Are the Requirements for 'Control of Use' Changing?

Analysis of the ECtHR Judgment in Pannon Plakát Kft and Others versus Hungary

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Abstract

The present study deals with the judgment of the ECtHR on control of the use of property and the conclusions to be drawn from it. According to ECtHR, disproportionate amendments to an Act on roadside advertising hoardings outside built-up areas have extinguished substantial part of applicant companies' businesses. The analyzed judgment is especially interesting because it provides a good example of the different approach of the Hungarian Fundamental Law and the ECHR to the examined issue (which concerns not only the right to property in the narrow sense, but also the right to freedom of enterprise), and also strongly demonstrates the importance of the precise establishment of the facts and the correct interpretation of the regulatory context. On the one hand, the judgment summarizes the conclusions of a number of earlier (mainly Hungarian) cases, and on the other hand, it further elaborates the interpretation of the ECHR provision under examination. It can be seen that the interpretation of the control of use is in a period of change. In addition to the general principle of fair balance, the requirement of compensation is increasingly being applied in the case of restrictions that do not amount to a deprivation of property.

Keywords: right to property, freedom of enterprise, compensation, ECtHR, Pannon Plakát.

1. Introductory Thoughts

Issues relating to the right to property are eternally relevant for researchers of constitutional law. There is a library of literature on theoretical approaches to property rights, limitation techniques and the legitimacy of interference. Undoubtedly, within this system, the ECHR and its Protocol No. 1 has its own specificities. The ECtHR has developed its own standards within this system of protection over the last decade, which have been analyzed in theoretical depth by many researchers. It is therefore not the purpose of this paper to reinterpret them. However, on the one hand, the diversity of the cases requires again and again an

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analysis of the different elements of the practice (since new problems may emerge) and, on the other hand, the way in which the specific cases are handled reflects the practice in terms of the extent to which the objectives pursued can be achieved properly.

The present study deals with the judgment of ECtHR in *Pannon Plakát versus Hungary*,[1] on control of the use of property and the conclusions to be drawn from it. According to ECtHR, disproportionate amendments to an Act on roadside advertising hoardings outside built-up areas have extinguished substantial part of applicant companies' businesses. The analyzed decision is especially interesting because it provides a good example of the different approach of the Hungarian Fundamental Law and the ECHR to the examined issue (which concerns not only the right to property in the narrow sense, but also the right to freedom of enterprise), and also strongly demonstrates the importance of the precise establishment of the facts and the correct interpretation of the regulatory context.

2. The Arguments of the Applicants and the Facts

The applicant companies (seven companies in total) are all advertising companies which operated roadside advertising hoardings and derived a substantial part of their income from that activity. Their business is roadside advertising with assets specifically designed for roadside use (therefore unsuitable for any other type of business activity).

Until 1996, the Hungarian Act I of 1988 on Traffic on Public Roads (TPR Act) prohibited the display of roadside hoardings in so far as they presented a risk to traffic safety. Thereafter, until the end of 2010, the TPR Act prohibited the installation of roadside hoardings within 50 meters (in the case of min roads, dual carriageways and motorways: 100 meters) of the axis of roads outside built-up areas. However, on 30 December 2010 (the amending Act was entered into force on 1 January 2011), the TPR Act was amended to completely ban the installation of hoardings exceeding 4 square meters, and stated that the public road operator could remove, at the owner of the advertising structure's expense, any hoardings in contravention of the prohibition. From 1 July 2011, fines may be imposed on owners of land on which hoardings not respecting the new criteria were placed. In October 2011, a governmental decree clarified that the prohibition applies not only to newly installed hoardings but also to those installed previously.[2] A recent amendment to the TPR Act, which entered into force on 7 August 2012, incorporated this rule into the TPR Act. The amendment stipulated that hoardings violating the regulations had to be removed by 30 September 2012. On 1 July 2013, the TPR Act was again amended. It prohibited, in general and with only a few limited exceptions, the 'presence' of any roadside advertising hoardings outside built-up areas, irrespective of whether they were capable of distracting drivers' attention or not.

1 *Pannon Plakát Kft. and Others v Hungary*, No. 39859/14, 6 December 2022.
2 Governmental Decree 224/2011. (X. 21.) Section 3(2).

As a result of the ban, the applicant companies lost the possibility to use and rent out a significant number of their previously installed hoardings.

On 4 November 2013, following an examination on the merits, the Hungarian Constitutional Court dismissed the constitutional complaints of the applicants and found the relevant legislation to be constitutional.[3] In its decision, the Constitutional Court noted the short *vacatio legis* afforded by the legislature for the amendments that came into effect on 1 January 2011, but considered, among other things, that the brevity of the period between the promulgation and coming into effect of these amendments was alleviated by the fact that fines for non-compliance could only be issued from 1 July 2011.[4] The decision also establishes the necessity and proportionality of the restriction of the freedom of enterprise and the freedom to choose an occupation. According to the Constitutional Court, the necessity of the restriction was justified by the fact that the declared purpose of advertising is to attract attention, and that the primary criterion for the design and display of advertising is conspicuousness. An advertising hoarding placed in the appropriate place and with attention-grabbing content is likely to attract the eye involuntarily, and even the most conscious and experienced driver is not always able to avoid or exclude such an effect. As regards proportionality, the decision concluded that the legislation, when regulating the positioning of advertising hoardings, took account of their capacity to attract attention, that the prohibition differentiated according to the size of the hoardings and their position in relation to the road, and that exceptions were also laid down.[5] As regards the alleged violation of the right of property, the Constitutional Court concluded that the amendment did not affect the right of property of the applicants because it did not deprive the property of the hoardings, thus the hoardings could be placed elsewhere in accordance with the relevant legal provisions.[6] In addition, the Constitutional Court rejected the examination of certain rules because they either apply to the owners of land (*i.e.* not to the petitioners) or they (fines, removal of the hoardings) are not directly applicable rules, but rules that require other procedures.[7]

On 23 June and 15 December 2015, the TPR Act was amended, and the previous ban was partially lifted: billboards and other advertising structures were allowed to be placed on streetlights, transmission lines or telephone poles in built-up areas.

The applicant companies complained that the loss of ability to operate their previously installed advertising hoardings and the ban on the future installation of such assets had amounted to an unjustified interference with their right to the peaceful enjoyment of possessions as provided for in Article 1 of Protocol No. 1. The applicants argued that the impugned measure had amounted to a deprivation of their possessions *via de facto* expropriation. They stressed that the measure did

3 Constitutional Court Decision No. 3208/2013. (XI. 18.) AB.
4 Id. Reasoning [57]-[60].
5 Id. Reasoning [84]-[98].
6 Id. Reasoning [109].
7 Id. Reasoning [32]-[35].

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not comply with the requirement of lawfulness as the State had not provided for a sufficient transitional period and that, moreover, no compensation had been afforded to them for the deprivation of their possessions. The applicant companies also submitted that the impugned measure was arbitrary as it had allegedly served the interest of another advertising company, closely linked to the Government at the material time, and that it had not been shown that the roadside hoardings would endanger road safety any more seriously than other types of advertisements which were not prohibited. In the applicant companies' view, this was also corroborated by the partial lifting of the ban in 2015, which discredited the legitimate aim put forward by the Government. The applicants further argued that the impugned measure was disproportionate because their possessions had been rendered unusable by the ban – they had had to dismantle their roadside hoardings at their own expense and the lease agreements concluded between them and private parties for the lease of the roadside hoardings for advertisement purposes had had to be prematurely amended or terminated. This burden had not been alleviated by any compensation.[8]

The Government submitted that the impugned measure had not amounted to an interference with the applicant companies' right, because they were not its addressees in the sense that the amendment to the TPR Act affected the owners of plots of land upon which the roadside hoardings were erected and not the applicants, who were merely the owners of the roadside hoardings. Moreover, the Government argued that the measure served a legitimate aim as it had been implemented with the intention of reducing the number of traffic accidents (that the attention of drivers was not distracted). In addition, the Government cited the Vienna Convention on Road Traffic of 8 November 1968 as imposing an obligation on Hungary to ensure the visibility of road traffic signs by drivers for whom they are intended. The Government further argued that the impugned measure was lawful as it had come into force *ex nunc* – no sanction or obligation had been imposed on the applicants with retroactive effect. They stressed that the impugned measure was also proportionate because the statutory prohibition was not absolute (it contained an exception for hoardings not exceeding 4 square meters) and had no bearing on the ownership title to the advertising hoardings. Moreover, according to the Government, the restriction on the applicant companies' possessions was proportionate.[9]

3. The Findings of the ECtHR

The ECtHR found the violation of Article 1 of Protocol No. 1. In its reasoning, the ECtHR first of all drew some important conclusions on the facts. It stressed the specific nature of the activities of the applicant companies, which made the roadside advertising hoardings inflexible instruments, as they are unsuitable for any other type of business activity. Stated that the applicants lost the ability to use

8 *Pannon Plakát Kft. and Others v Hungary*, paras. 33-37.
9 Id. paras. 38-40.

and rent out a significant number of their previously installed hoardings, therefore those had to terminate or amend contracts with existing clients. The applicant companies had to cover the costs of removing the roadside hoardings, which has substantially diminished the applicant companies' income and resulted in a loss of their investments' value (this fact was not disputed by the Government). The applicants lost opportunities on the market, therefore the chances are lower for them to make profit, which may translate into a decrease in the equity value of their shares. According to ECtHR, this affects not only the interests of the shareholders but also the enterprise value of a company (consequently this may infringe on the company's rights). The ECtHR stressed that shares in a public company are to be regarded as 'possessions', moreover the applicant companies were the owners of the roadside advertising hoardings, which lost most of their economic value as a result of the impugned measure. Given the serious economic consequences flowing from the measure, the ECtHR agreed with the applicants that it was a severe measure amounting to an interference with their property rights. The ECtHR also noted that there has been no formal expropriation of the applicant companies' assets. Meanwhile, it was not a *de facto* expropriation, since the assets in question, while losing their economic value in terms of their primary purpose, could still be sold for parts. According to ECtHR, in reference to *Könyv-Tár Kft and Others*,[10] such an interference falls to be considered under the second paragraph of Article 1 of Protocol No. 1.[11]

As to the lawfulness and aim of the interference, the ECtHR also stated in this case[12] that the national authorities are in principle better placed than the international judge to decide what is 'in the public interest'. The ECtHR declared that it would respect the legislature's judgment as to what is 'in the public interest' unless that judgment is manifestly without reasonable foundation. The ECtHR also declared that it did not call into question the Government's position that the measure had served the purpose of reducing traffic accidents, mindful of the importance of road traffic safety and the respondent State's obligations enshrined in the Vienna Convention on Road Traffic of 8 November 1968. Furthermore, for want of any material evidence, it did not accept the claim that the impugned measure had served the interest of another advertising company closely linked to the Government at the material time. The ECtHR therefore considered that the goals of the impugned measure, as cited by the Government, cannot be said to be "manifestly without reasonable foundation". It therefore found the measure to be lawful and pursuing a legitimate aim.[13]

As to the proportionality of the measure, the ECtHR emphasized the importance of 'fair balance', referring to case *James and Others*.[14] According to ECtHR, the search for this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole and hence also in the second paragraph. There must be a

10 *Könyv-Tár Kft. and Others v Hungary*, No. 21623/13, 16 October 2018, para. 43.
11 *Pannon Plakát Kft. and Others v Hungary*, paras. 42-46.
12 *Béláné Nagy v Hungary* [GC], No. 53080/13, 13 December 2016, para. 113.
13 *Pannon Plakát Kft. and Others v Hungary*, paras. 47-49.
14 *James and Others v the United Kingdom*, No. 8793/79, 21 February 1986, para. 37.

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reasonable relationship of proportionality between the means employed and the aim sought to be realized.[15] The ECtHR accepted that, in the present case, the competent authorities enjoy a wide margin of appreciation, their assessment as to the need for legislation, its aims and its effects should be accepted by the ECtHR unless it was manifestly unreasonable and imposed an 'excessive burden' on the person concerned. Given the serious economic consequences, the ECtHR agreed with the applicants that it was a severe measure in the circumstances.[16]

The ECtHR observed that only two days had passed between the promulgation and the entry into force of the first amendment (which prohibited the installation of new roadside hoardings). This measure undisputedly had a direct effect on the applicant companies' businesses by impelling them to terminate or amend their already existing contractual relationships with their clients and the limitations on signing new contracts. The burden was only to a limited extent alleviated that a fine for non-compliance with the impugned measure could only be imposed six months after the coming into effect of the amendments to the TPR Act, because the competent authority could already forcibly remove the applicants' property, at the applicant companies' expense, thereby placing an immediate financial burden on them. Moreover, from 24 October 2011, not only was the 'installation' of roadside hoardings prohibited, but also their 'presence'. The later statutory amendment also stipulated that hoardings violating the regulations had to be removed by 30 September 2012, that is, less than two months from the entry into force of the statutory amendment (7 August 2012) requiring the removal of already installed roadside hoardings. According to ECtHR, these measures – contrary to the argument put forward by the Government – in reality had retroactive effect.[17]

The ECtHR has a consistent practice that in the context of businesses operating under a legal framework that was essentially stable for more than ten years, such short transitory periods can hardly be regarded as sufficient. The applicants had a legitimate expectation of continuing their business activity, because the TPR Act had only prohibited the placement of roadside hoardings in so far as they presented a risk to traffic safety. Therefore, while the impugned measure was sufficiently foreseeable from a qualitative perspective, it was unexpected in the context of the present case.[18] The goals of the impugned measure cited by the Government were in line with the respondent State's international obligations and pursued the legitimate aim of ensuring an important public interest, namely, road traffic safety. Although the interference was a control of use rather than a deprivation of possessions, such that the case law on compensation for deprivation is not directly applicable, the ECtHR considered that a disproportionate and arbitrary control measure could not satisfy the requirements of Article 1 of Protocol No. 1. In addition, the very short period available to make adequate arrangements to respond to the impending change in the major source of revenue was not alleviated

15 The person concerned should not be placed under an individual and excessive burden. *See Vékony v Hungary*, No. 65681/13, 13 January 2015, para. 32.

16 *Pannon Plakát Kft. and Others v Hungary*, paras. 50-52.

17 Id. para. 53.

18 *Cf. C.A. Zrt. and T.R. v Hungary*, Nos. 11599/14 and 11602/14, 1 September 2020, para. 36.

by any positive measures on the part of the State.[19] Moreover, the Government failed to advance any argument concerning the relative brevity of the transitory period, making no reference to any pressing economic or social need which could have prevented a longer period being afforded (the aim of reducing traffic accidents was relevant, but it could not be considered to correspond to an exceptional circumstance which would allow the transitory period to be shortened).[20]

In sum, the ECtHR concluded that

> "having regard to the partly retroactive nature of the impugned measure, its unexpected nature, the short transitory period, the lack of any compensatory scheme and the importance that the extinguished business activity had for the applicant companies, […] – even bearing in mind the wide margin of appreciation afforded to the State in this type of policies and the importance of road traffic safety – […] the interference with the applicant companies' rights was disproportionate to the aim pursued and that they had to bear an individual and excessive burden. A disproportionate measure, especially without any scheme of compensation, does not satisfy the requirements of the protection of possessions under Article 1 of Protocol No. 1."[21]

The ECtHR awarded indemnity to the applicants, except for those for which it considered the complaints inadmissible (it did not accept the assignment of the claim) or which have since been liquidated/voluntarily wound up.

4. Critical Remarks

Property was always seen as a fundamental institution across Europe. This is especially true in private property-based societies, but it is also found in common/cooperative/state property-based systems.[22] The driving force behind constitutionalism in the eighteenth and nineteenth centuries was the emerging citizenry, which, based on its own social and political positions, elevated the right to property to the status of a fundamental right. Hence, today's constitutional protection is based in part on the interdependence between liberty and property.[23] The evolutionary path is of course not uniform, as there are differences in how property is viewed in different legal systems. While one view (the dominant one in the US) understands property as a commodity (a tool to maximize the satisfaction of individual preferences through the maximization of wealth), another understands property as propriety (a tool to maintain the appropriate social

19 *Cf. e.g. Pinnacle Meat Processors Company and Others v the United Kingdom* (dec.), No. 33298/96, 21 October 1998; and *Ian Edgar (Liverpool) Ltd. v the United Kingdom* (dec.), No. 37683/97, 25 January 2000.

20 *Pannon Plakát Kft. and Others v Hungary*, paras. 54-57.

21 Id. para. 58. The ECtHR cited *Vékony v Hungary*, para. 35; and *Valle Pierimpiè Società Agricola S.P.A. v Italy*, No. 46154/11, 23 September 2014, paras. 74-77.

22 András Téglási, 'A tulajdon alkotmányos védelmének kialakulása', *Jogtudományi Közlöny*, 2018/7-8, p. 361.

23 Attila Menyhárd, 'A tulajdon alkotmányos védelme', *Polgári Jogi Kodifikáció*, 2004/5-6, p. 24.

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order).[24] It is certainly a right of a particular nature, since in contrast to other freedoms it exists only insofar as it is guaranteed by the legislator.[25] The primary objective of legal policy is to protect private property against unlawful state interference in property. Its three cornerstones are *(i)* the protection of the institution of private property, *(ii)* the protection of private property as a subjective right and *(iii)* the obligation to tolerate interference in certain cases.[26] The latter condition reflects the fact that property is socially bound (the Hungarian Fundamental Law tries to express this in striking terms as 'social responsibility').[27]

The original text of the ECHR left out the rules on the right to property because states could not agree on the protection of property as a fundamental right. It was therefore only regulated two years later, but it is no surprise that the text explains not only what is protected, but also what is not.[28]

In the seven decades since then, the interpretation of the sommat rule has expanded spectacularly. The ECtHR has also largely adopted a commodity-type approach to property, the evolution of the rules on compensation for deprivation of possessions shows a clear example of the commodity view.[29] The definition of who is entitled to protection and of what property is protected are well settled. Latter includes anything capable of private ownership and thus excludes social rights.[30] However, in the system of the ECHR, beyond the narrow interpretation, the protection of property rights is appropriate too in the case of rights of pecuniary value if the object of the right is adequately defined and the right itself actually exists as recognized by law (thus it can cover other pecuniary rights in addition to property in the civil sense), and has a role of ensuring personal autonomy of action.[31] Since the ECHR is silent on freedom of enterprise, the ECtHR, interpreting the right to the peaceful enjoyment of possessions expansively, will also judge questions relating to the freedom of enterprise under the same provision.[32] There is no doubt that the Hungarian constitutional dogmatics protects the rights concerned in different aspects compared to the broadly guaranteed protection of property (for this reason, for example, the infringement of the freedom of

24 Frankie McCarthy, 'Protection of Property and the European Convention on Human Rights', *Brigham-Kanner Property Rights Conference Journal*, Vol. 6, 2017, p. 300.

25 Gábor Kecső, 'A tulajdonhoz és az örökléshez való jog', *in* Lóránt Csink (ed.), *Alapjogi kommentár az alkotmánybírósági gyakorlat alapján*, Novissima, Budapest, 2021, pp. 144-145.

26 Menyhárd 2004, p. 25.

27 *See* Tímea Drinóczi, 'A tulajdonhoz való jog az Alaptörvényben', *Jogtudományi Közlöny*, 2012/5, p. 228.

28 Kecső 2021, pp. 143-144.

29 McCarthy 2017, p. 327.

30 *See* more in Peter van den Broek, 'Protection of Property Rights under the European Convention on Human Rights', *Legal Issues of European Integration*, Vol. 13, Issue 1, 1986, pp. 89-90.

31 Ákos Cserny & András Téglási, 'A gazdasági alkotmányosság új fejezete Magyarországon? Az Alkotmánybíróság a korábbi alkotmányos alapelvek fogságában', *Jog – Állam – Politika*, 2015/1, p. 16.

32 Ferenc Fábián, 'A vállalkozáshoz való jog', *in* András Jakab & Balázs Fekete (eds.), *Internetes Jogtudományi Enciklopédia*, Budapest, 2018, at http://ijoten.hu/szocikk/a-vallalkozashoz-valo-jog.

enterprise is to be judged more strictly, because the public interest is not a sufficient basis for the restriction).[33]

Having briefly stated the above, a detailed description of the practice of the ECtHR in this area is beyond the scope of the present study. It can safely be stated that the case under examination in some respects does not differ from the general case law of the ECtHR. Consequently, it does not contest the public interest nature of the intervention, nor does it seek to argue that the measure constitutes a de facto deprivation of property. The observed practice is that very few de facto deprivations have been recognized by the ECtHR.[34] The 'fair balance', called for as a proportionality criterion in controlling use, is also a familiar reference point. They are therefore in line with the case law of many decades. It is also clear that in the case of deprivation, proportionality will be mostly a question of whether adequate compensation is paid,[35] even though that compensation is not expressly called for in the Article's text.[36]

According to one researcher, it is typical of the ECtHR's case law to declare 'control of use' instead of 'deprivation of possessions' in cases where the ECtHR considers that the losses in question do not merit compensation.[37] However, in recent years this perception seems to have changed. In the examined case, the ECtHR objected to the lack of compensation despite the fact that deprivation of possession could not be established. This had already been stated by the ECtHR in *Vékony*,[38] so in this sense it can be seen rather as a consolidation of changing practice. In fact, this approach is nothing new either. One author's view, expressed decades ago, was

> "that compensation is required when financial loss is suffered unless the interference has as its object the regulation of the use of the property interfered with as opposed to restriction on the use of that property for some wider public purpose, or unless the financial loss was intended by the legislation and that intention is consistent with the Convention."[39]

In Hungary, it has also been an open question for 30 years in which cases the owner must tolerate the restriction by public power without any compensation.[40] As in *Vékony*, the ECtHR argued in the present case that "a disproportionate and arbitrary control measure cannot satisfy the requirements of Article 1 of Protocol No. 1."[41] In essence, the ECtHR would not have explicitly required a compensation, but

33 Endre Orbán, A hazai és a strasbourgi tulajdonvédelem közelítésének lehetőségei, 2016, at https://hpops.tk.mta.hu/blog/2016/09/a-hazai-es-a-strasbourgi.
34 McCarthy 2017, p. 312.
35 Van den Broek 1986, p. 90.
36 Howard Davis, 'Democratic Disablement and the Right to Property in the European Convention for the Protection of Human Rights', *Journal of Civil Liberties*, Vol. 1, Issue 2, 1996, p. 138.
37 McCarthy 2017, pp. 327-328.
38 *Vékony v Hungary*, para. 35.
39 Van den Broek 1986, p. 90.
40 Orbán 2016.
41 *Pannon Plakát Kft. and Others v Hungary*, para. 56.

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objected that the intervention "was not alleviated by any positive measures on the part of the State, for example, the adoption of a scheme of reasonable compensation."[42] The ECtHR examined this in the light of the proportionality test. In this context, it referred to the individual and excessive burden, also similar to the case of *Vékony*. However, the conclusions of this proportionality test, as set out above, may be questioned to some extent.

In the present case, the reasons justifying the violation of the ECHR were as follows: *(i)* the partly retroactive effect of the measure; *(ii)* the short transitory period of the measure; *(iii)* the unexpected nature of the measure; and *(iv)* the lack of any compensatory scheme. The ECtHR interpreted all this in the light of the fact that the extinguished business activity had been important for the applicant companies. However, the ECtHR did not question the public interest nature of the legislation, nor did it accept the applicants' argument that the measure allegedly had served the interest of another advertising company, closely linked to the Government.

The ECtHR approached it more from the compensation side, but this approach is questionable in the light of the above. It would have been an interesting addition, however, if (once compensation had become the focus of the proportionality analysis) the ECtHR had assessed the question of compensation as a kind of 'damage-sharing'. By this I mean that it would have been worthwhile to examine the question from the point of view of whether the applicants alone could bear the burden or whether the State should have shared it. That is to say, it could have been approached from the point of view that, if both parties are responsible for the situation that has arisen, then one party alone cannot bear the burden of the consequences. This aspect would have been an interesting addition even in the context of the 'fair balance' criterion. It is of course questionable whether this follows from the article under examination, but it is equally true of the question of compensation, as stated above.

Although it appeared in the facts of the case, the ECtHR did not address the fact that the prohibition was softened in 2015. This is understandable in the sense that it did not base the disproportionality on the excessive rate of intervention (but on the lack of compensation), but it would have been interesting to have examined proportionality from this perspective. Does the subsequent softening of the rules a few years later justify the disproportionality? Unfortunately, this has not been clarified. It emerges from the reasoning that the ECtHR essentially criticized the fact that the first impugned amendment to the Act entered into force at a short transitory period and that following the subsequent amendments the activities of the petitioners became impossible without compensation. In my view, to better understand the situation, it is necessary to highlight a number of important elements of the amendments and of the facts.

The amendment to the TPR Act, which entered into force on 1 January 2011, did indeed introduce a general ban on advertising hoardings larger than 4 square meters, but the ECtHR was not entirely careful to state that "the public road operator could remove, at the owner of the advertising structure's expense, any

42 Id.

hoardings in contravention of the prohibition."[43] This rule only applied to hoardings placed in the 'road area'.[44] The road area is defined by the Act as "the area between the boundaries of the road and the land belonging to it."[45] It does not therefore include the area which the applicants had complained about. Another rule was applicable to the situation complained of by the applicant companies, which stated that the

> "traffic authority shall order the violator of the prohibition set forth in paragraph (3) to remove [...the hoarding...]. The public road operator may, on the order of the traffic authority, carry out the removal or have the removal carried out, at the expense and risk of the obligated person."[46]

The obligation therefore applied to the 'violator' and was not automatic, *i.e.*, it was based on an individual decision of the traffic authority. This rule was in force previously, but there is no doubt that the applicants were only affected by it due to the amendment of the TPR Act. In light of this, however, it would have required further clarification as to who was exactly affected by this measure and to what relevance it would have been for the authority to (have been required to) take an individual decision prior to removal.

Also related to this issue is the fact that only hoardings placed in the road area were removable under the governmental decree[47] as well, so the statement that "if unsuccessful, to remove them itself"[48] is erroneous in the present case.

Also, an additional correction to the facts is that the amendment which entered into force on 1 July 2011 did indeed allow for imposing fines, but in return it repealed the rule from Section 12 (4) that allowed the removal of the hoardings. This latter circumstance was not noticed by the ECtHR, although it may be significant that from that date, the possibility of removal on the basis of the authorization set out in the TPR Act was not an option.

Moreover, it should also be stressed that, in contrast to the ECtHR, the Hungarian Constitutional Court did not accidentally fail to examine the rules which did not directly affect the applicants but the owners of land.[49] While in this respect the Constitutional Court's approach is also open to criticism (since several rules applied at least indirectly to the applicants), it is also instructive in at least one respect, since it pointed out precisely that the rule allowing the imposition of fines was clearly applicable to the owners of land and not to the applicant companies. In this respect, it is therefore questionable to what extent the applicants were affected by the possibility of fines.

In my opinion, it can hardly be concluded that the amendment of the Act has caused direct damage if, as described above, the traffic authority had to take an

43 Id. para. 10.
44 TPR Act, Section 12(5).
45 Id. Section 47, point 13.
46 Id. Section 12(4).
47 Governmental Decree 224/2011. (X. 21.)
48 *Pannon Plakát Kft. and Others v Hungary*, para. 12.
49 Constitutional Court Decision No. 3208/2013. (XI. 18.) AB, Reasoning [11]-[21].

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individual decision on the violation of the prohibition. It is not apparent from the ECtHR's judgment that such a decision was taken against the applicants. This is significant because, in its absence, it is at most one of the possible interpretations of the impugned rules which the ECtHR has adopted. If, however, no such decisions were in fact taken, it is arguable that the first amendment of the TPR Act complained of in the chronological order would indeed have covered the previously installed hoardings. In the case of subsequent amendments, this can be established, but the arguments concerning the retroactive effect of the legislation and the short transitory period are greatly weakened. Retroactive legislation could in fact have arisen if the legislator had intervened in ongoing contracts. This, however, can only be understood as from the time when it was explicitly stated that existing hoardings could not be maintained.

In this relation, the other rules of the TPR Act should have been interpreted also in relation to the unexpectedness. Since its promulgation in 1988, Section 42 of the TPR Act has stated that no activity may be carried out alongside a public road which endangers the safety of traffic or the condition of the public road. In this respect, paragraph (2) states that the use of land alongside a public road may be restricted without any compensation in the cases provided for by law. The ECtHR did not in any way assess the fact that the applicants organized their activities in the knowledge of that rule. This does not, of course, mean that this rule is necessarily compatible with the spirit of the ECHR, but it does affect predictability to a large extent, since one of the ECtHR's arguments was precisely that the applicants could be affected unexpectedly by the interference without compensation.

Undoubtedly, it was not possible to prepare for the first amendment in two days. Nevertheless, I agree with the Constitutional Court that: "the delayed introduction of the possibility of sanctioning can also be considered as a kind of transitional period."[50] I am aware that this sentence has provoked much debate in the academic literature,[51] but it should be interpreted in the very context I have described above. If the first amendment of the TPR Act only meant that no new hoardings could be installed, then the question could at most be whether there were any contracts concluded by the applicants which would have started the installation of hoardings. In light of this, the real question is what the petitioners had to prepare for? If the transitory period had been longer, should they have been allowed to install new hoardings during the transitory period? This would be contrary to the requirement of reasonable cooperation.

According to the ECtHR, that period was also unacceptably short, when the amendment to the Act in 2012 set a tight two-month period for the removal of existing hoardings. Without discussing the interpretation of this period, it should be noted that, although the obligation to remove the existing hoardings dates from that date, the ban on existing hoardings was already in force since October 2011 (as the ECtHR also notes). In my view, it therefore unfolds from the regulation that

50 *Pannon Plakát Kft. and Others v Hungary*, para. 69.

51 Mátyás Bencze & Ágnes Kovács, '"Mission: impossible": alkotmánybíráskodás az alkotmányos értékek védelme nélkül', *Jogtudományi Közlöny*, Vol. 69, Issue 6, 2014, p. 282.

the legislature first prohibited the installation, then imposed fines, and finally decided on the removal, which could be interpreted as a gradual intervention.

It should also be noted that there are also dangers in having a single rule (such as the ECHR provision in the present case) cover such a wide area, as it can be dangerous to confuse the fundamental rights involved. It can be seen that, despite the identical facts, the Hungarian Constitutional Court and the ECtHR have only a partial overlap in the legal issues involved. In the case before the Hungarian Constitutional Court, the applicants also invoked a violation of Article IX(1) (freedom of expression) and Article XV(2) (prohibition of discrimination) of the Fundamental Law, in addition to the violation of Article B(1) (primarily due to the retroactivity, but also due to the violation of the clarity of the norm), Articles M and XII (both on the ground of violation of the freedom of enterprise and profession, and Article XIII(1) (on the ground of disproportionate interference with the right to property and lack of public interest). To a large extent the rules laid down in Articles B, M, XII and XIII cover the provisions which the ECtHR has examined under the ECHR. However, these provisions all fall within the scope of Article 1 of Protocol No. 1. Why is this important? Although it is possible to argue separately about the partly retroactive effect, the short transitory period and the unexpected nature of the provisions, but if the requirements are strongly mixed, it is easy to achieve an interpretation which, taken together, seems convincingly disproportionate. However, it is not sure that this serves overall the transparency (especially from the side of the regulatory state).

The essence of advertising is to attract attention. Its abstract dangers to driving can be significant. If the public interest objective of the legislator is not disputed (it was not disputed by the ECtHR), what makes the regulation unexpected? Does longer transitory period solve the problems? Of course, it is understandable that compensation may still be an important aspect, but does it ultimately mean that the control of use will always entail compensation? When the main point of contention in a provision is precisely in which cases a restriction of use requires compensation, it is hardly acceptable to confuse expectations to this extent and to derive them from each other.

5. Closing Remarks

The judgment of the ECtHR has important lessons to learn in many respects. On the one hand, it summarizes the conclusions of a number of earlier (mainly Hungarian) cases, and on the other hand, it further elaborates the interpretation of the ECHR provision under examination. It can be seen that the interpretation of the control of use is in a period of change. In addition to the general principle of fair balance, the requirement of compensation is increasingly being applied in the case of restrictions that do not amount to a deprivation of property. However, the criteria for this do not seem clear. In practice, the over-general rule of the ECHR leads to a confusion of several fundamental rights. If there is no explicit test for the applicability of compensation, the practice can easily become unpredictable.

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This difficulty is compounded if the interpretation of the factual and legal issues is neither clear nor complete. The case under examination provided strong examples of all this.