



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

COURT (CHAMBER)

**CASE OF HENTRICH v. FRANCE**

*(Application no. 13616/88)*

JUDGMENT

STRASBOURG

22 September 1994

**In the case of Hentrich v. France\*,**

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,

Mr F. GÖLCÜKLÜ,

Mr L.-E. PETTITI,

Mr J. DE MEYER,

Mr N. VALTICOS,

Mr S.K. MARTENS,

Mr A.B. BAKA,

Mr L. WILDHABER,

Mr J. MAKARCZYK,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 24 February and 25 August 1994,

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

**PROCEDURE**

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 12 July 1993, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 13616/88) against the French Republic lodged with the Commission under Article 25 (art. 25) by a French national, Mrs Liliane Hentrich, on 14 December 1987.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6 paras. 1 and 2, 13 and 14 (art. 6-1, art. 6-2, art. 13, art. 14) of the Convention and Article 1 of Protocol No. 1 (P1-1).

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\* Note by the Registrar. The case is numbered 23/1993/418/497. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that she wished to take part in the proceedings and designated the lawyer who would represent her (Rule 30).

3. The Chamber to be constituted included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 25 August 1993, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr J. De Meyer, Mr N. Valticos, Mr S.K. Martens, Mr A.B. Baka, Mr L. Wildhaber and Mr J. Makarczyk (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the French Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's and the Government's memorials on 20 and 23 December 1993 respectively. On 6 January 1994 the Deputy Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 22 February 1994. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Miss M. PICARD, magistrat,  
on secondment to the Department of Legal Affairs,  
Ministry of Foreign Affairs, *Agent*,  
Mr J.-M. SOMMER, Head of the Office  
of Real Property Law, Department of Civil Affairs,  
Ministry of Justice,  
Mr E. BOURGOIN, Chief Inspector of Taxes,  
Department of Revenue, Ministry of the Budget, *Counsel*;

- for the Commission

Mr A. WEITZEL, *Delegate*;

- for the applicant

Mr G. ALEXANDRE, avocat, *Counsel*.

The Court heard addresses by Miss Picard, Mr Bourgoin, Mr Weitzel and Mr Alexandre, and also replies to questions put by it and by one of its members.

The Government and the applicant filed various documents at the hearing.

## AS TO THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

6. Mrs Liliane Hentrich, who is a French national, lives in Strasbourg.

7. On 11 May 1979 she and her husband, Mr Wolfgang Peukert, bought 6,766 square metres of land in Strasbourg for a total sum of 150,000 French francs (FRF). Further building was not permitted on the land, which was entered in the land register in several different parcels: 2,126 sq. m of land, 406 sq. m of ground, house and appurtenant buildings, 130 sq. m of ground and cowshed, 2,353 sq. m of garden, ground and shed, and 1,751 sq. m of garden.

8. The sale was concluded on the condition precedent that the SAFER (Regional Development and Rural Settlement Corporation) of Alsace did not exercise its right of pre-emption over the property within two months. The main tax office at Molsheim registered the sale on payment of duties, firstly on 28 May 1979 and then on 13 August 1979, when the sale took effect on expiry of the statutory time allowed for the SAFER to exercise its right, which it had not done.

#### A. The pre-emption

9. On 5 February 1980 Mrs Hentrich and her husband were notified by a bailiff of the following decision:

"As [the Commissioner of Revenue] considers the sale price declared in the contract of sale ... to be too low, he is exercising, for the benefit of the Treasury and with all the effects it entails, the right of pre-emption provided for in Article 668 of the General Tax Code over all the real property and appurtenant rights [acquired by them] ... [the Commissioner of Revenue] offers to pay [the buyers] or any other rightful claimant

(a) the price specified in the contract of sale,

(b) the ten per cent premium provided for in law, and

(c) the costs and fair expenses of the contract on production of all the appropriate vouchers."

## **B. The challenging of the pre-emption in the courts**

### *1. The proceedings in the Strasbourg tribunal de grande instance*

10. On 31 March 1980 the applicant and her husband instituted proceedings in the Strasbourg tribunal de grande instance against the Commissioner of Revenue for the département of Bas-Rhin. They sought to have the pre-emption set aside on the grounds that the time-limit for exercising the right had not been complied with, the notification had been null and void (this ground was not pursued at the hearing) and there had been a misuse of powers and a breach of the Convention and of Protocol No. 1. In the alternative, they applied for an assessment by a court expert of the market value of the property in issue and an examination of the sellers.

11. The tribunal de grande instance gave judgment against them on 16 December 1980. It ruled that the time allowed for exercising the right of pre-emption had begun to run on 13 August 1979 and it held that the State could not be blamed for not having exercised its right of pre-emption so long as the sale had not taken effect and was subject to the condition precedent.

12. It rejected the complaints based on the Convention in the following terms:

"As to the breach of the Convention ... allegedly constituted by the right of pre-emption in Art. 668 of the GTC [General Tax Code]

...

If the Court were to conclude on that account that Article 668 GTC conflicted with the provisions of the Human Rights Convention, [the plaintiffs] could legitimately maintain that the French courts must in future refuse to apply Article 668 GTC.

...

[The plaintiffs] began by arguing that Article 668 GTC was blatantly inconsistent with Article 1 para. 1 of the Protocol to the Convention (P1-1), which provides that every natural or legal person is entitled to the peaceful enjoyment of his possessions and that no one shall be deprived of his possessions except in the public interest.

But the Article referred to has a second paragraph, which provides: 'The preceding provision shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary ... to secure the payment of taxes ...'

It so happens that the French State, faced with tax evasion on an increasingly large scale, has felt obliged to enact the provisions of Article 668 GTC.

By means of that Article the State hopes to ensure proper payment of the duties levied on contracts of sale.

The impugned enactment is therefore not inconsistent with the provisions relied on.

[The plaintiffs] went on to argue that Article 668 fell foul of Article 6 para. 2 (art. 6-2) of the Convention ..., which provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law;

that the exercise of the right of pre-emption by the Revenue was a penalty for a 'presumed offence of tax evasion'; and

that they were therefore regarded, by the very fact of the right of pre-emption having been exercised, as tax evaders with all that that implies in the way of disgrace and without their having any possibility of exculpating themselves.

Article 668, however, states that the Revenue may exercise a right of pre-emption over property sold at a price it considers too low.

It is therefore not necessary to prove tax evasion before this provision can be applied.

It is sufficient for the price to appear to the Revenue to be too low without its having to determine the reason why it is too low, which may in fact have nothing to do with tax evasion (e.g. ignorance of the real value or kindness).

Admittedly, the provision was enacted solely to counter tax evasion, but those to whom it is applied are nevertheless not necessarily tax evaders and cannot be regarded as such; no penalty is imposed on them and the State even pays them 10% more than the price they paid.

This 10% premium has been provided for precisely because it may inadvertently happen that the right of pre-emption is applied in cases where there has been no attempt to evade tax by the persons concerned.

[The plaintiffs] are therefore wrong to regard themselves as disgraced and as having been punished for committing tax evasion.

[The plaintiffs] also alleged a breach of Article 6 para. 1 (art. 6-1) of the Convention ..., which lays down that a punishment can be imposed only after a hearing of the person whose rights are disputed or who is charged with a criminal offence.

But Article 668 GTC in no way disputes the rights of anyone who has acquired a property and the purchaser is not charged with any offence.

The provision merely confers a privilege on the State for the purpose of ensuring that taxes are paid.

It is therefore not necessary, as [the plaintiffs] maintained, to allow them to prove that they paid the proper price and did not conceal any payment.

Lastly, [the plaintiffs] asserted that they were the victims of a discriminatory measure prohibited by Article 14 (art. 14) of the Convention ...; and

that the measure was discriminatory in relation to other buyers of neighbouring properties at almost identical prices, against whom the Revenue had not exercised its right of pre-emption.

But the Revenue has complete freedom to exercise its right of pre-emption as it wishes.

There is no evidence before the Court to support the contention that the State was influenced by considerations of race, nationality, language, political opinion or any of the other criteria referred to in Article 14 (art. 14) of the Convention.

..."

## *2. The proceedings in the Colmar Court of Appeal*

13. The applicant and her husband appealed to the Colmar Court of Appeal on 23 January 1981. On 4 December 1981 the judge responsible for preparing the case for trial directed them to make their submissions by 5 February 1982.

After securing an extension of time until 7 May, the applicants filed pleadings on 29 April 1982 in which they reiterated the arguments they had adduced at first instance. They supplemented their complaint of discriminatory treatment by pointing out that there was another piece of land that could, they said, have been pre-empted and by criticising the Revenue for having chosen the special procedure of pre-emption instead of the ordinary procedure of making a supplementary tax assessment. Lastly, they argued that the decision to exercise the right of pre-emption did not contain the reasons required by section 3 of Law no. 79-587 of 11 July 1979 (see paragraph 22 below).

14. The Revenue filed its pleadings on 3 February 1983, as the judge responsible for preparing the case for trial had requested on 5 November 1982. The time-limit of 5 May 1983 that was given to the applicant and her husband for their reply was put back to 3 June and then 7 October. They filed their submissions on 19 September 1983. The pre-trial proceedings were concluded on 6 January 1984.

15. The Colmar Court of Appeal held a hearing on 21 January 1985 and gave judgment on 19 February 1985. It upheld the lower court's determination of the date on which the time allowed for exercising the right of pre-emption had begun to run and dismissed the appeal for the following reasons:

"The ground of appeal alleging that the notification of 5 February 1980 was unlawful because it did not, as required by section 3 of Law no. 79-587 of 11 July 1979, give any reasons must be rejected, account having been taken of the fact that it does not appear sufficiently substantial to constitute a preliminary point of administrative law, seeing that the notification appears to set out the legal basis and the reason of fact which prompted the Revenue to exercise the right of pre-emption.

For the rest, the Court, without the slightest hesitation, adopts the excellent reasons for which the court below rejected the grounds relating, firstly, to the misuse of powers of which the Revenue was allegedly guilty by acting speculatively and,

secondly, to the contravening by Article 668 of the General Tax Code of several fundamental principles laid down in the Convention ..."

### *3. The proceedings in the Court of Cassation*

16. The applicant and her husband appealed on points of law on 13 June 1985 and filed supplementary pleadings on 13 November.

They argued two grounds of appeal, the first based on failure to comply with the time-limit for exercising the right of pre-emption and the second on breaches of Article 1 of Protocol No. 1 (P1-1) and Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the Convention.

In support of the second ground - the only relevant one here - they maintained, firstly:

"...

It appears from reading these provisions [Article 1 of Protocol No. 1 and Article 6 para. 1 of the Convention (P1-1, art. 6-1)] together that no one can be deprived of his property, even by a tax law, without being able to defend himself in court proceedings. The fact remains, however, that the right of pre-emption conferred by Article 668 of the GTC (which has become Article L.18 of the Tax Proceedings Code) is exercised at the discretion of the State, which does not have to prove the allegation that the price was too low, and that this provision does not allow a dispossessed purchaser to show that he acted in good faith or that the price in question was a normal one. In the instant case the Court [of Appeal], which noted that the State's right was a discretionary one and that it was impossible for the expropriated party to be heard in his own defence and still concluded that Article 668 of the GTC conformed with the provisions of Article 1 of the First Protocol and Article 6 para. 1 (P1-1, art. 6-1) of the ... Convention ..., did not draw from its own findings the legal conclusions which followed from them and thus breached the aforementioned provisions ..."

They went on:

"Article 6 para. 2 (art. 6-2) of the ... Convention ... provides: 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.' It is established that the purpose of Article 668 of the GTC is to prevent tax evasion and it provides for a penalty in respect of those guilty of it. In the instant case the Court [of Appeal], which refused to recognise that this was the purpose and nature of the State's pre-emption so as not to apply to the State the provisions of Article 6 para. 2 (art. 6-2) of the Convention, misunderstood the meaning and scope of Article 668 of the GTC (which has become Article L.18 of the Tax Proceedings Code) and accordingly breached that provision.

Lastly, the Court [of Appeal], which noted that the Revenue could exercise its right of pre-emption without having to prove the expropriated party's guilt and without that party being able to prove his innocence, but still considered that such a measure did not contravene Article 6 para. 2 (art. 6-2) of the Convention, breached that provision in refusing to apply it."

17. The Revenue's defence was registered on 7 March 1986. The reporting judge, who was appointed on 18 April 1986, filed his report on 18 November 1986. The advocate-general was chosen on 2 January 1987.



Initially heard on 31 March 1987, the case was transferred on 19 May 1987 to a full court of the Court of Cassation's Commercial Division.

18. On 16 June 1987 the Court of Cassation (Commercial Division) delivered four leading judgments, including one dismissing the applicant and her husband's case.

As to the ground of appeal relating to the breach of provisions of the Convention, it said:

"... in the first place, where the Revenue exercises the powers vested in it by Article 668 of the General Tax Code, the dispossessed purchaser may ask a court to rule on a challenge by him seeking to establish that the conditions for applying the aforementioned provision were not satisfied.

In the second place, exercising the State's right of pre-emption as provided by the aforementioned Article 668 does not imply that the dispossessed purchaser has committed a criminal offence, from which it follows that the exercise of this right was not within the contemplation of Article 6 para. 2 (art. 6-2) of the Convention ...

The ground of appeal is therefore unfounded in every limb."

19. Since 1981, it has been possible to build on the land, subject to conditions. The land has not been resold but has been left at the disposal of a neighbouring market gardener. Its current value is in the region of FRF 330 per square metre.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. The Revenue's right of pre-emption

20. At the time of the pre-emption in question, Article 668 of the General Tax Code provided:

"Without prejudice to the provisions of Article 1649 quinquies A and for a period of six months from the date on which the formality of registration for tax purposes or the combined formality [simultaneous registration for tax purposes and entry in the land charges register] is completed, the Revenue may exercise for the benefit of the Treasury a right of pre-emption over real property, real-property rights, businesses or goodwill, rights to leases or to the benefit of a promise of a lease of all or part of a property where it considers the sale price to be too low, by offering to pay the rightful claimants the price in question and a premium of ten per cent.

The six-month period shall be reduced to three months where the formality is completed at the office for the area in which the property is situated.

The decision to exercise the right of pre-emption shall be served by a bailiff."

21. On 1 January 1982 Article 668 became Article L.18 of the Tax Proceedings Code and now provides:

"For a period of six months from the date of registration for tax purposes or the date on which the combined formality [simultaneous registration for tax purposes and entry in the land charges register] is completed, the State, represented by the Revenue, may exercise a right of pre-emption over real property, real-property rights, businesses or goodwill, rights to leases or to the benefit of a promise of a lease of all or part of a property where the Revenue considers the sale price to be too low, by offering to pay the purchaser or his successors in title the price in question and a premium of ten per cent.

The six-month period shall be reduced to three months where the formality is completed at the office for the area in which the property is situated.

The decision to exercise the right of pre-emption shall be served on the purchaser, vendor or their successors in title by a bailiff.

The exercise of this right shall not prejudice the Revenue's right to bring, where appropriate, adversarial supplementary assessment proceedings as provided for in Article L.55."

22. The administrative decision to exercise the right of pre-emption provided for in this Article must - so it is stated in the Prime Minister's circular of 10 January 1980 - contain reasons in accordance with Law no. 79-587 of 11 July 1979, which came into force on 11 January 1980 and whose relevant sections provide:

#### **Section 1**

"Natural or legal persons shall have the right to be informed without delay of the reasons for unfavourable individual administrative decisions concerning them.

To this end, reasons must be given for decisions which:

- (a) restrain the exercise of civil liberties or generally amount to a policing measure;
- (b) impose a penalty;
- (c) make the grant of an authorisation subject to restrictive conditions or impose obligations;
- (d) withdraw or rescind decisions creating rights;
- (e) assert prescription, an estoppel or a forfeiture;
- (f) refuse a benefit to which persons who satisfy the statutory conditions for receiving it are entitled."

#### **Section 3**

"The reasons required by this Law must be in writing and include a statement of the considerations of law and fact on which the decision is based."

## **B. The extent of review by the courts**

23. Jurisdiction to hear appeals against pre-emption decisions under Article 668 of the General Tax Code is vested in the ordinary courts.

Firstly, in a judgment of 22 December 1950 (Dalloz 1951, jurisprudence, p. 547) the Conseil d'Etat held that it had no jurisdiction, stating that "by reason of the serious interference with the right of ownership which the power granted to the Revenue ... to exercise a right of pre-emption over sold real property entails ..., it is for the ordinary courts ... to deal with cases concerning the right of pre-emption". Secondly, the ordinary courts have agreed to rule on challenges to pre-emption decisions. They initially reviewed only the formal correctness of pre-emption decisions (Lyons Court of Appeal, judgment of 14 April 1947, Gazette du Palais 1947, 2, 48). Subsequently they extended their review so as to satisfy themselves that pre-emptions had not had a speculative purpose and that they did not disclose any misuse of powers (Court of Cassation, Commercial Division, Lucan judgments of 5 February 1957, Juris-Classeur périodique 1957, I, 9875 and 9876).

Having regard to the discretionary nature of the right of pre-emption, the Court of Cassation held, however, that the courts could not review the Revenue's assessment that a declared price was too low.

In its four leading judgments delivered on 16 June 1987 (see paragraph 18 above) the Court of Cassation considerably widened the scope of judicial review. Explicitly abandoning its earlier view of the discretionary nature of the right of pre-emption, it held that the reasons given for decisions to exercise the right must be in writing and contain a statement of the considerations of law and fact on which the decisions were based. It concluded from this that reasoning which stated only "the Revenue considers the sale price to be too low" was inadequate as it was too summary and too general, the Revenue being required to specify the facts on which it based its assessment that the stipulated sale price was too low, in order to enable a dispossessed purchaser to challenge the assessment and establish that the agreed price corresponded to the real market value of the property.

In two of these cases the Court of Cassation quashed the impugned judgments for having contravened the provisions thus construed; in the other two, including the case of the applicant and her husband, it dismissed the appeals. The applicant and her husband were the only dispossessed purchasers who did not win their case in the Court of Cassation.

### C. Pre-emption in practice

24. In 1980 the Revenue exercised its right of pre-emption only once in the département of Bas-Rhin - against the applicant and her husband - and twenty-five times in the rest of France.

Between 1980 and 1986 it carried out eighty-eight operations of this kind.

Since the judgments of 1987 (see paragraph 18 above) it has refrained from resorting to pre-emption.

## PROCEEDINGS BEFORE THE COMMISSION

25. Mrs Hentrich applied to the Commission on 14 December 1987. In her submission, the exercise of the right of pre-emption had been an unjustified interference with her right of property, in breach of Article 1 of Protocol No. 1 (P1-1). It had raised a presumption that she was guilty of tax evasion, contrary to Article 6 para. 2 (art. 6-2) of the Convention. She had been denied the benefit of the right of access to a court that would give her a fair trial within a reasonable time, in disregard of Articles 6 and 13 (art. 6, art. 13) of the Convention. Lastly, she submitted that there had been discriminatory treatment, contrary to Article 14 (art. 14) of the Convention, in the enjoyment of the rights secured in the aforementioned provisions.

26. The Commission declared the application (no. 13616/88) admissible on 5 December 1991. In its report of 4 May 1993 (Article 31) (art. 31), it expressed the opinion that

(a) there had been a violation of Article 1 of Protocol No. 1 (P1-1) (twelve votes to one);

(b) there had been a violation of Article 6 para. 1 (art. 6-1) of the Convention as regards the fairness and length of the proceedings (twelve votes to one);

(c) there had been no violation of Articles 6 para. 2 and 14 (art. 6-2, art. 14) of the Convention (twelve votes to one); and

(d) it was unnecessary to examine separately the complaint based on Article 13 (art. 13) of the Convention (unanimously).

The full text of the Commission's opinion and of the four partly dissenting opinions contained in the report is reproduced as an annex to this judgment\*.

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\* Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 296-A of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

## FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

27. In their memorial the Government asked the Court to

"dismiss the application lodged by Mrs Hentrich by holding that the complaints based on breaches of Article 6 para. 1 of the Convention and Article 1 of Protocol No. 1 (art. 6-1, P1-1) are inadmissible for failure to exhaust domestic remedies or, in the alternative, that they are unfounded; that Article 6 para. 2 (art. 6-2) of the Convention is not applicable in this case or, in the alternative, that the complaint based on it is ill-founded; that the complaint based on the failure to try the case within a reasonable time is unfounded; and, lastly, that the complaints based on breaches of Articles 13 and 14 (art. 13, art. 14) of the Convention are unfounded".

## AS TO THE LAW

### I. INTRODUCTION

28. Essentially, Mrs Hentrich claimed to be the victim of a violation of Article 1 of Protocol No. 1 (P1-1) on account of the Revenue's exercise of the right of pre-emption conferred on it by Article 668 of the General Tax Code. She also maintained that the national proceedings had not afforded her an adequate opportunity to present her case to the French courts, contrary to Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the Convention.

### II. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

29. As they had done before the Commission, the Government submitted that domestic remedies had not been exhausted.

The first limb of the second ground of appeal in the Court of Cassation, they said, mentioned Article 1 of Protocol No. 1 (P1-1) but did not refer to public interest or to the proportionality of the interference. Its thrust was to impugn Article 668 of the General Tax Code in that it did not allow a dispossessed purchaser to show his good faith, not to argue that the right of pre-emption infringed the right of individuals to the peaceful enjoyment of their possessions.

Furthermore, Mrs Hentrich had not put the Court of Cassation in a position to remedy the shortcomings of the national proceedings, since she had not alleged before it that Law no. 79-587 of 11 July 1979 had been contravened.

30. The Court points out, firstly, that Article 26 (art. 26) of the Convention must be applied "with some degree of flexibility and without

excessive formalism" (see the *Castells v. Spain* judgment of 23 April 1992, Series A no. 236, p. 19, para. 27).

It notes, like the Commission, that at all stages of the national proceedings the applicant expressly relied on the relevant provisions of the Convention and indicated to the domestic courts in substance the complaints now made at Strasbourg.

31. As regards the applicant's submissions based on the incompatibility of Article 668 of the General Tax Code with Article 1 of Protocol No. 1 (P1-1), the Court notes that these were not new complaints as Mrs Hentrich confined herself before the Convention institutions to developing the argument already considered by the French courts, namely that Article 668 did not comply with, *inter alia*, the provisions of Article 1 of Protocol No. 1 (P1-1).

32. As regards the complaints relating to the proceedings, the applicant admittedly did not rely on Law no. 79-587 in the Court of Cassation as she had done in the Court of Appeal. It cannot be overlooked, however, that the Colmar Court of Appeal (see paragraph 15 above), like others at the time, had adopted the restrictive approach that had been taken up to then by the Court of Cassation. The applicant's omission could therefore only justify this limb of the objection if the Government had persuaded the Court that at the time of the appeal on points of law an allegation that the Law in question had been contravened would have afforded a prospect of success such that there was an effective remedy. The Government, however, did not cite a single contemporaneous decision of the Court of Cassation to that effect.

Lastly, the Government did not provide a convincing explanation of the Court of Cassation's position. On the one hand, the Court of Cassation did not doubt that the exercise of the right of pre-emption was compatible with Article 6 (art. 6) of the Convention and Article 1 of Protocol No. 1 (P1-1) as long as a dispossessed purchaser could have a court review whether the conditions of its exercise had been satisfied (see paragraph 18 above); and on the other hand, it could not be unaware that in the instant case, as a result of the application of its own earlier principles, the dispossessed purchasers had been deprived of this possibility. Yet it did not quash the Court of Appeal's judgment for infringing the Convention provisions.

33. Accordingly, Mrs Hentrich gave the French courts the opportunity which is in principle intended to be afforded to Contracting States by Article 26 (art. 26), namely the opportunity of preventing or putting right the violations alleged against them (see, among other authorities, the *Guzzardi v. Italy* judgment of 6 November 1980, Series A no. 39, p. 27, para. 72).

The objections must therefore be dismissed.

### III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 (P1-1)

34. In the applicant's submission, the pre-emption of her property by the Revenue amounted to a de facto expropriation and infringed Article 1 of Protocol No. 1 (P1-1), which provides:

"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."

35. Because the right of pre-emption was exercised, Mrs Hentrich was deprived of her property within the meaning of the second sentence of the first sub-paragraph of Article 1 (P1-1); the Government did not contest that.

36. The Court therefore has to satisfy itself that the requirements of the provision in question were complied with.

#### **A. Purpose of the interference**

37. In the applicant's view, the prevention of tax evasion would only be an aim in the public interest if the owner was presumed guilty of tax evasion and if his property was subsequently used for a purpose that was in the public interest. A purchaser of real property could only be deprived by the Revenue of any profit made at the time of purchase in the event of fraud. That a price was too low might be explained by innocuous factors, such as goodwill, ignorance or urgency.

38. The Government maintained that the pre-emption procedure was the only means available to the Revenue for regulating, and raising moral standards in, the property market and preventing tax evasion. The value of the procedure, which the Revenue considered to be particularly effective, lay in its deterrent nature and the fact that it was exceptional, being used only when - as in the instant case - the price was manifestly too low.

39. Like the Commission, the Court notes that the right of pre-emption is exercised only where the declared price falls short of the Revenue's valuation of the real property purchased. The right of pre-emption is not designed to punish tax evasion, and it applies even where the declared price corresponds to the price actually paid, but its purpose is to prevent non-payment of higher registration fees. The purchaser's good or bad faith is therefore immaterial.

The Court reiterates that the notion of "public interest" is necessarily extensive and that the States have a certain margin of appreciation to frame

and organise their fiscal policies and make arrangements - such as the right of pre-emption - to ensure that taxes are paid. It recognises that the prevention of tax evasion is a legitimate objective which is in the public interest. It does not have to decide in the instant case whether the right of pre-emption could legitimately be designed also to regulate the property market.

### **B. Lawfulness of the interference**

40. In Mrs Hentrich's submission, the pre-emption procedure was arbitrary as the Revenue had not given reasons for its decision and the taxpayer had not been able to know or criticise the reasons for it subsequently.

41. The Government maintained that the pre-emption measure had to comply with Law no. 79-587 of 11 July 1979 and was reviewable by the courts. Admittedly, the concept of a price being too low was imprecise, but it was to be assessed with reference to transfers of the same type in similar circumstances and the assessment could be challenged by the dispossessed owner.

42. Unlike the Commission, the Court considers it necessary to rule on the lawfulness of the interference.

While the system of the right of pre-emption does not lend itself to criticism as an attribute of the State's sovereignty, the same is not true where the exercise of it is discretionary and at the same time the procedure is not fair.

In the instant case the pre-emption operated arbitrarily and selectively and was scarcely foreseeable, and it was not attended by the basic procedural safeguards. In particular, Article 668 of the General Tax Code, as interpreted up to that time by the Court of Cassation and as applied to the applicant, did not sufficiently satisfy the requirements of precision and foreseeability implied by the concept of law within the meaning of the Convention.

A pre-emption decision cannot be legitimate in the absence of adversarial proceedings that comply with the principle of equality of arms, enabling argument to be presented on the issue of the underestimation of the price and, consequently, on the Revenue's position - all elements which were lacking in the present case.

The Court notes that the French legal system has in fact been modified in this respect, it now being mandatory for the reasons for administrative pre-emption decisions to be subject to the adversarial principle. It must, however, observe that this development did not avail the applicant, although it could have done.



### C. Proportionality of the interference

43. According to Mrs Hentrich, the fact that it was impossible to defend herself against the effect of the pre-emption - which she described as dishonouring - made the measure a disproportionate one, as did the inadequacy of the compensation paid for the expropriation.

44. The Government disagreed with the Commission's opinion that the measure was disproportionate to the objective sought to be achieved because of the existence of the adversarial procedure of a supplementary tax assessment. They said that this procedure had neither the same purpose nor the same effects. Pre-emption, which was more markedly exemplary in character, was designed essentially to ensure that the sale price of the real property concerned was not taken as a bench-mark, whereas supplementary tax assessments, which were of more general application, were unsuited to this type of situation. A revised assessment was a tax penalty which had no impact on the general organisation of the property market and whose legal consequences affected only the parties to the sale and more particularly the purchaser.

In the Government's submission, dispossessed purchasers did not sustain any financial loss since they received, in addition to the price paid to acquire the real property, a supplementary payment of 10% and could claim reimbursement of the costs and fair expenses of the contract and, on production of vouchers, reimbursement of sums committed before the pre-emption. Any purely non-pecuniary damage that might be suffered would certainly not be disproportionate to the aim pursued.

Whatever the reason for the declared price being too low, the community suffered a substantial loss of transfer duty, and this called for an appropriate response.

45. In order to assess the proportionality of the interference, the Court looks at the degree of protection from arbitrariness that is afforded by the proceedings in this case.

46. In this instance the trial and appeal courts interpreted the domestic law as allowing the State to avail itself of its right of pre-emption without having to indicate the reasons of fact and law for its decision.

47. The Court notes, firstly, that the Revenue may, through the exercise of its right of pre-emption, substitute itself for any purchaser, even one acting in perfectly good faith, for the sole purpose of warning others against any temptation to evade taxes. This right of pre-emption, which does not seem to have any equivalent in the tax systems of the other States parties to the Convention, does not apply systematically - in other words, every time the price has been more or less clearly underestimated - but only rarely and scarcely foreseeably. Furthermore, the State has other suitable methods at its disposal for discouraging tax evasion where it has serious grounds for suspecting that this is taking place; it can, for instance, take legal

proceedings to recover unpaid tax and, if necessary, impose tax fines. Systematic use of these procedures, combined with the threat of criminal proceedings, should be an adequate weapon.

48. The Court considers that the question of proportionality must also be looked at from the point of view of the risk run by any purchaser that he will be subject to pre-emption and therefore penalised by the loss of his property solely in the interests of deterring possible underestimations of price. The exercise of the right of pre-emption entails sufficiently serious consequences for the measure to attain a definite level of severity. Merely reimbursing the price paid - increased by 10% - and the costs and fair expenses of the contract cannot suffice to compensate for the loss of a property acquired without any fraudulent intent.

49. Having regard to all these factors, the Court considers that, as a selected victim of the exercise of the right of pre-emption, Mrs Hentrich "bore an individual and excessive burden" which could have been rendered legitimate only if she had had the possibility - which was refused her - of effectively challenging the measure taken against her; the "fair balance which should be struck between the protection of the right of property and the requirements of the general interest" was therefore upset (see, *mutatis mutandis*, the *Sporrong and Lönnroth v. Sweden* judgment of 23 September 1982, Series A no. 52, p. 28, para. 73, and the *AGOSI v. the United Kingdom* judgment of 24 October 1986, Series A no. 108, p. 19, para. 55, and p. 21, para. 62).

#### **D. Conclusion**

50. Accordingly, there has been a breach of Article 1 of Protocol No. 1 (P1-1).

#### **IV. ALLEGED VIOLATION OF ARTICLE 6 PARAS. 1 AND 2 (art. 6-1, art. 6-2) OF THE CONVENTION**

51. Mrs Hentrich claims to be the victim of violations of Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the Convention, which provide:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...

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

52. Like those appearing before it, the Court considers that Article 6 para. 1 (art. 6-1) applies in the instant case.

### **A. Fairness of the proceedings**

53. The applicant complained that the Revenue and the courts had not given her a "fair" hearing. She had not been able to challenge effectively the authorities' assessment by adducing evidence to show that she had acted in good faith and that the proper price had been paid. In short, the principle of equality of arms had been contravened.

54. This was also the opinion of the Commission.

55. The Government conceded that Mrs Hentrich had been unable to defend herself in the Strasbourg tribunal de grande instance and the Colmar Court of Appeal, as those courts had held that Article 668 of the General Tax Code conferred a discretionary power on the Revenue and that accordingly a dispossessed purchaser could not validly challenge a pre-emption. The Government considered, however, that she had not taken advantage of the opportunity afforded her by the appeal on points of law to have any shortcomings of the tribunals of fact remedied, and maintained at all events that the trial had been fair.

56. The Court notes, firstly, that as their sole defence on this point the Government merely reiterated the objection that has already been dismissed (see paragraphs 32 and 33 above).

Secondly, it points out that one of the requirements of a "fair trial" is "equality of arms", which implies that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (see the *Dombo Beheer B.V. v. the Netherlands* judgment of 27 October 1993, Series A no. 274, p. 19, para. 33). In the instant case, the proceedings on the merits did not afford the applicant such an opportunity: on the one hand, the tribunals of fact allowed the Revenue to confine the reasons given for its decision to exercise the right of pre-emption to stating "the sale price declared in the contract of sale [is] too low" (see paragraphs 9 and 15 above) - reasons that were too summary and general to enable Mrs Hentrich to mount a reasoned challenge to that assessment; and on the other hand, the tribunals of fact declined to allow the applicant to establish that the price agreed between the parties corresponded to the real market value of the property.

There has therefore been a breach of Article 6 para. 1 (art. 6-1) in this respect.

### **B. Length of the proceedings**

57. Mrs Hentrich also complained of the length of the proceedings.

58. The period to be taken into consideration began on 31 March 1980, when proceedings were instituted in the Strasbourg tribunal de grande instance, and ended on 16 June 1987, with the delivery of the Court of

Cassation's judgment. It therefore amounted to seven years and nearly three months.

59. The reasonableness of the length of proceedings is to be determined with reference to the criteria laid down in the Court's case-law and in the light of the circumstances of the case, which in this instance call for an overall assessment.

60. In the Government's submission, the case was not a complex one, except in the Court of Cassation; Mrs Hentrich contributed to slowing down the proceedings; and the judicial authorities could not be held responsible for the proceedings having taken an abnormal length of time, in view of the backlog of business in the Colmar Court of Appeal.

61. Like the Commission, the Court notes that while the proceedings at first instance progressed at an acceptable pace, there were delays especially on appeal (the proceedings took four years), and to a lesser extent in the Court of Cassation (where the proceedings lasted two years). For the most part, the length of the appeal proceedings was due to the backlog of business in the Colmar Court of Appeal, a factor which, as the Court has consistently held in the past, cannot excuse it. On the other hand, the length of the proceedings in the Court of Cassation was attributable primarily to that court's wish to hear together four cases that raised similar issues - an approach which is understandable but which, under Article 6 (art. 6) of the Convention, cannot justify substantial delay.

That being so, and having regard to what was at stake for the applicant, the Court cannot regard the lapse of time in the instant case as having been "reasonable".

There has therefore been a breach of Article 6 para. 1 (art. 6-1) in this respect.

### **C. Presumption of innocence**

62. The applicant maintained lastly that, contrary to the presumption of innocence, the pre-emption in issue was tantamount to an accusation of tax evasion. She referred to the opinion of French legal writers that pre-emption was a penalty designed to punish possible tax evaders without the Revenue having the burden of proving the offence.

63. The Government's primary submission was that Article 6 para. 2 (art. 6-2) was inapplicable in the instant case. The pre-emption procedure had no criminal characteristics, either in domestic law or from the point of view of the Convention; it was concerned only with a physical fact, namely that the price paid for a property transfer was too low, and it did not necessarily imply a fraud amounting to a criminal offence. In the alternative, they considered that the complaint was ill-founded, as a dispossessed purchaser had the possibility of challenging a pre-emption decision in the ordinary courts.

64. Like the Commission, the Court considers that the implementation of the pre-emption measure was not tantamount to a declaration of guilt.

#### V. ALLEGED VIOLATION OF ARTICLE 13 (art. 13) OF THE CONVENTION

65. In view of its decision in respect of Article 6 para. 1 (art. 6-1), the Court considers it unnecessary to look at the case under Article 13 (art. 13) of the Convention; this is because the requirements of that provision are less strict than, and are here absorbed by, those of Article 6 para. 1 (art. 6-1) (see, among other authorities, the *Pudas v. Sweden* judgment of 27 October 1987, Series A no. 125-A, p. 17, para. 43).

#### VI. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 1 OF PROTOCOL No. 1 AND ARTICLES 6 AND 13 (art. 14+P1-1, art. 14+6, art. 13) OF THE CONVENTION

66. The findings in paragraphs 50, 56, 61, 64 and 65 above make it unnecessary for the Court to consider also the complaint that the applicant had suffered discrimination contrary to Article 14 (art. 14) of the Convention in the enjoyment of the rights secured to her in Article 1 of Protocol No. 1 and Articles 6 and 13 (P1-1, art. 6, art. 13) of the Convention.

#### VII. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

67. Article 50 (art. 50) of the Convention provides:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

Under this provision, Mrs Hentrich sought compensation for damage and reimbursement of costs.

##### **A. Damage**

68. The applicant said that the seized land could now be built on and that its value was in the region of FRF 1 million. She concluded that the exercise of the right of pre-emption had enabled the State to enrich itself at

her expense without cause to the extent of at least FRF 800,000 and claimed this amount in compensation for pecuniary damage.

She also alleged non-pecuniary damage but left it to the Court's discretion to assess its extent.

69. The Government disputed that the alleged financial damage had actually been sustained and considered that at all events the calculation had to be based on the situation at the time of the pre-emption, unless the purely speculative nature of the purchase was to be recognised.

70. The Delegate of the Commission left the matter to the Court's discretion.

71. The Court considers that the applicant may have suffered non-pecuniary damage, but the present judgment affords her sufficient compensation in this respect.

On the other hand, the question of pecuniary damage is not ready for decision. Given the violation found of Article 1 of Protocol No. 1 (P1-1), the best form of redress would in principle be for the State to return the land. Failing that, the calculation of pecuniary damage must be based on the current market value of the land. Those appearing before the Court did not supply any very precise particulars on this matter. Accordingly, the question must be reserved and the further procedure must be fixed, due regard being had to the possibility of an agreement between the respondent State and the applicant (Rule 54 paras. 1 and 4 of the Rules of Court).

## **B. Costs and expenses**

72. Mrs Hentrich sought reimbursement of the costs of representation in the French courts (FRF 29,075) and before the Convention institutions (FRF 27,000).

73. The Government expressed no view as to the amount of lawyer's fees but pointed out that only expenses actually incurred could be reimbursed.

74. The Delegate of the Commission did not find the sums sought exorbitant.

75. The Court allows the applicant's claim in full.

## **FOR THESE REASONS, THE COURT**

1. Dismisses unanimously the Government's preliminary objections;
2. Holds by five votes to four that there has been a breach of Article 1 of Protocol No. 1 (P1-1);

3. Holds unanimously that for lack of a fair trial there has been a breach of Article 6 para. 1 (art. 6-1) of the Convention;
4. Holds unanimously that there has been a breach of Article 6 para. 1 (art. 6-1) on account of the length of the proceedings;
5. Holds unanimously that there has been no breach of Article 6 para. 2 (art. 6-2) of the Convention;
6. Holds unanimously that it is unnecessary to consider separately the complaints based on Articles 13 and 14 (art. 13, art. 14) of the Convention;
7. Holds unanimously that this judgment in itself constitutes sufficient just satisfaction in respect of the alleged non-pecuniary damage;
8. Holds unanimously that the respondent State is to pay the applicant, within three months, 56,075 (fifty-six thousand and seventy-five) French francs in respect of costs and expenses;
9. Holds unanimously that the question of Article 50 (art. 50) is not ready for decision as regards pecuniary damage;

Accordingly,

- (a) reserves the said question in that respect;
- (b) invites the Government and the applicant to submit in writing, within three months, their observations on the matter and, in particular, to notify the Court of any agreement they may reach;
- (c) reserves the further procedure and delegates to the President of the Chamber power to fix the same if need be.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 September 1994.

Rolv RYSSDAL  
President

Herbert PETZOLD  
Acting Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) partly dissenting opinion of Mr Ryssdal and Mr Baka;
- (b) partly dissenting opinion of Mr Pettiti and Mr Valticos.

R.R.  
H.P.



PARTLY DISSENTING OPINION OF JUDGES RYSSDAL  
AND BAKA

We share the Court's opinion that there have been violations of Article 6 para. 1 (art. 6-1) of the Convention in the present case both because of the lack of a fair trial and because of the length of proceedings.

However, we have voted against the finding of a breach of Article 1 of Protocol No. 1 (P1-1).

We consider that there was a deprivation of the applicant's possessions within the meaning of the second sentence of Article 1 of Protocol No. 1 (P1-1). It has therefore to be decided whether the deprivation was in the public interest and subject to the conditions provided for by law as required by this provision.

The pre-emption of the applicant's property was based on Article 668 of the General Tax Code which gives the tax authorities the right to purchase by pre-emption any property whose sale price they consider to be too low. In such a case the authorities may exercise this right for the benefit of the Treasury by "offering to pay the rightful claimants the price in question and a premium of ten per cent". This right of pre-emption is designed to prevent tax evasion and, like the majority of the Court (paragraph 39), we consider the prevention of tax evasion to be a legitimate objective which is in the public interest.

In our opinion the pre-emption was also exercised subject to the conditions provided for by law. In particular, Article 668 of the General Tax Code was adequately accessible and formulated with sufficient precision.

According to the case-law of the Court, "there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see the *Lithgow and Others v. the United Kingdom* judgment of 8 July 1986, Series A no. 102, p. 50, para. 120). An important factor in the assessment of such proportionality is the compensation to be paid. As already mentioned, the amount of such compensation in pre-emption cases is fixed by law as the purchase price plus a premium of ten per cent. In addition the tax authorities were obliged to pay the costs and fair expenses.

Having regard to the compensation paid and to the margin of appreciation left by Article 1 of Protocol No. 1 (P1-1) to the national authorities, we have come to the conclusion that this Article was not violated in the present case.

**PARTLY DISSENTING OPINION OF JUDGES PETTITI AND  
VALTICOS**

*(Translation)*

We voted in favour of finding that there had been a breach of Article 6 para. 1 (art. 6-1) of the European Convention on Human Rights on the ground that the proceedings had not been fair and that their length had been excessive. We did not vote in favour of finding a breach of Protocol No. 1 (P1).

It appeared to us that in the consideration of the system adopted in France for the right of pre-emption in respect of real-property sales regard should be had above all to the relevant national law and its special features, which are different from those of other member States of the Council of Europe.

Vendors and purchasers are duly informed of the obligation to be honest in declarations of price. As regards false statements, for instance, several provisions of the General Tax Code (GTC) require the parties to a contract for the sale of real property or of a business or to a right to a lease or a promise of a lease and parties to contracts for the partition or exchange of real property or of a business to certify at the bottom of the contract that it "represents, on pain of the penalties provided for in the Act of 18 April 1918 (Art. 1837 GTC), the full agreed price or balance in cash" (Art. 850 GTC).

Article 863 of the GTC imposes a similar obligation on a notary who draws up a contract of sale, exchange or partition, requiring him to notify the parties of the penalties provided for in Articles 850 and 1837 of the GTC and in Article 366 of the Criminal Code. In the same way, Article 864 requires notaries who draw up contracts transferring real property, a business or a professional office (office ministériel) to inform the parties of the penalties attaching to concealment, to mention in the contract that this has been done and to state in it that, to his knowledge, the contract is not altered or contradicted by any secret document containing an increase in the price (see Bruzon, *Droit pénal fiscal*, Paris, Librairie générale de droit et de jurisprudence).

This is distinct from the right of pre-emption but certainly has the same aim of foreseeability and deterrence. The right of pre-emption is exercised in order to ensure a distribution of registration fees by regulating the property market. In order to avoid underestimations which ultimately penalise those who are completely honest in their price declarations by altering the total tax revenue, each State adopts a particular arrangement which is part of its general fiscal policy.

These fiscal policies, as such, are not covered by the European Convention and Protocol No. 1. In our view, only if tax provisions that might amount to an interference with possessions or with the use of

property did not provide opportunities for appeal in accordance with Article 6 (art. 6) of the Convention might there hypothetically be a breach of Protocol No. 1 and Article 6 (P1, art. 6) taken together, without any separate breach of Protocol No. 1 (P1) taken on its own.

We would cite various arrangements adopted by other States to prevent concealment or underestimation of prices.

#### GERMANY

Tax offences (Steuerordnungswidrigkeiten) include, for example, underestimation of tax payable without fraudulent intent, the making of inaccurate tax returns, actions designed to jeopardise the collection of taxes without fraudulent intent or to secure or retain unjustified tax concessions and breaches of the obligation to retain and transfer tax deducted at source. They are punished by administrative fines.

The offence of tax evasion is defined as follows in section 370 of the General Tax Act:

"A person shall be liable to imprisonment not exceeding five years or a criminal fine if he

1. supplies financial or other authorities with inaccurate or incomplete information about facts of importance for tax purposes;
2. contrary to his obligations, fails to inform the financial authorities of facts of importance for tax purposes;
3. ..."

Attempted evasion is punishable in the same way as the offence of tax evasion.

A particularly serious offence is committed by anyone who makes serious underestimations of his income or claims unjustified tax concessions through his own actions.

#### NETHERLANDS

Section 68 of the General National Taxation Act (Algemene Wet inzake Rijksbelastingen) provides for the criminal prosecution and punishment of tax evasion. This offence may be committed by failure to make a tax return, making an inaccurate and incomplete return, failing to submit documents, failing to keep accounts, submitting falsified documents or failing to keep account documents or books. Such offences are punishable by imprisonment for a period not exceeding six months and/or a third-category fine (section 68(1)). The definition is an extremely wide one since fraudulent intent does not have to be proved and the rigour of the principle means that negligence or mistake may give rise to criminal proceedings.

#### ITALY

Tax evasion is made a punishable offence by Law no. 4 of 7 January 1929 laying down general rules for the prosecution and punishment of offences against finance Acts and by special tax laws, in particular on VAT

and direct taxes (Legislative Decree no. 429 of 10 July 1982, Law no. 516 of 7 August 1982 and Law no. 154 of 15 May 1991); in the absence of any specific enactment, prosecutions can be brought under the Code of Criminal Procedure. All these provisions exhaustively list the various offences and the penalties attaching to them. The same penalties apply to underestimations in returns.

Admittedly, these measures do not provide for a right of pre-emption, but the fiscal-policy objective is of the same kind. Several States also have arrangements for pre-emption in respect of agricultural property or property belonging to the artistic heritage.

The Court has rightly held that the interference was lawful as regards the aim pursued under Protocol No. 1.

But we consider that the majority were wrong to find a breach in respect of the lawfulness of the interference on the grounds of lack of precision and foreseeability (paragraphs 40 to 42 of the judgment), thus indirectly criticising the quality of the law derived from enactments and case-law (see the *Kruslin and Huvig v. France* judgments of 24 April 1990, Series A no. 176-A and B). Foreseeability was ensured both by the applicable provisions and by the established notarial practice of informing vendors and purchasers before sales are concluded.

Equally wrongly, in our view, the majority found a breach in respect of proportionality (paragraphs 45 to 48 of the judgment). It looked at the possibility of arbitrariness in the proceedings and the risk run by any purchaser that he will be subject to pre-emption. These considerations were more relevant to foreseeability or the fairness of the trial than to proportionality.

The right of pre-emption is exercised through a selection of cases in which there have been the greatest underestimations of price on the property market. It is the lack of any judicial review of the selection criteria after a comparative survey which may amount to a breach.

The majority appears to have been influenced by considerations of good faith, fraud and formal exactness of the declaration of price. But in the French system there may be not an underestimation through fraud or through concealment of the price really paid but one which hides a benefit granted to the purchaser and which may, for example, be equated with a partially disguised gift, and this results in a failure to pay due registration fees. The right of pre-emption is therefore not exercised "for the sole purpose of warning others against any temptation to evade taxes".

It is obvious that the French procedure for exercising the right of pre-emption, before the change in the Court of Cassation's case-law, was defective from the point of view of Article 6 (art. 6) of the Convention; in that respect it could be contrary to Protocol No. 1 taken together with Article 6 (P1, art. 6).

The right had virtually ceased to be exercised but the provision retained its effect of deterrence and of raising moral standards in the market.

The majority's legitimate concern (paragraph 49 of the judgment) that a "fair balance ... should be struck between the protection of the right of property and the requirements of the general interest" was sufficiently met by the finding of a breach of Article 6 para. 1 (art. 6-1).