



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

THIRD SECTION

CASE OF AVENDI OOD v. BULGARIA

(Application no. 48786/09)

JUDGMENT
(Just satisfaction)

Art 41 • Just satisfaction • Award for pecuniary damage sustained from violation of Art 1 P1 on account of unlawful retention of applicant company's merchandise

STRASBOURG

14 February 2023

FINAL

14/05/2023

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

In the case of Avendi OOD v. Bulgaria,

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

Pere Pastor Vilanova, *President*,

Georgios A. Serghides,

Yonko Grozev,

Jolien Schukking,

Darian Pavli,

Peeter Roosma,

Ioannis Ktistakis, *judges*,

and Milan Blaško, *Section Registrar*,

Having deliberated in private on 24 January 2023,

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

PROCEDURE

1. The case originated in an application (no. 48786/09) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Avendi OOD, a Bulgarian limited liability company with its registered office in Sofia (“the applicant company”), on 24 August 2009.

2. In a judgment delivered on 4 June 2020 (“the principal judgment”), the Court held that the applicant company’s rights guaranteed by Article 1 of Protocol No. 1 had been breached because of the delayed return of its merchandise seized in criminal and administrative proceedings. In particular, the Court found that the seized goods had not been retained by the authorities on any legal ground after a court decision dated 7 December 2005 ordering their return; the merchandise was returned to the applicant company between 28 and 30 March 2007. The Court held that there was no need to examine the complaint under Article 13 of the Convention (see paragraphs 21, 64-85 and 88 of the principal judgment).

3. Under Article 41 of the Convention, the applicant company sought various sums by way of just satisfaction.

4. Since the question of the application of Article 41 of the Convention was not ready for decision as regards pecuniary damage, the Court reserved it and invited the Government and the applicant company to submit, within three months, their written observations on that issue and, in particular, to notify the Court of any agreement they might reach (see paragraph 97 of the principal judgment and point 4 of the operative provisions). The Court rejected the applicant company’s claims in respect of non-pecuniary damage and costs and expenses.

5. The applicant and the Government each filed observations. They informed the Court that they had failed to reach an agreement.

THE LAW

6. 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

1. *Relevant domestic law*

7. Section 25 of the Excise Duties and Tax Warehouses Act 2005, as applicable at the material time, provided, among other things, that excise duties were not due and any duties paid were to be reimbursed if merchandise was destroyed while under the control of the administrative authorities.

8. Article 111 §§ 1 and 4 of the Code of Criminal Procedure 2005 provides that evidence is retained until the end of any criminal proceedings. Perishable goods which cannot be returned to the owners from whom they were seized can be sold with the prosecutor’s permission and the sums received are placed in a commercial bank, serving the State budget.

2. *The parties’ submissions*

(a) **The applicant company’s claims**

9. The applicant company originally claimed 1,267,621 Bulgarian leva (BGN – 648,124.33 euros (EUR)) in respect of pecuniary damage based on:

- (1) the purchase price paid for 26,753 bottles containing Baileys cream liqueur, which were returned after their shelf life had expired;
- (2) compensation for loss of profit (difference between their purchase price and their market price) with respect to those beverages;
- (3) default interest on the amounts under points (1) and (2); and
- (4) default interest in respect of the retention of beverages seized but which had no expiry date and were therefore still marketable when they were returned (see paragraphs 90-94 of the principal judgment).

Before the adoption of the principal judgment, the applicant company had presented tax demands in support of those claims, as well as a copy of a judgment of the Sofia City Administrative Court dated 30 November 2010 given in proceedings for compensation brought by the applicant company against the National Revenue Agency. The judgment itself referred to an expert report commissioned by the domestic court which gave figures for the purchase price paid by the applicant company, the market price of the beverages and the possible differences between those prices, as well as statutory default interest for different periods of time, in line with Bulgarian regulations (see paragraph 27 of the principal judgment). In its observations

filed after the adoption of the principal judgment (see paragraph 5 above) the applicant company also submitted a copy of the expert report cited above and referred to the figures in it when calculating its claims as follows.

10. In those same observations, the applicant company claimed a total amount of BGN 1,112,121.51 (EUR 568,618.70) in respect of pecuniary damage, under five heads.

11. First, the applicant company stated that, according to the above-mentioned expert report, 26,748 bottles (five bottles fewer than indicated in paragraph 9 above) containing Baileys cream liqueur had been returned after their shelf life had expired. According to that report, the shelf life of some of the bottles had expired in September 2006 and that of others in October 2006. In the expert's view, the goods could not then have been sold on the open market. The applicant company submitted that they had subsequently been destroyed under the applicable safety rules. It did not provide further details about that destruction process or about the rules. The applicant company then claimed compensation equivalent to the purchase price it had paid for those beverages. Referring to the tax demands issued with respect to the purchase of the goods, the applicant company claimed compensation in the amount of BGN 458,419 (EUR 234,385.91), which included excise duty in the amount of BGN 18,736 (EUR 9,579.56), although the expert report had established the purchase price at a higher level, namely BGN 466,159.96 (EUR 238,343.80). The applicant company did not state whether, after the destruction of the expired goods, it had requested the return of the excise duty paid, on the basis of the applicable law (see paragraph 7 above), and if not, why not.

12. Secondly, the applicant company claimed compensation for lost profit with respect to the bottles that had been destroyed (see paragraph 11 above). It referred in that connection to the profit it could possibly have made from the difference between the purchase price and the market value during the period when the merchandise was retained by the authorities. The applicant company submitted that, according to its calculation based on the purchase value of the goods and its own professional knowledge of the relevant market in Bulgaria during the applicable period, the amount of that profit was BGN 185,250 (EUR 94,854.87). It did not submit evidence to support those calculations. However, it added that according to the expert report submitted for inclusion in the case file, the lost profit had been determined in the sum of BGN 134,527.70 (EUR 68,782.92), using figures as at 7 January 2005 and based on the average market price of similar bottles. The applicant company indicated that it was ready to accept that amount in compensation for its alleged lost profit.

13. Thirdly, the applicant company claimed statutory default interest for the period when the amounts referred to in paragraphs 11 and 12 above had not been available to it. In the applicant company's submission, that period ran from 6-7 January 2005 to the date on which it had lodged its application

before the Court (24 August 2009 – see paragraph 1 above). It submitted that the interest should be calculated in accordance with the domestic rules, namely on the base interest rate of the Bulgarian National Bank for the period, as published on the Internet site of the National Revenue Agency, plus 10 percentage points. According to its calculations, the interest for that period totalled BGN 372,322.32 (EUR 190,365.38). According to the expert report produced in the proceedings before the Sofia City Administrative Court, the statutory default interest for the amounts referred to in paragraphs 11 and 12 above for the period running from 7 January 2005 to 17 March 2008 was estimated at BGN 253,116.78 (EUR 129,418.54). Interest for the period from 1 January 2006 to 17 March 2008 was calculated at BGN 181,021.61 (EUR 92,556.30).

14. Fourthly, the applicant company claimed BGN 88,646.25 (EUR 45,324.11) in default interest for the period from 6-7 January 2005 (the date of the seizure) to 28 March 2007 (the date on which the bottles had been returned) in respect of a total of 27,109 bottles of alcoholic beverages that had been seized but had no expiry date and thus had still been marketable when they were returned. In its initial application the applicant company submitted that the amount of default statutory interest should be based on the total purchase price of the bottles, which according to its calculations was equivalent to BGN 457,500 (EUR 233,916.04). In its submissions following the principal judgment, it revised those claims to BGN 315,187.71 (EUR 161,152.92) and referred to the tax invoices issued for the purchase. According to the expert report, the average market price on the date of the seizure of the above-mentioned goods was estimated as equivalent to BGN 396,896.86 (EUR 202,930.14) and the default interest with respect to the period of retention was calculated at BGN 111,926.24 (EUR 57,226.97). The applicant company did not claim compensation for the purchase price or loss of profit in relation to the retention of those beverages.

15. Lastly, in its submissions filed after the delivery of the principal judgment, the applicant company added claims for interest based on the alleged failure of the State to provide judicial remedies at the national level, which it estimated at BGN 58,206.24 (EUR 29,760.38).

(b) The Government's position

16. The Government made some general remarks.

17. First, they argued that the applicant company's claims for pecuniary loss had not been properly itemised or substantiated in so far as, during the proceedings leading to the principal judgment, those claims referred solely to what the Sofia City Administrative Court had noted in its judgment of 30 November 2010 on the basis of an expert opinion, which itself had not been submitted to the Court before the adoption of the principal judgment. Thus, in the Government's view, the applicant company had not provided any explanation of the data cited in that judgment, the scope of the assessment

requested by the applicant in the framework of the domestic proceedings, the expert's professional qualifications, the means and methods used and applied, or the final results. The Government laid particular stress on the fact that in the course of the proceedings leading to the principal judgment, the applicant company had not requested an extension of the time-limit in order to substantiate its claims or the reservation of that matter for a later stage. They added that the domestic courts had ultimately rejected the applicant company's claims, a fact that in their view rendered the report used in the internal proceedings devoid of legal value. The Government also submitted that the applicant company's claims and the figures presented in the judgment of the Sofia City Administrative Court showed discrepancies for which no explanation had been provided and which additionally made the claims unclear and unsubstantiated.

18. The Government further submitted that the applicant company could have generated profit from the bottles of perishable beverages and thus reduced the pecuniary damage claimed, but it had not provided any information as to whether this had in fact been the case. They first indicated that the bottles had carried a "best before" date and not a "use by" date which corresponded to the minimum durability of a foodstuff, as described in Article 24 of Regulation (EU) No. 1169/2011. The Government submitted that only a "use by" date would indicate that goods should be deemed unsafe after the date in question, and therefore the bottles could have been placed on the market by the applicant company, possibly with the option of negotiating the price with the retailer and/or prospective final consumer. Secondly, the Government submitted that, bearing in mind that the excise duty on the goods had already been paid, it was open to the applicant company to request the reimbursement of those sums if the bottles had been destroyed, under section 25 of the Excise Duties and Tax Warehouses Act 2005 (see paragraph 7 above). Lastly, the Government submitted that the applicant could have disposed of the beverages in another manner, such as selling them back to the importing company, recycling them, converting them into a different product or extracting the ethyl alcohol or other more valuable ingredients.

19. The Government's final general remark referred to the possibility, which in their view had been open to the applicant company, of seeking the immediate public sale of the beverages whose shelf life had not expired during their retention after seizure, in accordance with Article 111 § 4 of the Code of Criminal Procedure 2005 (see paragraph 8 above). They argued further that the applicant company could also have sought damages under the Contracts and Obligations Act instead of submitting a claim under the State and Municipalities' Responsibility for Damage Act (see paragraphs 43-47 and 96 of the principal judgment).

20. In view of the above, the Government concluded that there were legal remedies available at the domestic level by which the applicant could have either reduced the damage caused or obtained satisfactory compensation. They therefore invited the Court to dismiss the claims in full.

21. Regarding the applicant company's specific claims as formulated before the adoption of the principal judgment (see paragraphs 9 and 10 above) the Government elaborated as follows.

22. As regards the purchase price of the bottles, they submitted that the applicant company had failed to provide the purchase contract with the company which had sold the beverages to it, or invoices in that respect so as to confirm the price at which the seized goods had been purchased.

23. Concerning the compensation for loss of profit, the Government argued that it was impossible to calculate that amount given that the market price was variable and sensitive to multiple dynamic factors and that the applicant company had failed to provide sufficient data such as the accounting books for the relevant period or other information showing the average market price of other Baileys bottles sold during the same period.

24. As for the claims for statutory default interest, the Government submitted that if the Court were to find that the claims in respect of the purchase price and loss of profit were to be allowed, interest should be payable only for the period between 12 December 2005 and 30 March 2007. According to the calculation method on the official website, the amount of allowable interest should not exceed BNG 108,571.97 (on a total potential sum for the purchase price and loss of profit of BGN 643,669, for the calculation of which no details were provided).

25. Regarding the default statutory interest for the remaining bottles, the Government argued that the figure suggested by the applicant company was not supported by information about the exact number of bottles purchased, or about the potential profit it had lost, such as extracts from the company's accounting books. Therefore, any calculation of the default interest payable was unsubstantiated and speculative.

3. *The Court's assessment*

26. The applicable principles have been summarised in the Court's judgment in *East West Alliance Limited v. Ukraine* (no. 19336/04, §§ 245-53, 23 January 2014).

27. In the case at hand, in its principal judgment the Court found, in particular, that the delayed return of the seized merchandise after 7 December 2005 had constituted an unlawful interference with the applicant company's property rights and was thus contrary to Article 1 of Protocol No. 1 (see paragraphs 82 and 84 of the principal judgment).

28. The Court notes at the outset the Government's observations that the applicant company had based its just satisfaction claims mainly on an expert report which had not been provided before the adoption of the principal judgment (see paragraph 17 above). The Court observes in this connection that in those proceedings the applicant company provided a copy of the Sofia City Administrative Court judgment of 30 November 2010 which cited the expert report and on that basis gave figures for the purchase price paid by the applicant company for the seized beverages, the difference between that price and the market price at the time of seizure, and the calculations regarding the statutory default interest claimed (see paragraphs 25-33 of the principal judgment). The applicant company also submitted copies of tax invoices with respect to the purchased goods that are the subject of the present application, and those invoices were not disputed by the Government. Finally, the applicant company produced a copy of the expert report cited in the Sofia City Administrative Court judgment of 30 November 2010 after the delivery of the principal judgment. The Court does not see any reason to hold that those documents were submitted out of time and must undertake its analysis on the basis of the figures as indicated in that evidence, in the light of the parties' submissions and its case-law. In addition, the Court notes that the Government's objection of non-exhaustion of domestic remedies, based on the applicant company's failure to lodge a general tort claim against the State under the Contracts and Obligations Act, was dismissed (see paragraphs 55-58 of the principal judgment). Therefore, the Court cannot agree with the Government's argument that the applicant company was also obliged to pursue that remedy to recover damages (see paragraph 19 *in fine* above) and it will not take this factor into account in its considerations below.

(a) Regarding the claims with respect to the purchase price of the beverages returned after the expiry of their shelf life

29. The claim with respect to compensation for the purchase price solely concerns the bottles returned to the applicant company after the shelf life of many of the beverages had expired, a total of 26,753 bottles containing Baileys cream liqueur (see paragraph 9 above). However, the tax invoices and the expert report produced in the proceedings before the Sofia City Administrative Court showed that the total number of such beverages purchased by the applicant company and the subject of the disputed seizure had been 26,748 bottles (see paragraph 11 above). The applicant company did not make a claim in respect of pecuniary damage regarding the purchase price of other bottles that were also unlawfully retained (see paragraph 14 *in fine* above). On the basis of the evidence submitted, the Court finds it established that 26,748 bottles of Baileys cream liqueur were returned to the applicant company after their shelf life had expired. The Court notes that the parties do not agree on the question whether those beverages were still marketable when they were returned. In particular, the Government argued

that the applicant company could still have marketed those bottles in other ways in order to recover – at least in part – the purchase price (see paragraph 18 above). Regarding the question whether the bottles could still be sold depending on whether they carried a “best before” or a “use by” date, in accordance with Regulation (EU) No. 1169/2011, the Court notes that it is true that it appears from the case file, and in particular from the Sofia City Administrative Court’s judgment of 30 November 2010, the expert report cited in that judgment and the expert reports of 30 March 2007, that the seized beverages were no longer marketable (see paragraphs 21 and 27 of the principal judgment, and paragraph 11 above). However, the applicant company had not submitted any evidence about the alleged destruction of the bottles, despite the fact that domestic law provided an express procedure for the purpose and a refund of the paid stamp duty for those bottles. This leaves open the question as to whether it was possible to dispose of the beverages in another manner by selling back, recycling or converting them, as suggested by the Government. The Court finds under this head that the applicant company sustained pecuniary loss as a direct result of the violation of Article 1 of Protocol No. 1. However, it will take all the above elements into account when assessing the amount of the compensation due (see paragraph 31 below).

30. The respondent State should compensate the applicant company for the loss of the bottles as from the time when the interference had become unlawful (see, *mutatis mutandis*, *East West Alliance Limited*, cited above, § 257). Indeed, had the bottles been returned in December 2005, when their seizure became unlawful, the applicant company would still have had the possibility to sell them on the market; their delayed restitution, and in particular their restitution after the expiry of their shelf life, made such a course of action impossible and/or unrealistic. The Court considers that the loss to be compensated in that respect consists of the value of those 26,748 bottles that were unlawfully retained.

31. As to the amount of the compensation for that loss, the Court observes that the applicant company, on the basis of the tax invoices, estimated that amount at BGN 458,419 (EUR 234,385.91), which included excise duty in the amount of BGN 18,736 (EUR 9,579.71 – see paragraph 11 above). The Government have not submitted any reason for the Court to doubt whether it could base its findings on those documents and it considers them sufficient to establish the purchase price paid by the applicant company. The applicant company informed the Court that all the Baileys cream liqueur bottles had been destroyed in accordance with the applicable rules (see paragraph 11 above), which was not contested by the Government. Nevertheless, the Court takes note of the Government’s indication that in such cases the domestic law provides a special procedure allowing excise duty already paid to be recovered (see paragraphs 7 and 18 above). The applicant company neither confirmed that it had taken advantage of that procedure nor argued that it

would not be applicable in its case. Therefore, the Court considers that the amount of the compensation should exclude the sums corresponding to the excise duty. In addition, the Court is mindful of the Government's submission that, under domestic law, the applicant company, being aware of the fact that the shelf life of the Baileys cream liqueur bottles was likely to expire within a short time, could have asked the prosecutor for the sale of the bottles and the holding of the sums obtained (see paragraphs 8 and 19 and above). The applicant company made no comment on that point. In such a situation, the Court is, on the one hand, not in a position to speculate on the question whether the prosecutor would have authorised such a sale and whether, when and how the applicant company would have marketed the seized beverages. Such a procedure is inevitably dependent on official permission from a State body and on the variables of the offers received, according to the circumstances of the case. On the other hand, the Court cannot exclude the possibility that, had the applicant company initiated that procedure, it could have been in a position to avoid the total loss of the purchase price paid by selling its merchandise before the expiry of its shelf life, even if at a reduced price. The same is applicable to the Government's argument that, at the time of the return of the bottles, the applicant company could have tried to obtain at least a minimum profit by recycling or converting the beverages and to the fact that the applicant company has not provided any details about their destruction (see paragraphs 11, 18 *in fine* and 29 above).

32. In the light of the foregoing considerations and having regard to all the material in its possession, the Court finds it appropriate to rule on an equitable basis (see *East West Alliance Limited*, cited above, § 253) and to award under this head EUR 115,000, plus any tax that may be chargeable.

(b) Regarding the claims for loss of profit with respect to the beverages returned after the expiry of their shelf life

33. The applicant company further claimed compensation for loss of profit on the ground that it had been unable to profit from marketing the above-mentioned bottles containing Baileys cream liqueur during the period of their retention by the authorities. It claimed BGN 185,250 (EUR 94,854.87) or at least BGN 134,527.70 (EUR 68,782.92), as determined in the expert report (see paragraph 12 above). The Government submitted that the calculation under this head could not be precise given the uncertainty of the market and the lack of data from the applicant company's accounts (see paragraph 23 above).

34. Having regard to the violation found in the principal judgment (see paragraphs 2 and 27 above), the Court is of the view that there is a causal link between that violation and the damage alleged under the present head. However, it considers the amounts claimed to be exaggerated.

35. The Court first notes that the applicant company's calculations and the amount cited in the expert report vary substantially (close to 30% of the capital value). It is true that the expert report provided figures for the average market price of the bottles eleven months before the period during which the bottles were retained unlawfully and at this earlier date the prices were likely to be lower, as the passing of time, with inflation, has a tendency to increase them. However, the applicant company did not submit any concrete calculation methods or evidence about the market price's fluctuations during that period.

36. The Court has already noted that the applicant company could have tried to obtain permission to sell the beverages in the course of the criminal proceedings (see paragraphs 8, 19 and 31 above). It further notes that any profit made by the applicant company would have been subject to tax (see *Zlinsat, spol. s r.o. v. Bulgaria* (just satisfaction), no. 57785/00, § 44 (g), 10 January 2008, with further references). Neither the applicant company in its submissions nor the experts in their reports factored this into their estimates.

37. Finally, the actual sale of the bottles would depend on the market variables and on the level of the demand; a lower demand would entail the risk of having a part of the bottles unsold. The Court comes to the view that, in the circumstances of the case, it has to make an overall assessment of these factors (see *East West Alliance Limited*, cited above, § 253).

38. Therefore, ruling on an equitable basis, the Court considers that the applicant company should be awarded the sum of EUR 35,000 for loss of profit, plus any tax that may be chargeable.

(c) Regarding the claims for statutory default interest based on the unlawful detention of the entirety of the beverages in question

39. The Court notes the applicant company's claims and the Government's response concerning statutory default interest on sums calculated with respect to the purchase price of the beverages returned after the expiry of their shelf life and the lost profit in relation to those goods, as well as with respect to the unlawful detention of bottles of alcoholic beverages that had no expiry date and thus had still been marketable when they were returned (see paragraphs 13, 14, 24 and 25 above). The Court is of the opinion that given the particular circumstances of the case, the applicant company has suffered disruption of its business on the account of the authorities' action and that this led to a certain amount of economic loss. Therefore, the Court considers it appropriate to award to the applicant company a lump sum of EUR 15,000 under this head.

(d) Regarding the claims for interests originated from alleged failure of the State to provide national judicial remedies

40. The Court notes that it concluded in the principal judgment that there was no need to examine separately the applicant company's complaint under Article 13 (see paragraph 88 of the principal judgment and point 3 of the operative provisions, as well as paragraph 2 above). Therefore, the Court rejects that part of the just satisfaction claim.

(e) Conclusion

41. In conclusion, the Court finds it appropriate to award the applicant company a total of EUR 165,000 in respect of pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

42. The applicant company did not claim any additional costs and expenses for the observations submitted after the delivery of the principal judgment (see paragraph 5 above).

43. Therefore, the Court is not called upon to make an award under this head.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. Holds

- (a) that the respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 165,000 (one hundred and sixty-five thousand euros) in respect of pecuniary damage, plus any tax that may be chargeable, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
- (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 14 February 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Registrar

Pere Pastor Vilanova
President