



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

FIFTH SECTION

**CASE OF FORMINSTER ENTERPRISES LIMITED v. THE CZECH
REPUBLIC**

(Application no. 38238/04)

JUDGMENT
(merits)

STRASBOURG

9 October 2008

FINAL

09/01/2009

This judgment may be subject to editorial revision.

In the case of Forminster Enterprises Limited v. the Czech Republic,

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

Peer Lorenzen, *President*,

Rait Maruste,

Karel Jungwiert,

Volodymyr Butkevych,

Mark Villiger,

Mirjana Lazarova Trajkovska,

Zdravka Kalaydjieva, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 16 September 2008,

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

PROCEDURE

1. The case originated in an application (no. 38238/04) against the Czech Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Forminster Enterprises Limited, a company with its registered seat in Cyprus (“the applicant company”), on 22 October 2004.

2. The applicant company was represented by Mr M. Nespala, a lawyer practising in Prague. The Czech Government (“the Government”) were represented by their Agent, Mr V. A. Schorm, of the Ministry of Justice.

3. The applicant company complained under Article 1 of Protocol No. 1 and Article 6 of the Convention of the seizure of business documents and shares in its possession.

4. On 9 January 2007 the President of the Fifth Section of the Court decided to give notice of the application and to communicate the complaint concerning the seizure to the Government. On 12 January 2007 he decided to give notice of the application to the Government of the Republic of Cyprus in order to enable them to exercise their right to intervene in the proceedings (Article 36 § 1 and Rule 44). The Cypriot Government waived that right by their letter of 30 January 2007.

5. The applicant company and the Government each filed written observations (Rule 59 § 1). The Chamber decided that no hearing on the admissibility and merits was required (Rule 59 § 3 *in fine*)

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

1. The background to the case

7. On 29 January 1997 the applicant company entered into a purchase agreement with Královéhradecká brokerská a.s., a joint stock company incorporated under Czech law (“KHB”). Under the agreement it bought 384,971 book-entry shares representing 55.71% of the registered capital of KOTVA a.s., a joint stock company incorporated under Czech law. The shares were registered with Prague Securities Centre (*Středisko cenných papírů*), which acted as a central securities depository.

2. The criminal proceedings against H. and others and the impounding of the applicant company’s securities

8. In March 1997 criminal proceedings were instituted against H., a member of KHB’s board of directors, for illegal disposal of shares and other securities to the detriment of two Czech investments funds, TREND a.s. and MERCIA a.s., which joined the criminal proceedings as civil parties seeking damages.

9. On 11 March 1997 the Hradec Králové Deputy Regional Prosecutor (*náměstek krajského státního zástupce*), within the framework of the criminal proceedings, ordered the Securities Centre to register the suspension of the applicant company’s right to dispose of all shares deposited in its account (*příkaz k registraci pozastavení výkonu práv majitele veškerých cenných papírů*) until the end of the criminal proceedings. The order was based on a suspicion that the shares had been acquired illegally and that it was necessary to freeze them in order to secure claims from the victims of the transaction. The prosecutor relied on section 27(3)(d) of the Securities Act (no. 591/1992), which entitled State authorities to order such suspension where empowered to do so by a specific law, and on Article 78 § 1 of the Code of Criminal Procedure (“the CCP”), which gave the prosecuting authorities the right to seize items of importance for criminal proceedings.

10. In a letter of 25 April 1997 addressed to the Ministry of Finance, the Regional Prosecutor stated as follows:

“In order to clarify the criminal activities of [H. and others] and establish facts important for the criminal proceedings, and in an effort to prevent illegal transfers of securities, I decided to apply section 27(3)(d) of the Securities Act (no. 591/1992) ...

However, this procedural step which, I discovered, was based on Articles 78 and 79 of the CCP, is very problematic and untenable in the case of book-entry shares. Under these circumstances, the Securities Centre will be ordered, by 16 May 1997 at the latest, to cancel the registration of the suspension of disposal rights over the book-entry shares held by the following companies: ... (f) Forminster Enterprises Limited.

Securities owned by persons who are not facing criminal charges, which are in the portfolio of the aforesaid companies and are not relevant to the criminal activities, can no longer be impounded under criminal law because the existing criminal procedural regulations provide only for the seizure of tangible items of importance for the criminal proceedings under Article 78 of the [CCP] which can be surrendered or, pursuant to Article 79, seized. [In addition,] the application of Article 79a of the [CCP] in respect of securities is excluded. To proceed under section 27(3)(d) of the Securities Act is possible only when a specific law so provides. [However,] the [CCP] does not provide for such a procedural step ...”

11. On 12 May 1997 the Deputy Regional Prosecutor informed the Securities Centre that his order of 11 March 1997 was cancelled. Relying on section 27(3)(d) of the Securities Act read in conjunction with Article 79 § 1 of the CCP, he again ordered the suspension of the applicant company’s right to dispose of its 384,971 KOTVA shares pending the criminal proceedings. He considered, *inter alia*:

“In the field of financial and commercial law, book-entry shares are not considered to be items, unlike in criminal law, where they are considered as *rei sui generis*, and are clearly regarded as ‘items’, as the use of the term ‘item’ in Article 89 § 16 of the Criminal Code shows. With regard to the specific characteristics of such items and the manner in which they are dealt with on the capital markets, it is necessary to apply ... Article 79 § 1 of the [CCP] by analogy and impound the securities in question ... under section 27(3)(d) of Act no. 591/1992.”

12. On 15 May 1997 the Securities Centre implemented the order.

13. On 27 June 1997 the applicant company challenged this measure before the Prague Senior Prosecutor (*vrchní státní zástupce*) who, on 8 August 1997, held that the Deputy Regional Prosecutor had proceeded in accordance with the law.

14. On 30 January 1998 the applicant company lodged a constitutional appeal (*ústavní stížnost*) alleging, *inter alia*, that its property rights guaranteed by Article 11 of the Charter of Fundamental Rights and Freedoms (*Listina základních práv a svobod*) had been violated by the Deputy Regional Prosecutor’s decision of 12 May 1997.

15. On 20 May 1998 the applicant company lodged an application with the Regional Prosecutor’s Office seeking the restoration of its KOTVA shares under Article 80 of the CCP. On 2 October 1998 it was told by the prosecutor’s office that on 30 September 1998 H. and others had been officially indicted before the Hradec Králové Regional Court (*krajský soud*) which was, therefore, competent to deal with the company’s application. The indictment contained more than 7,000 pages.

16. On 11 November 1998 the Constitutional Court (*Ústavní soud*) rejected the applicant company's constitutional appeal, contesting the seizure, as having been introduced outside the sixty-day statutory time-limit provided for by the Constitutional Court Act. According to the court, the time-limit had already been triggered by the adoption of the Deputy Regional Prosecutor's decision to seize the shares, as the company's complaints to the Senior Public Prosecutor's Office and the Prosecutor General's Office had not constituted effective remedies within the meaning of the Constitutional Court Act.

17. On 10 March 1999 the Regional Court remitted the criminal case against H. and others to the Regional Prosecutor's Office for further consideration.

18. On 28 April 1999 the applicant company renewed its application for restoration of its rights to the KOTVA shares under Article 80 of the CCP, this time before the Regional Court; the latter was, however, no longer competent to consider it, as the criminal case had been returned to the Regional Prosecutor.

19. On 17 April 2000 the applicant company urged the Regional Prosecutor to decide on its application of 20 May 1998 for restoration of its rights to the KOTVA shares. On 21 April 2000 it was informed that the case was currently under the supervision of the Olomouc Senior Public Prosecutor's Office and it was therefore open to the applicant company to challenge the impoundment before that authority.

20. On 7 February 2003 the applicant company requested the Senior Public Prosecutor's Office to annul the impoundment of the KOTVA shares under Article 79c of the CCP. On 17 February 2003 the prosecutor refused the request, finding it unsubstantiated.

21. On 10 March 2003 the Prague High Court (*vrchní soud*) rejected the applicant's complaint of 24 February 2003 in which it was argued that the impounding had been ordered *sine lege* and was no longer necessary in the light of the objectives of the criminal proceedings. The court ruled that the impounding had been justified by the reasonable suspicion that the shares had represented the profit obtained by Mr H. from his illegal transactions. According to the court, that suspicion had not yet been dispelled.

22. On 5 May 2003 the applicant company challenged this decision before the Constitutional Court. Referring to Article 6 § 1 of the Convention and Article 1 of Protocol No. 1, it contended that the seizure of its shares had been ordered *sine lege*, that its property rights were restricted for more than seven years and that the seizure had been unlawful and was no longer necessary to achieve the aims of the criminal proceedings.

23. On 15 April 2004 the Constitutional Court declared the appeal inadmissible as manifestly ill-founded, stating, *inter alia*:

“... the Regional Prosecutor proceeded in accordance with the national law then in force. While at the relevant time the criminal law included neither Article 79c of the

[CCP], which expressly provides for the impoundment of book-entry shares (this provision was introduced by Act no. 265/2001 which entered into force on 1 January 2002), nor Article 89 § 13 of the Criminal Code which subsumes securities under the notion of 'item' ... [introduced by Act no. 253/1997 which entered into force on 1 January 1998], there is no doubt that the criminal law ..., in respect of serious economic crime cases, considered book-entry shares as items within the meaning of the criminal law even before 1 January 1998. The Regional Prosecutor's order of 12 May 1997 ... was issued under section 27(3)(d) of Act no. 591/1992 as amended and under Article 79 of the [CCP]. At the relevant time, the criminal law did not require any particular form for such an order. No appeal against it was therefore available ... However, any order suspending the right to dispose of securities was subject to supervision by the competent prosecutors' offices."

24. H. and ten others accused of various economic crimes were re-indicted on 8 August 2003. In January 2004 their case was subsequently remitted once again by the Regional Court to the Regional Prosecutor's Office for further consideration.

25. On 15 July 2005 the indictment was filed by the Regional Prosecutor for the third time.

26. On 15 June 2006 the Regional Court decided under Article 79c § 3 of the CCP to extend the seizure until the end of the criminal proceedings, as the reasonable suspicion that the shares had constituted the profit obtained by H. as a result of his illegal transaction had not yet been dispelled. It further decided to suspend the voting rights connected with the seized shares.

27. On 24 July 2006 the High Court, on a complaint by the applicant company, upheld this decision.

28. In July 2006 the joint stock companies K-T-V Invest a.s. and Česká investiční a správcovská a.s. merged. Following that merger, 384,971 seized KOTVA book-entry shares with a nominal value of 1,000 Czech korunas (CZK) (35.19 euros (EUR)¹), held by the applicant company, were converted into the same number of share certificates issued by the company Česká investiční a správcovská a.s., with a nominal value of CZK 920 (EUR 32.37).

29. On 5 February 2007 the share certificates for Česká investiční a správcovská a.s. were deposited with the Regional Court pursuant to section 113(9) of the Capital Markets Act (Law no. 256/2004) and on a request made under Article 78 § 1 of the CCP.

30. The applicant company's constitutional appeal challenging these decisions is pending before the Constitutional Court.

The criminal proceedings are still pending and the applicant company's securities remain seized. Seventeen hearings, each lasting several days, were held by the court, during which a large volume of evidence was taken. The case file contains more than 14,500 pages. The Regional Court heard or is still due to hear several dozens of witnesses, some of them abroad.

¹ EUR 1 = CZK 28.52 at the relevant time

Moreover, several experts were heard and expert reports commissioned. The damage caused according to the indictment amounts to CZK 1,191,922,741 (EUR 41,941,642)

3. *The settlements concluded by the applicant company, MERCIA a.s. and TREND a.s. in separate civil proceedings against the applicant company*

31. MERCIA and TREND challenged the acquisition of the KOTVA shares by the applicant company, not only as civil parties seeking damages in the criminal proceedings but also through their respective civil actions disputing the transfer of the shares to the applicant company.

32. On 9 September 1998 the Prague Regional Commercial Court (*krajský obchodní soud*), before which MERCIA had contested the title to 251,497 KOTVA shares (out of a total of 384,971 KOTVA shares) in civil proceedings brought against the applicant company, approved a friendly settlement concluded between the applicant company and MERCIA.

33. On 21 December 1999 the applicant company and TREND concluded a friendly settlement of their civil dispute concerning the ownership of the 384,971 KOTVA shares. This settlement was contested by an action for nullity filed on an unspecified date by minority shareholders of TREND seeking the return of the KOTVA shares to TREND.

34. On 17 May 2000 the Czech Securities Commission (*Komise pro cenné papíry*), a State regulatory authority, approved the settlements. As a consequence, all civil proceedings concerning KOTVA shares brought by MERCIA and/or TREND against the applicant company were discontinued. Moreover, these joint stock companies waived their status as civil parties in the criminal proceedings. They informed the State authorities acting in the criminal case of their respective settlements and stated that, as the instigators of the impoundment of the shares, they no longer insisted on seizure.

II. RELEVANT DOMESTIC LAW AND PRACTICE

Constitutional Court Act (no. 182/1993)

35. Under Section 72(1)(a) an individual alleging an impairment of his or her rights guaranteed by constitutional law may lodge a constitutional appeal with the Constitutional Court.

Criminal Code

36. Until 31 December 1997, Article 89 § 16 read as follows:

“Controllable natural resources, too, shall be regarded as items.”

37. Another sentence was inserted into that provision on 1 January 1998. It provided as follows:

“The provisions governing items shall also apply to securities.”

38. After Act no. 238/1999 entered into force on 1 January 2000, this provision became Article 89 § 13.

Code of Criminal Procedure (as in force at the material time)

39. Article 78 governs the obligation to hand over items of importance for criminal proceedings. Under paragraph 1, persons possessing such items are required to submit them to a court, prosecutor or police authority at the latter’s request. If the item is being seized for the purposes of the criminal proceedings, the person concerned must surrender it to the prosecuting authorities at their request.

40. Pursuant to Article 79 § 1, if the person concerned does not surrender the item of importance for the criminal proceedings, it must be taken from him/her and seized on an order from the president of a chamber during the trial or by the prosecutor, investigator or police authority at the pre-trial stage of the proceedings. The investigator or police authority may do so only with the authorisation of a prosecutor.

41. Article 80 § 1 provides, *inter alia*, that items which are no longer needed for the criminal proceedings and whose confiscation or seizure can be ruled out should be returned to the person concerned. Under Article 80 § 3 a decision on this matter at the pre-trial stage of the criminal proceedings is adopted by a prosecutor. Such a decision may be challenged by means of a complaint.

42. According to Article 119 § 2 rulings of prosecutor, investigator and police have the form of decision.

43. Article 141 § 1 states that a complaint is a remedy against a decision.

44. Under Article 141 § 2 a first-instance decision adopted by a court or a prosecutor may be challenged by means of a complaint only where the law explicitly so provides.

Act no. 265/2001 amending the Code of Criminal Procedure and the Criminal Code (entry into force on 1 January 2002)

45. Article 79a provides for the seizure of financial assets deposited in a bank account. Under paragraph 1, if the facts indicate that the financial assets in a bank account are destined for the commission of a crime, or have already been used for such purposes, or constitute the proceeds of criminal activities, the president of a chamber or a prosecutor, or the police authority at the pre-trial stage of the criminal proceedings, are empowered to impound them. Paragraph 5 provides that such seizure may be challenged by means of a complaint.

46. The newly introduced Article 79c governs the seizure of book-entry shares. Under paragraph 1, should the president of the chamber, or the prosecutor at the pre-trial stage of the criminal proceedings, decide on a seizure of book-entry shares, the Securities Centre, a legal person empowered to keep records and exercise other activities of the Securities Centre under a specific law, or the Czech National Bank must open a special bank account in which the seized securities are deposited. Paragraph 3 provides, *inter alia*, that the authorities mentioned in paragraph 1 may suspend the rights connected with seized shares. According to paragraph 4, Article 79a applies *mutatis mutandis* to the procedure governing decisions to seize book-entry shares and to reduce the terms of or lift such seizures.

47. Article 146a, which provided for a review by a court of seizures of property by a prosecutor, was substantially amended, bringing within its ambit, *inter alia*, decisions on seizures of book-entry shares under Article 79c, financial assets, real estate and other assets. However, seizures of items under Article 79 do not fall within its scope.

State Prosecution Act (no. 283/1993)

48. Section 12a (3) provides that a decision adopted by a prosecutor may be reviewed by a superior prosecutor unless the Act or another law provides otherwise.

Securities Act (no. 591/1992, as in force at the relevant time)

49. Under section 1(2) a share certificate may be substituted by a book-entry share, that is, by entry in a record of shares as provided for by law.

50. Section 27 provided for suspension of the right to dispose of book-entry shares. Under paragraph 3d, a suspension order was to be issued by the competent State authority, under a specific law (for instance, section 313 of the Code of Civil Procedure). The provision was repealed by Act no. 257/2004, which entered into force on 1 May 2004.

Capital Markets Act (no. 256/2004, entry into force on 1 May 2004)

51. Section 97 provides for suspension of the owner's disposal rights over book-entry investment instruments. Under paragraph 1(b), an order registering the suspension of the owner's disposal rights is granted by the competent court or administrative authority, if it is necessary in connection with the issuing of a preliminary measure, for the purposes of judicial or administrative proceedings, or if a specific law so provides.

*Interpretative guideline no. 2/1998 of the Prosecutor General
(published in the Interpretative Guidelines Gazette)*

52. The Prosecutor General directed that book-entry shares were to be considered as items within the meaning of criminal law and could therefore be seized on the basis of Articles 78 and 79 of the CCP. This was according to him possible even before the enactment of Act no. 253/1997, which entered into force on 1 January 1998.

III. RELEVANT DOMESTIC PRACTICE

53. *The Criminal Code – A Commentary* by Šámal, P., Púry, F. and Rizman, S., 3rd edition, 1998, C.H. Beck, p. 548, reads as follows:

“According to the majority opinion in [domestic] practice, ... [as of] ... 1 January 1998 ... it is also possible to seize book-entry securities as items ... on the basis of Articles 78 et seq. of the Code of Criminal Procedure governing the seizure of items. What continues to cause problems is the inadequate and inappropriate nature of Articles 78 and 79 of the [CCP] in respect of [such seizures], as the seizure of book-entry shares does not constitute the seizure or taking of an ‘item’ within the proper meaning of that term.”

54. *The Criminal Code – A Commentary* by Šámal, P., Púry, F. and Rizman, S., 4th edition, 1998, C.H. Beck, pp. 472 and 865, reads:

“An order to seize an item [under Article 79 § 1] is a decision *sui generis* ... No complaint can be lodged against it, as it is not a decision [within the meaning of Article 141 et seq.].”

“A prosecutor supervising the pre-trial stage of criminal proceedings is in principle empowered to decide on complaints challenging decisions adopted therein by [the prosecuting authorities]. The exception to this principle is a situation where the prosecutor assented to or initiated the decision and is thus not in a position to review the complaint impartially.”

55. *The Code of Criminal Procedure – A Commentary* by Růžicka, M. and others, ASPI, 13 January 2003, in a chapter entitled “The seizure of book securities – Article 79c”, reads as follows:

„Until the end of 2001, [domestic] practice relied on the idea that even book-entry securities constituted items within the meaning of criminal law. The provisions of Article 89 § 13 of the Criminal Code (inserted by amendment no. 253/1997) extended the scope of application of the term ‘item’ to include, *inter alia*, all types of securities. Nevertheless, it had been possible to arrive at the same conclusion even before that amendment entered into force ... It was therefore possible to seize [book-entry shares] (Article 79 of the [CCP]) ...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 OF THE CONVENTION

56. The applicant company complained of interference with its property rights contrary to Article 1 of Protocol No. 1, which reads as follows:

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

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

57. The Government contested that argument.

58. The applicant company further complained of the excessive length of that interference under Article 6 § 1 of the Convention which, in so far as relevant, provides:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal. ...”

59. The Court reiterates that it is the master of the characterisation to be given in law to the facts of the case (see *Guerra and Others v. Italy*, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 223, § 44), and that it has previously held that whilst Article 1 of Protocol No. 1 contains no explicit procedural requirements, it nevertheless implies that domestic law must provide for legal protection against arbitrary interference by the public authorities and that any interference with the peaceful enjoyment of possession must be accompanied by certain procedural guarantees (see *Capital Bank AD v. Bulgaria*, no. 49429/99, § 134, ECHR 2005-XII (extracts)). In the instant case the Court considers that the complaint raised by the applicant company under Article 6 § 1 of the Convention is closely linked to the complaint under Article 1 of Protocol No. 1 and may accordingly be examined as part of the latter complaint.

A. Admissibility

60. The Court notes that the application raises issues of fact and law under the Convention, the determination of which requires an examination of the merits. It also considers that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that it cannot be declared inadmissible on any other grounds. The complaint must therefore be declared admissible.

B. Merits

The parties' submissions

61. The applicant company alleged that its shares had been seized on the basis of a legal provision which lacked sufficient clarity and foreseeability. It also alleged that it had not had at its disposal sufficient procedural safeguards against the seizure. It further asserted that the seizure did not pursue any legitimate aim as the possible victims of the suspected crimes, MERCIA and TREND, concluded with it friendly settlements whereby they waived their claims in damages. The applicant company further asserted that the seizure had not been proportionate as its length was excessive.

62. While admitting that the seizure constituted interference with the applicant company's property rights, the Government asserted that the interference had been lawful. They conceded that Article 79 of the CCP, one of the provisions relied on by the prosecuting authorities, did not expressly provide for the seizure of book-entry shares. None the less, they maintained that, despite the fact that neither the Supreme Court nor the Constitutional Court had clarified in their respective case-law at the time the seizure had been imposed whether book-entry shares fell within the scope of that provision, the case-law of the ordinary courts had answered this question in the affirmative, as evidenced by the Prosecutor General's interpretative guideline (see paragraph 52 above). The principles enshrined in this case-law were subsequently embodied in the CCP, with the amendment which entered into force on 1 January 1998. Moreover, the interpretation of book-entry shares as movable items was also borne out by the records of the debate preceding the adoption of the Securities Act in Parliament. The Government further pointed out that Article 89 § 16 (previously Article 89 § 13) of the Criminal Code, which entered into force on 1 January 1998, stipulated that the provisions governing items were applicable to securities. They further asserted that the seizure of items had been subject to judicial control under Article 80 of the CCP and, subsequently, from 1 January 2002 onwards, under Article 79c taken in conjunction with Article 79a of the CCP. As regards the procedural safeguards available to the applicant company, the Government maintained

that the seizure could have been appealed before the Constitutional Court and that the applicant company could have lodged an application under Article 80 of the CCP requesting that the seizure be lifted or, after 1 January 2002, challenged the decision to seize under Article 79c of the CCP directly.

The Government further asserted that the seizure pursued a legitimate aim in the public interest, namely that of protecting the victims of crime, seizing the proceeds of crime and combating the most dangerous form of economic crime faced by the Czech Republic in the course of the transformation of its economy. In their view, the seizure was justified as it was indispensable for securing the enforcement of the outcome of the criminal proceedings against H. and others who, through transfers of securities, had inflicted damage to the detriment of the companies concerned amounting to nearly CZK 1.2 billion. Should the seizure be terminated, that enforcement might be frustrated. Referring to the exceptional circumstances of the case, they considered the seizure to be proportionate. They emphasised the extreme complexity of the proceedings, due to the fact that they concerned one of the most serious economic crimes in the history of the Czech Republic. In their observations they stated that more hearings would be held regularly every month. They stated that a decision on the merits would be adopted and the proceedings possibly terminated by the end of 2007.

The Court's assessment

63. The Court observes that the gist of the applicant company's complaint consists in the allegation that shares in its possession were seized contrary to Article 1 of Protocol No. 1 and that it lost all control over them as a result of that seizure. The freezing of the shares thus amounted, in the applicant company's view, to *de facto* deprivation of its property. The Government asserted that the situation constituted a control of property within the meaning of the third sentence of Article 1 of Protocol No. 1. The Court notes that the applicant company did not allege that it had lost its status as holder of the shares. It further observes that not all of the rights relating to the shares were suspended by the original seizure, the applicant company having been entitled, *inter alia*, to receive dividends, to challenge resolutions of general meetings or to propose the convening of general meetings. Moreover, the voting rights attached to the shares were suspended only in June 2006. Therefore, the Court considers that the situation in question could not be regarded as a deprivation of property. Accordingly, it is the second paragraph of Article 1 of Protocol No. 1 which is applicable (see *Capital Bank AD v. Bulgaria*, no. 49429/99, § 86, ECHR 2005-XII (extracts), with further reference to, *mutatis mutandis*, *AGOSI v. the United Kingdom*, judgment of 24 October 1986, Series A no. 108, § 51, and

Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland [GC], no. 45036/98, §§ 153-154, ECHR 2005-VI).

64. The Court reiterates that its power to review compliance of impugned acts with national law is limited and it is not its task to take the place of the domestic courts (see *Malone v. the United Kingdom*, judgment of 2 August 1984, Series A no. 82, § 79, and *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 95, ECHR 2002-VII). However, that does not dispense with the need for the Court to determine whether the interference in issue complied with the requirements of Article 1 of Protocol No. 1 (ibid.). The Court further recalls that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful (see *Capital Bank AD v. Bulgaria*, cited above, with further reference to *Iatridis v. Greece* [GC], no. 31107/96, § 58, ECHR 1999-II).

65. Moreover, the Court reiterates that a norm cannot be regarded as a “law” within the meaning of the Convention unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; an individual must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Whilst certainty is desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. The Court further reiterates that the scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails (see, for example, *Cantoni v. France*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, § 35, and *Chauvy and Others v. France*, no. 64915/01, §§ 43-45, ECHR 2004-VI).

66. Turning to the specific facts of the case, the Court observes that the first issue in dispute under the invoked provision is whether Article 79 of the CCP provided a legal basis for the seizure of book-entry shares, in particular whether the term “item” contained therein encompassed such shares. It notes that neither the Criminal Code nor the CCP specified before 1 January 1998 whether the prosecuting authorities were empowered to

seize book-entry shares, the statutes in question providing for the seizure of “items” in general. Nor did the case-law of the Supreme Court and the Constitutional Court clarify the issue at that time. As to the existence of the domestic courts’ practice alleged by the Government with reference to the Prosecutor General’s interpretative guideline, the Court accepts that the requirements of foreseeability and clarity of the law may be satisfied if the matter in question can be solved by means of the application of principles enshrined in settled domestic practice, including a practice having a certain degree of authoritative effect.

67. However, notwithstanding the question whether the guideline reflected the practice of the domestic authorities, the Court observes that the Government did not show that the guideline had been issued at the time of the original seizure in 1997 and that it had been published at that time in the Official Gazette or other publicly accessible standardised law resource. The same conclusion must be made with regard to the ordinary courts’ practice referred to by the Government and by the Constitutional Court in the reasoning of its decision rejecting the applicant company’s constitutional appeal. Consequently, the Court is not in a position to conclude that the case-law whose existence is alleged by the Government could have made the interpretation of Article 79 of the CCP unequivocal, as that case-law must be considered inaccessible to the applicant at the time of the original seizure. Furthermore as regards Czech practice, the Court observes that, when they were published in 1998, the legal opinions adduced by the Government (see paragraphs 53 – 55) had not arrived at the same conclusions when addressing the issue whether the term “item” in Article 79 of the CCP encompassed book-entry shares before 1 January 1998. That jurisprudence cannot therefore be regarded as interpreting unambiguously the scope of application of Article 79 of the CCP before 1 January 1998. In these circumstances, the Court observes that at least two interpretations of the scope of application of Article 79 of the CPC existed at the relevant time.

None the less, this does not suffice in order to conclude that the law was not foreseeable or was arbitrary (see *O. B. Heller, a.s. and Československá obchodní banka, a.s. v. the Czech Republic* (dec.), no. 5631/00, 9 November 2004). The Court notes in this regard that the seizure took place in consequence of the business transaction concluded by the applicant company in the course of its professional activities. Given the unsettled business environment of the Czech Republic of 1990 and the considerable volume of that transaction, it considers that the applicant company, if dealing with due care, presupposing *inter alia* legal assistance, could not be regarded as lacking a reasonable opportunity to foresee the consequences of acquiring the securities, including the impossibility of ruling out the risk that the securities might be subsequently seized. This conclusion applies *a fortiori* to the situation after 1 January 1998, when Article 89 § 13 of the

Criminal Code was amended so as to bring securities within the ambit of the provisions governing items, and even more so with the entry into force on 1 January 2002 of Article 79c of the CCP providing explicitly for the seizure of book-entry shares.

68. It remains to be examined whether the applicant company enjoyed safeguards against arbitrary interference by the prosecuting authorities when its securities were seized.

69. The Court recalls that the requirement of lawfulness, within the meaning of the Convention, presupposes, among other things, that the national law must provide a measure of legal protection against arbitrary interference by the public authorities with the rights safeguarded by the Convention (see *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 84, ECHR 2000-XI). Moreover, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental rights be, in certain cases, subject to some form of adversarial proceedings before an independent body competent to review the reasons for the measures and the relevant evidence (see, *mutatis mutandis*, *Al-Nashif v. Bulgaria*, no. 50963/99, § 123, 20 June 2002). It is true that Article 1 of Protocol No. 1 contains no explicit procedural requirements and the absence of judicial review does not amount, in itself, to a violation of that provision (see *Fredin v. Sweden (no. 1)*, judgment of 18 February 1991, Series A no. 192, § 50). Nevertheless, it implies that any interference with the peaceful enjoyment of possessions must be accompanied by procedural guarantees affording to the individual or entity concerned a reasonable opportunity of presenting their case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable judicial and administrative procedures (see *Jokela v. Finland*, no. 28856/95, § 45, ECHR 2002-IV).

70. In the instant case, it was not disputed by the parties that the decision on seizure under Article 79 of the CCP could not be contested under the CCP. The Court observes that according to that provision a decision on seizure during the pre-trial proceedings is reserved to the prosecutor. Such a decision cannot be contested under the CCP as it is, according to domestic practice, a decision *sui generis*, not a decision within the meaning of Article 119 § 2 of the CCP (see paragraph 54 above).

Moreover, a complaint against a prosecutor's decision is, according to Article 141 § 2 of the CCP, permissible only in cases where the law so provides. Article 79 of the CCP does not provide for such a complaint in relation to seizures. As regards Article 80 of the CCP, the Court observes that it provides, *inter alia*, for the lifting of a seizure measure in pre-trial proceedings by the prosecutor when the seized item is no longer required for the criminal proceedings and its expropriation or confiscation can be ruled

out. Thus, it is a legal instrument which makes it possible, not to appeal directly a decision on seizure, but rather to react to a change in the circumstances under which an item was seized. Furthermore, decisions under Article 80 of the CCP and appeals against them are adopted by a prosecutor (see paragraph 48 above) and not by a court, at the pre-trial stage of criminal proceedings. It is true that the seizure of book-entry shares became reviewable by a court with the amendment of the CCP, which introduced Article 79c CCP taken in conjunction with Article 79a of the CCP and with Article 146a of the CCP as amended. However, the correspondingly worded legal provisions entered into force only on 1 January 2002. The applicant company thus cannot be considered to have enjoyed under Czech criminal law as it stood at the time of the seizure sufficient procedural guarantees within the meaning of Article 1 of Protocol No. 1.

71. As for the right to challenge the seizure by means of a constitutional appeal, the Court observes that the applicant availed itself twice of this remedy without success (see paragraphs 16 and 23). The Court observes that the task of the Constitutional Court, when dealing with appeals filed under section 72(1) of the Constitutional Court Act, is, in principle, to review constitutionality of an impugned measure. As a general rule, it is not the function of that court to deal with errors in fact or law asserted in such an appeal. Therefore, it is doubtful whether such a review provides, on its own, individuals or entities with a reasonable opportunity to challenge effectively measures interfering with the rights guaranteed by Article 1 of Protocol No. 1.

However, in the instant case, where the facts were not disputed by the parties, the Constitutional Court did address the issue in law, raised by the applicant company in the constitutional appeals, when it found in its decision of 15 April 2004 that the contested seizure was from the very beginning legal (see paragraph 23). It is true that in its first ruling of 11 November 1998 the Constitutional Court did not proceed so when it refused to review the legality of the seizure as it declared the first constitutional appeal before it inadmissible as being lodged outside the time-limit provided for by the Constitutional Court Act. However, the examination of that decision by the Court is barred by the fact that the present application was lodged on 22 October 2004, i.e. outside the six-month time-limit provided for in Article 35 § 1 of the Convention.

72. It ensues that, due to the particular circumstances of the present case where the Constitutional Court dealt with and ruled on the issue raised by the applicant company while challenging the seizure, the applicant company cannot be regarded as having been deprived of a reasonable opportunity to challenge effectively the seizure in question.

73. The imposition of the seizure must be therefore considered lawful within the meaning of Article 1 of Protocol No. 1.

74. In these circumstances, it remains to be examined whether the seizure was justified, that is, whether it pursued a legitimate aim and was proportionate.

75. As to whether the control of property in issue pursued a legitimate aim, the Court notes that under the system of protection established by the Convention, it is for the national authorities to make the initial assessment of the existence of a problem of public concern warranting measures of the control of property. Here, the national authorities enjoy a wide margin of appreciation and the Court will respect their judgment as to what is “in the public interest” unless that judgment is manifestly without reasonable foundation. This necessarily applies, and perhaps to a greater extent, in the event of changes to a country’s political system (see, *mutatis mutandis*, *The former King of Greece and Others v. Greece* [GC], no. 25701/94, § 87, ECHR 2000-XII). As for the requirement of proportionality, any interference with the right to the peaceful enjoyment of possessions must achieve a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure interfering with property rights of individuals (see, among other authorities, *Pressos Compania Naviera S.A. and Others v. Belgium*, judgment of 20 November 1995, Series A no. 332, § 38, and *Malama*, cited above, § 48). In determining whether both requirements are met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing how the measures are to be implemented and to ascertaining whether the consequences of implementation are justified in the general interest for the purpose of achieving the object of the law in question (see *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 75, ECHR 1999-III). Under the Court’s case-law, the character of interference, the aim pursued, the nature of property rights interfered with, and the behaviour of the applicant and the interfering State authorities are among the principle factors material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicants.

76. Applying these principles to the case at hand, the Court observes that the Government’s assertion regarding a legitimate aim refers to policies which are essential for the proper functioning of all Contracting Parties. It further notes that at the time of the seizure the Czech Republic undertook systemic social and economic reforms one of whose side effects was an increase of serious economic crime. Moreover, although the Court accepts that the two victims of the transaction, MERCIA and TREND, might be regarded as having waived their rights with regard to the applicant company following their settlement agreements (see paragraphs 32-34), it was not

shown by the applicant company that all reasons for the seizure thereby ceased to exist, as is evidenced, *inter alia*, by the legal actions brought before the courts by the minority shareholders of MERCIA and TREND in order to contest the settlement agreements concluded with the applicant company (paragraph 33). It follows that the seizure must be considered as pursuing a legitimate aim within the meaning of Article 1 of Protocol No. 1.

77. As regards the proportionality of the seizure, the applicant company's right to dispose of its shares has been suspended since 11 May 1997, that is, for more than eleven years. Its voting rights attached to the shares were suspended on 15 June 2006 while other rights attached to the shares, such as the right to be paid dividends and to challenge resolutions of general meeting, were retained by the applicant company.

The Court acknowledges the importance of conducting investigations of suspected serious economic crimes, as in the instant case, with due diligence in order to ensure that these crimes are properly assessed and the proceedings duly terminated. Nevertheless, the Court, taking into account the length of the seizure of the shares of the applicant company – more than twelve years – and the considerable value of those assets, finds that a fair balance has not been struck in the instant case between the general interests of society and the interests of the applicant company, as the latter has been obliged to bear an excessive burden as a result of the continuing seizure.

78. Therefore, there has been a violation of Article 1 of Protocol No. 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

79. 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.”

80. The Court considers that the question of the application of Article 41 is not ready for decision. The question must accordingly be reserved and the further procedure fixed with due regard to the possibility of agreement being reached between the Czech Government and the applicant company.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible under Article 1 of Protocol No. 1;
2. *Holds* that there has been a violation of Article 1 of Protocol No. 1;

3. *Holds* that the question of the application of Article 41 is not ready for decision;
accordingly,
(a) *reserves* the said question;
(b) *invites* the Czech Government and the applicant company to submit, within the forthcoming three months, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
(c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in English, and notified in writing on 9 October 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President