of legal certainty is a fundamental aspect of the rule of law (*Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII).

77. As to the requirement of lawfulness, the Court observes that the applicant's procurement contract was annulled on the basis of section 59(2) of Law no. 4734 and section 21(1) of Law no. 4735. Section 59(2) provides that the existence of pending criminal proceedings against a bidder should constitute exclusionary grounds from the tender process until the criminal proceedings are final. Accordingly, the interference with the applicant's peaceful enjoyment of his "possessions" had a legal basis which was not declared unconstitutional by the Constitutional Court in its subsequent review. The Court therefore notes that the impugned interference was "lawful" for the purposes of the analysis under Article 1 of Protocol No. 1.

78. The Court is prepared to assume, in the next place, that the interference with the applicant's possessions could have pursued a legitimate aim in the public interest, specifically the prevention of collusive practices and the protection of the public purse and promotion of fair competition.

79. As to the proportionality of the measure, Article 1 of Protocol No. 1 requires of any interference that there should be a reasonable relationship of proportionality between the means employed and the aim pursued (see *G.I.E.M. S.R.L. and Others v. Italy* [GC], nos. 1828/06 and 2 others, § 300 28 June 2018, with further references). This fair balance will be upset if the person concerned has to bear an individual and excessive burden (ibid., § 300).

80. The Court reiterates that a wide margin of appreciation is usually allowed to the States under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds (see, among other authorities, *Lekić,* cited above, § 105).

81. The Court further notes that the margin of appreciation of Contracting States is substantially broader when the issues involve an assessment of candidates for public procurement and the policy choices as to mandatory or discretionary exclusion of candidates. Under the European Union Directive on public procurement, for instance, conviction for fraud, corruption, terrorist offences, money laundering or participation in a criminal organisation constitute mandatory exclusion grounds of an economic operator from public procurement. Under the same directive, contracting authorities are given the discretion to exclude economic operators who have been proven to be unreliable, for instance, because of

violations of competition rules, or other grave professional misconduct. Moreover, a right to terminate the contract is available to member States if it turns out that a contractor had been convicted in a final judgment for the reasons listed in Article 57 § 1 of the Directive at the time of the award of the contract. The Directive, like the OECD recommendation, advises procurement authorities to pay attention to the principle of proportionality in their use of discretion.

82. The Court would reiterate at this juncture that it has held in the context of social security payments that the authorities should not be prevented from correcting their mistakes, even those resulting from their own negligence, because holding otherwise would be contrary to the doctrine of unjust enrichment (see *Moskal v. Poland*, no. 10373/05, § 73, 15 September 2009). Concerning the case at hand, the same principle equally holds true, and the Court does not question that procurement authorities may be required to take measures aimed at correcting their mistakes in the interests of the public. Nonetheless, the above general principle cannot prevail in a situation where the individual concerned is required to bear an excessive burden (see, *mutatis mutandis*, *Dzirnis*, cited above, § 78).

83. The Court further notes that it is not its role to decide in principle whether the existence of criminal proceedings against a person should act as exclusionary grounds and whether such prosecution should serve as justifiable grounds to annul a contract and keep the guarantee. Under the Court's well-established case-law, its task is not to review domestic law *in abstracto*, but to determine whether the manner in which it was applied to, or affected, the applicants gave rise to a violation of the Convention (see, *mutatis mutandis*, *Garib v. the Netherlands* [GC], no. 43494/09, § 136, 6 November 2017).

84. Turning, therefore, to the question whether the domestic authorities engaged in the balancing of interests in the case as required by the Convention, the Court observes that the domestic legislation did not appear to leave any latitude to the procurement authorities in the matter when they were notified of the charges against the applicant. Similarly, the domestic courts reviewing the impugned measure were prevented from carrying out an assessment of proportionality as they interpreted the domestic law provisions to leave no room for the discretion of the courts, ruling out any possibility for the consideration of alternative arrangements. It therefore follows that no assessment of proportionality as required by the Convention was carried out in the domestic proceedings. The Court will therefore have to assess for itself whether the result had been disproportionate.

85. The Court finds it useful in that connection to highlight a number of specificities arising in the case and the conclusions it draws from them. First, it notes that when the invitation to tender was announced on 19 September 2006, an indictment accusing the applicant had already been

filed with the criminal court on 10 July 2006, which was accepted by that court on 24 July 2006. Under normal circumstances and in accordance with section 59 of Law no. 4734, the applicant should never have been allowed to tender. Domestic law, in particular the relevant Circular, required the prosecution to inform the public procurement authorities without delay of any person who had been prosecuted in respect of a procurement-related offence (see paragraph 31 above). In the present case, this notice by the criminal court reached the authorities six months after the indictment had been deposited with the criminal court. Six months can hardly be considered swift in the procurement context, where time is of the essence. Thus, the Court notes that the authorities acted negligently in communicating crucial information that affected the qualification of participants in the procurement process.

Secondly, the applicant himself was never notified of the indictment against him despite the explicit provision in the CPP requiring that the accused be notified of the indictment (see paragraph 33 above) and the provision in the regulation on the assignment of defence counsel, which specifies that the mandate of the State-appointed defence counsel in the investigative stage terminates when the indictment is accepted by the criminal court (see paragraph 34 above). It seems to the Court therefore that the notification of the indictment to the legal aid lawyer whose authority at that point had been limited to assisting the applicant during his police questioning was not in accordance with the law. The Court is not therefore convinced by the Government's argument that the applicant was notified of the criminal proceedings against him. Furthermore, the absence of any proof of the applicant's having been aware of the proceedings against him when he participated in the tender leads the Court to conclude that the applicant cannot be accused of acting in bad faith when he participated in that process. Lastly, for the same reasons set out in the Supreme Administrative Court's General Assembly of Administrative Proceedings Divisions (see paragraph 32 above), the Court cannot subscribe to the reasoning that the applicant should have refrained from participating in the tender by anticipating that a criminal case could be lodged against him following his questioning by the police.

86. Having regard to the specific circumstances above which had a decisive impact on the situation the applicant found himself in, and notwithstanding the margin of appreciation allowed to a State in choosing the most appropriate response in such cases, the Court finds that the annulment of the applicant's contract with *ex tunc* effects and the retention of the guarantee was disproportionate. In particular, the Court considers that even if the termination of the contract had been necessary and unavoidable, the fair balance principle would at least require that a less severe measure alleviating the financial burden placed on the applicant be applied, such as the return of his guarantee and reimbursement of some or all of his costs.

87. Having regard to (i) the fact that the applicant was not notified properly of the indictment so that he could refrain from participating in the tender, (ii) the negligence on part of the procurement authority or the absence of coordination with the public prosecutor's office to verify whether there were any circumstances that would exclude the applicant from entering into a contract, (iii) the fact that the measure was applied as an automatic consequence of the fact that he had been indicted, (iv) and the irreversible and permanent nature of the impugned measure with no possibility for the applicant to claim a refund in the event that the criminal proceedings against him ended with a result other than a conviction, the Court concludes that the interference with the applicant's right was disproportionate to the aim pursued, in that he 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. APPLICATION OF ARTICLE 41 OF THE CONVENTION

88. Article 41 of the Convention provides:

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

A. Damage

89. The applicant claimed for pecuniary damage EUR 765,074 in respect of losses he had incurred as a result of the annulment of his procurement contract. The amount consisted of the following: (i) corresponding to his loss of profit in not being able to finish the contract: EUR 494,710; (ii) the amount of the guarantee EUR 87,484; (iii) stamp duty, notary fees and other costs in relation to the participating the tender: approximately EUR 24,780; (iv) expenses in relation to the dismantling of the construction site: EUR 78,658; (v) depreciation in value of the excavator the applicant had bought for the carrying out of the contract: EUR 69,061. The applicant also submitted that he had substantially incurred a loss of income because of the criminal proceedings against him which had not been completed for more than ten years. In that connection, he asked the Government to compensate him for loss of potential earnings on the basis of his average income in the five years preceding the events. On the basis of his income tax statements for those years, he submitted that his average annual earnings had been TRY 120,559.

90. The applicant also claimed a separate award in respect of non-pecuniary damage, stating that his reputation had been damaged as a result

of the impugned proceedings. He claimed 100,000 United States dollars (USD).

91. The Government contested the claims. In their view, there was no causal connection between the damage claimed by the applicant and the violation alleged. In any event, they considered the sums to be speculative and excessive.

92. The Court notes that the Compensation Commission is now entitled to examine just satisfaction claims in applications where the Court has found a violation of Article of Protocol No. 1 to the Convention but has not ruled on the applicants' claims for just satisfaction under Article 41 of the Convention or has decided to reserve the question (see paragraph 36 above). The Court further notes that in the recent case of *Kaynar and Others* (cited above) where it found a violation of Article 1 of Protocol No. 1 on account of the legislative interference that had deprived the applicants of the possibility to obtain the registration of their land, it decided to strike out the part of the application relating to Article 41 of the Convention on the basis that the Compensation Commission could decide the question in a better informed manner having regard to the various complexities arising out of the calculation of pecuniary damage (ibid., §§ 76-78, and compare *Timurlenk v. Turkey*, no. 37758/08, §§ 34-36, 28 January 2020).

93. The Court reiterates that, in principle, a judgment in which it finds a violation of the Convention imposes on the respondent State a legal obligation to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 32, ECHR 2000 XI). In the case at hand, the Court has found that the interference with the applicant's property rights was disproportionate specifically because of the termination of the contract with *ex tunc* effects in the absence of any consideration for the return of the security deposit in whole or in part, or reimbursement of some or all of his costs (see paragraph 86 above).

94. Having regard to large number of imponderables involved in the calculation of pecuniary damage and the impossibility of quantifying exactly the loss sustained by the applicant, the Court considers that the compensation commission, having the legal and technical means, would be better equipped to determine the question of just satisfaction in the present case.

95. The Court therefore decides to strike out the part of the application relating to the pecuniary and non-pecuniary damage under Article 41 of the Convention.

B. Costs and expenses

96. As the applicant did not make a claim for costs and expenses, the Court does not make an award under this head.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds*, that there has been no violation of Article 6 § 2 of the Convention;

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

4. *Decides*, to strike the part of the application relating to Article 41 of the Convention concerning pecuniary and non-pecuniary damage on account of the violation of Article 1 of Protocol No. 1 to the Convention, out of its list of cases;

Done in English, and notified in writing on 24 November 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Jon Fridrik Kjølbro
Registrar	President

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

J.F.K.
S.H.N

CONCURRING OPINION OF JUDGE KOSKELO

1. I agree with my colleagues that there has been no violation of Article 6 § 2 and a violation of Article 1 of Protocol No. 1 in the present case. I have, however, found it necessary to submit this separate opinion because of the reasoning by which the judgment concludes that the applicant had a "possession" protected under Article 1 of Protocol No. 1.

2. The interpretation of what constitutes "possessions" is cardinal in the context of Article 1 of Protocol No. 1 as the notion defines and delineates the scope of application of the provision. It is therefore important to reflect on how this concept is to be understood. The incremental and often casuistic evolution of the Court's case-law may give rise to situations where the contours of key concepts, in their autonomous meaning, turns out to be lacking in clarity or consistency. Such a state of affairs creates difficulties not least at the domestic level, where the primary responsibility of ensuring compliance and respect for the protected Convention rights lies. For the Court itself, and for the effectiveness of the Convention system as a whole, the scope of the Court's substantive jurisdiction is a matter of potentially far-reaching implications. There is thus a twofold need for clarity and consistency. It is against this background that the present opinion should be seen.

3. As far as the specific circumstances of the present case are concerned, there is no doubt, in my view, that the applicant's complaint did engage the application of Article 1 of Protocol No. 1. He had paid in the requisite amount by way of a guarantee intended to secure the performance of his contractual obligations, and thus had at least a legitimate expectation that he would not forfeit the right to its reimbursement in the absence of any breach of contract on his part.

4. The Chamber, however, relies on a much broader form of words to explain why Article 1 of Protocol No. 1 is applicable in the circumstances of the present case. This is what, in my view, calls for attention.

5. According to the judgment, the applicant had a "possession" because he had "at least a legitimate expectation of being able to *rely on the contract* and *complete it* and expect the return of his guarantee, and this may be regarded, for the purposes of Article 1 of Protocol No. 1, as *attached to the property rights granted* to the applicant under the contract" (see paragraph 65 of the judgment, emphasis added). This rather convoluted formulation gives rise to several questions regarding the notion of "possession" as set out in that provision and as hitherto interpreted by the Court. In particular, it appears that no distinction has been made, or maintained, between contractual rights and property rights.

6. It is worth noting at the outset that the above wording in paragraph 65 of the judgment appears to be modelled on what the Court stated in *Stretch v. the United Kingdom,* where a similar formulation was used, albeit in

different circumstances. In that case, the Court held that the applicant was to be regarded as having at least a legitimate expectation of exercising the option to renew [the existing contract of land lease] and that this might be regarded, for the purposes of Article 1 of Protocol No. 1, as attached to the property rights granted to him by Dorchester under the lease (see *Stretch v. the United Kingdom*, no. 44277/98, § 35, 24 June 2003). What is essential is that, in *Stretch*, the original lease contract entailed that the complainant had to erect at his own expense several buildings for light industrial use on the leased land and he was entitled to sub-let them for rent. The reference to "property rights granted" thus contemplated the investment already made by the lessee in the buildings he had erected by virtue of the original lease, the extension of which was at issue. The facts of the present case are thus not comparable to those in *Stretch*.

7. Under the contract from which the present complaint arises, the applicant undertook to construct a flood-prevention scheme for a local river basin. According to the above-cited conception adopted by the Chamber, that contract entailed that the applicant was "granted property rights". This raises the question: what were the "property rights" granted under that particular contract? On the other hand, the same sentence refers to the applicant's having a "legitimate expectation" of being able to rely on the contract. The idea of "property rights" and "legitimate expectations" are thus conflated.

8. What is clear is that by performing the agreed work, the contractor earns the agreed remuneration. Such a receivable undoubtedly constitutes a claim which falls under the notion of "possessions" for the purposes of Article 1 of Protocol No. 1. The wording of paragraph 65, however, suggests that the contract as such amounts to "property rights" for the benefit of the constructor as obligor, even to the extent that the works have not yet been performed and the remuneration has thus not yet been earned.

9. There is no doubt that as a matter of contract law, the applicant had both the right and the obligation to perform the agreed works, and the right to obtain the agreed payment for that performance. It does not follow, however, that these contractual rights also constitute "property rights" for the purposes of Article 1 of Protocol No. 1. The scope of the notion of "possessions" in this context is an issue that calls for closer analysis. The provision, after all, is concerned with the "right to property" and not with contractual rights in general.

10. In its case-law the Court, and formerly the Commission, have consistently held that "future income" can only constitute a "possession" to the extent that it has already been earned, or is definitely payable (see *Batelaan and Huiges v. the Netherlands* (dec.), no. 10438/83, D.R. 41, p. 176: *E.M. v. Norway* (dec.), no. 20087/92, 26 October 1995 [Plenary Commission]; *Wendenburg and Others v. Germany* (dec.), no. 71630/01, 6 February 2003; *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01,

§ 64, ECHR 2007-I; and *Malik v. the United Kingdom*, no. 23780/08, § 93, 13 March 2012).

11. The question at present is whether it is correct, or justified, to classify prospective income from an *existing* contractual relationship as a "possession", even where it has not yet been earned through performance of the corresponding contractual obligations and is not otherwise definitely payable. The formulation used in the present judgment appears to make such an assumption. There is, however, no clear support for this position in the existing case-law. As already indicated above (see paragraph 6), the case of *Stretch* must be distinguished on the facts. The same appears to apply to other case-law dealing with contractual situations. In *Fedorenko v. Ukraine* (no. 25921/02, § 25, 1 June 2006), the context of the case was that the applicant had contracted to sell his house to the State, and the dispute concerned a clause regarding the determination of the price, which thus had a direct impact on the value of the applicant's existing property in the context of its sale. In *Association of General Practitioners v. Denmark* ((dec.), no. 12947/87, 12 July 1989), the dispute concerned the level of fees that doctors could charge for treating their patients under an existing framework agreement, but their actual entitlement to remuneration obviously remained contingent on the treatment provided to each patient. Accordingly, at issue were the amounts due upon actual performance. The Commission did "not exclude" that Article 1 of Protocol No. 1 might be applicable but declared the application inadmissible on other grounds. In *Asito v. Moldova* (no. 40663/98, § 60, 8 November 2005), the complaint concerned the annulment of a contract in circumstances where the applicant had already made a financial contribution to the other party under the contract. In *Ceni v. Italy* (no. 25376/06, §§ 43-44, 4 February 2014), the Court expressly stated that the applicant's rights under Article 1 of Protocol No. 1 were engaged in the context of a preliminary contract for the purchase of an apartment on the grounds that she had already paid the price and obtained possession. Furthermore, in *Topallaj v. Albania* (no. 32913/03, § 95, 21 April 2016), the Court held that no "possession" existed on the basis of contracts that were conditional on the fulfilment of events which never came to fruition. The circumstances in that case were particular, and did not address the present question as to whether a contract could in general be considered to constitute a "possession" for the obligor, even to the extent that it has not yet been performed by the latter.

12. Thus, in the light of the actual circumstances of the above cases, the Court's existing case-law does not, in my view, lend support for a proposition entailing a general assimilation of contractual rights with property rights for the purposes of the scope of application of Article 1 of Protocol No. 1, in particular to the extent that the obligor cannot rely on pecuniary rights which have already been earned through the actual performance of obligations under the contract.

13. If indeed the contractual right to "rely on the contract" is classified as a "possession", many consequences would follow.

14. For instance, to mention just one, such a position would call into question the Court's settled case-law in the context of civil service/public employment law, where the Court has consistently held that a public servant's removal from office and the resultant loss of future income does not affect his or her "possessions" and thus does not engage the application of Article 1 of Protocol No. 1 (see *Nazif Yavuz v. Turkey* (dec.), no. 69912/01, 27 May 2004; *Kurtulmuş v. Turkey* (dec.), no. 65500/01, ECHR 2006-II; and *Buterlevičiūtė v. Lithuania*, no. 42139/08, § 70, 12 January 2016).

15. Notably, in this line of case-law, the Chamber in *Baka v. Hungary* (no. 20261/12, judgment of 27 May 2014) concluded that the applicant, who had been prematurely dismissed from his post as President of the Supreme Court of Hungary, could not rely on Article 1 of Protocol No. 1 in respect of his loss of income and other requisite benefits. That complaint was declared inadmissible as being incompatible *ratione materiae* with the provision in question, on the following grounds:

> "105. The Court reiterates that future income cannot be considered to constitute 'possessions' unless it has already been earned or is definitely payable (see *Erkan v. Turkey* (dec.), no. 29840/03, 24 March 2005 and *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 64, ECHR 2007-I). There is no right under the Convention to continue to be paid a salary of a particular amount (see *Vilho Eskelinen and Others* [GC], cited above, § 94). The dismissal of the applicant from the post of President of the Supreme Court indeed precluded him from receiving a further salary in that post. Furthermore, the new legislation passed in 2011 prevented him from enjoying the special post-retirement benefits as a former President of the Supreme Court. However, that income had not been actually earned. Nor can it be argued that it was definitely payable (see *Volkov v. Ukraine* (dec.), no. 21722/11, 18 October 2011; see conversely, *N.K.M. v. Hungary*, no. 66529/11, 14 May 2013)."

16. There is no evident reason why, in the assessment of whether or not there is a "possession", there should be a crucial distinction, in terms of the position of pecuniary benefits not yet earned through actual performance, between the situation of a person relying on a contract and that of a person relying on a status such as that of civil servant – including a judge, whose right to remain in office is an essential tenet of the rule of law. This serves as an illustration as to why the interpretation of the notion of "possessions", and the distinctions made in this context, raise some rather pressing questions.

17. In the event that a contract, or a status such as that of civil servant, were to be classified as a "possession" for the purposes of Article 1 of Protocol No. 1, under such a state of the law any measure based on a breach of contract, or breach of duty, would fall to be analysed as an interference with rights protected under that provision. Possible complaints arising from such situations would then in principle fall to be examined on their merits,

whether based on the negative or the positive obligations incumbent on the States Parties.

18. In sum, the issues raised by the reasoning adopted in the present judgment regarding the notion of "possessions" are of considerable general interest. As already mentioned, the implications could be considerable, including for the Court's caseload and case-processing time, as well as for legal certainty. The extent to which contractual or other similar relationships engage the application of Article 1 of Protocol No. 1 is a question that would call for a thorough analysis and a clear articulation of the principles and distinctions that should govern the interpretation of that key concept. While the outcome of this particular case does not depend on this point (see paragraph 3 above), it appears that the Court will need to revisit the issues in an appropriate future context.