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EUROPEES HOF VOOR DE RECHTEN VAN DE MENS
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Art. 6, 34 EVRM

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Art. 34 EVRM. Klachtrecht geldt niet voor statelijke actoren. Croation Radio-Television wordt gekwalificeerd als een non-gouvernementele organisatie en heeft wel klachtrecht. Uiteenlopende rechterlijke oordelen. Geen schending van art. 6 EVRM wegens aanwezigheid rechtseenheidsvoorziening.

De Kroatische publieke omroep (de omroep) heeft groot financieel nadeel geleden na fraude door een financiële medewerker. Zij heeft geprobeerd dit via onrechtmatige-verrijkingsprocedures te verhalen, maar daarbij hebben verschillende rechters verschillend geoordeeld. Anders dan het Kroatische Constitutionele Hof, oordeelt het EHRM dat de publieke omroep voldoende onafhankelijk en autonoom is om als non-gouvernementele organisatie te worden aangemerkt, zodat de omroep klachtrecht onder art. 34 EVRM toekomt.

Hier merkt het Hof op dat de Staat oprichter is van de omroep en dat haar statuten worden goedgekeurd door het Kroatisch parlement en haar middelen voor een groot deel uit de staatskas komen. Verder levert de omroep omroep- en andere diensten in het belang van het publiek. Daarbij is zij gehouden om een overeenkomst te sluiten met de regering waarin programmeringsverplichtingen worden vastgelegd en de financiering ervan.

Daartegenover staat dat de omroep in Kroatië wordt gereguleerd door de mediawetgeving, die bepalingen bevat om haar objectiviteit en onafhankelijkheid te waarborgen. Bovendien garandeert deze wet volledige programmavrijheid van de media. De omroep valt dus niet onder de bescherming van de Staat en geniet vrijheid van pers en is onafhankelijk in haar ondernemingsactiviteiten. Daarbij financiert zij haar activiteiten onder een maandelijkse licentie die zij zelf regelt.

Hierdoor kan niet worden gezegd dat de omroep onder de controle van de Staat valt en dus kan zij worden gekwalificeerd als een non-gouvernementele organisatie die het klachtrecht bij het EHRM toekomt. Weliswaar waren er uiteenlopende oordelen in deze zaak, maar het Kroatische Hooggerechtshof heeft volgens het EHRM voldoende gedaan om rechtseenheid te bewerkstelligen. Art. 6 lid 1 EVRM is dan ook niet geschonden.

Croation Radio-Television,
tegen
Kroatië.

The law

I. Joinder of the applications

78. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. Locus standi of the applicant institution

79. The Court notes at the outset that the applicant institution brought proceedings before the Court by lodging an individual application under Article 34 of the Convention, which reads as follows:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

80. The Court therefore considers that it must first examine whether the applicant institution as a legal entity has standing for the purposes of the above provision. It reiterates in this connection that a legal entity may submit an individual application to the Court, provided that it is a 'non-governmental organisation' within the meaning of Article 34 of the Convention (see, for example, *Slovenia v. Croatia* (dec.) [GC], no. 54155/16, § 61, 18 November 2020).

A. The parties' submissions

1. The Government

81. The Government submitted that the applicant institution did not enjoy sufficient institutional and operational independence from the State to be considered a non-governmental organisation within the meaning of Article 34 of the Convention and the Court's case-law. Thus, it did not have *locus standi* to lodge an individual application with the Court.

82. As regards its structure, the Government pointed out that Croatian Radio-Television was a public institution whose sole founder was the State, and that the founders' rights were exercised by the Government of Croatia (see paragraph 45 above). Moreover, its activities and their supervision, and its operation, financing and

management were set out in special legislation, the Croatian Radio-Television Act (see paragraphs 44–65 above), which distinguished it from other, commercial, broadcasting companies operating in Croatia.

83. Only one member of Croatian Radio-Television's Supervisory Board and two members of the Programming Council were elected by journalists and other employees, whereas fourteen members of those governing bodies were appointed and removed by the Croatian Parliament, which also appointed and removed the Director General (see paragraphs 55–56 and 58–60 above).

84. Moreover, Croatian Radio-Television's operation and its general legal acts were supervised by the Ministry of Culture and the Media and by the Electronic Media Council (see paragraph 66 above).

85. As regards financing, the Government pointed out that, even though the relevant legislation prescribed that Croatian Radio-Television was financed by public and commercial revenues, more than 85% of its financial resources in the past several years had come from public sources (see paragraph 63 above), namely from the mandatory licence fee (which was a form of State aid) and direct allocations from the State budget.

86. In addition, the Croatian Radio-Television Act prescribed the number of minutes per hour allowed for promotional messages (commercials) (see paragraph 65 above). Thus, the applicant institution's main source of revenue was not sponsored advertising, but almost exclusively State aid and State budget allocations.

87. That meant that Croatian Radio-Television's financial viability was guaranteed regardless of its success in the market. This placed it in a significantly more favourable position than other broadcasting companies which did not enjoy the same privilege. Therefore, while Croatian Radio-Television did not have a broadcasting monopoly, it could not be said that it competed equally with other media companies and television networks in Croatia.

88. The Government further argued that the applicant institution was not only structurally and financially dependent on the State, but that this was to a large extent true also for its programming policy. Although the relevant legislation prescribed that Croatian Radio-Television Act was independent in its operation (see paragraph 62 above), its programming policy was strictly defined by the law and the creation of its programmes thus differed significantly from programme creation in privately-owned broadcasting media (see paragraphs 48–51 above).

89. Moreover, at the time of the health crisis caused by the COVID-19 pandemic, when the State had been in strict lockdown, Croatian Radio-Television had been chosen to exercise some of the State's powers, namely those related to the education of children, by organising distance learning programmes for primary-school pupils.

90. The Government therefore concluded that the applicant institution was not sufficiently structurally, financially or in terms of the programmes it produced separate from the State to be considered a non-governmental organisation within the meaning of Article 34 of the Convention. They therefore invited the Court to declare the application inadmissible for lack of *locus standi*.

91. As regards the applicant institution's argument that the present cases were not in any way different from *Radio France and Others* (*v. France* (dec.), no. 53984/00, ECHR 2003-X (extracts); see paragraphs 94 and 97 below), the Government replied that in that case the Court's conclusion that the applicant was a non-governmental organisation had been based on the finding that it did not enjoy any powers beyond those conferred by ordinary law and that it was subject to the jurisdiction of the ordinary courts, and not administrative courts. However, that could not be said for the applicant institution.

92. In this regard the Government pointed out that the Director General of the applicant institution had the power to enact subordinate legislation (see paragraphs 64 and 68 above). Under that subordinate legislation, regulating in greater detail the payment of the mandatory licence fee, the applicant institution enjoyed the privilege of having its own inspectors entitled to check whether individuals or companies owned radio or television sets and were thus liable to pay the licence fee. It also entitled the applicant institution to institute minor-offence proceedings against persons who withheld that information, and to collect personal data (such as names, addresses, personal identification numbers, motor vehicle registration numbers, etc.) of individuals and legal entities liable to pay the fee (see paragraph 69 above).

93. Compatibility of that subordinate legislation with primary legislation was subject to review by the High Administrative Court (see paragraph 68 above), in the same way as any other subordinate legislation enacted by (other) public authorities such as the State or local governments. This meant that, at least as regards some of its activities, the applicant institution enjoyed powers beyond those conferred by ordinary law and that it was, in respect of those powers, sub-

ject to the jurisdiction of administrative and not ordinary courts.

2. The applicant institution

94. The applicant institution considered odd the Government's argument that Croatian Radio-Television did not enjoy sufficient institutional and operational independence from the State even though the respondent State itself had through its legislation guaranteed the independence of the applicant institution (they referred to section 1(3) and section 17 of the Croatian Radio-Television Act, cited in paragraphs 46 and 62 above), a guarantee important for a healthy democracy.

95. The applicant institution submitted that its status, arguments it was making and the legal framework in which it operated were almost identical to those of the applicant company in the case of *Radio France and Others* (cited above). Similarly, the Government's arguments were almost identical to those that had been advanced by the French Government in that case, in which the Court had found that the applicant company was a non-governmental organisation and thus had had *locus standi* to lodge an individual application.

96. Relying on the Court's criteria developed in *Radio France and Others* (cited above), *Österreichischer Rundfunk v. Austria* (no. 35841/02, 7 December 2006) and *Islamic Republic of Iran Shipping Lines v. Turkey* (no. 40998/98, ECHR 2007–V), the applicant institution argued that it had to be viewed as a non-governmental organisation because (a) it was granted editorial independence and institutional autonomy by the relevant legislation (see paragraph 62 above); (b) it had not been established to carry out public-administration tasks; (c) it provided a public service (see paragraph 48 above) rather than exercised any governmental powers; (d) it operated in a sector open to market competition and did not have a broadcasting monopoly; (e) it was under the supervision of the Electronic Media Council, an independent authority (see paragraph 66 above); and (f) ordinary courts had jurisdiction to decide on its rights and obligations.

97. The applicant institution therefore concluded that there were no substantial differences between the present cases and *Radio France and Others* which could result in a different assessment of the admissibility of the applications.

B. The Court's assessment

98. The Court again reiterates that under Article 34 of the Convention, a legal entity ‘claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto’ may submit an individual application to the Court, provided that it is a ‘non-governmental organisation’ within the meaning of that provision (see, for example, *Slovenia v. Croatia*, cited above, § 61).

99. The term ‘governmental organisations’, as opposed to ‘non-governmental organisations’ within the meaning of Article 34, includes legal entities which participate in the exercise of governmental powers or run a public service under government control. The term ‘governmental organisations’ applies not only to the central organs of the State, but also to decentralised authorities that exercise ‘public functions’, regardless of their autonomy *vis-à-vis* the central organs; likewise it applies to regional and local authorities, including municipalities (ibid.).

100. Other public-law entities can have the status of a ‘non-governmental organisation’ in so far as they do not exercise ‘governmental powers’, are not established ‘for public-administration purposes’ and are completely independent of the State (see *The Holy Monasteries v. Greece*, 9 December 1994, § 49, Series A no. 301-A; *Radio France and Others*, cited above, § 26; and *Islamic Republic of Iran Shipping Lines*, cited above, § 80). In order to determine whether a legal person is a ‘governmental organisation’ or ‘non-governmental organisation’, account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out, the context in which it is carried out, and the degree of its independence from the political authorities (see *Slovenia v. Croatia*, §§ 61, 68 and 78; *Radio France and Others*, § 26; and *Österreichischer Rundfunk*, all cited above, §§ 48–54).

101. The term ‘governmental organisation’ thus includes, *inter alia*, State-owned companies which do not enjoy ‘sufficient institutional and operational independence from the State’ (see, for example, *Zastava It Turs v. Serbia* (dec.), no. 24922/12, §§ 19–23, 9 April 2013). On the other hand, the Court has considered a company to be ‘non-governmental’ for the purposes of Article 34 where it was governed essentially by company law, did not enjoy any governmental or other powers beyond those conferred by ordinary private law in the exercise of its activities, and was subject to the jurisdiction of the ordinary rather than the administrative courts (see *Slovenia v. Croatia*, cited above, § 62). The Court has also taken into account the fact that an applicant company carried out commercial activities and had neither a public-service role nor a monopoly in a competitive sector (ibid.). However, none of the above-mentioned factors alone can be considered to be decisive; the Court has always taken

into account all the relevant factual and legal circumstances in their entirety (ibid., § 63).

102. Applying these criteria (see paragraphs 100–101 above) to public broadcasting organisations, the Court has so far always held that they had *locus standi* to lodge an individual application (see *Radio France and Others*, cited above, § 26; *Österreichischer Rundfunk*, cited above, §§ 46–53; *MacKay and BBC Scotland v. the United Kingdom*, no. 10734/05, §§ 18–19, 7 December 2010; *Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland*, no. 34124/06, 21 June 2012; and *Schweizerische Radio- und Fernsehgesellschaft and publisuisse SA v. Switzerland*, no. 41723/14, §§ 46–48, 22 December 2020). What the Court considered decisive was whether the legislature had devised a framework which was designed to guarantee their editorial independence and their institutional autonomy (see *Radio France and Others*, § 26; *Österreichischer Rundfunk*, § 53; and *Schweizerische Radio- und Fernsehgesellschaft and publisuisse SA*, § 47, all cited above — those guarantees are also emphasised in the relevant Council of Europe instruments cited in paragraphs 74–75 above).

103. Turning to the present cases, the Court first observes that the applicant institution undisputedly does not exercise governmental powers (compare *Österreichischer Rundfunk*, cited above, § 49) and that it was not established 'for public-administration purposes' (compare *The Holy Monasteries*, cited above, § 49). Rather, it provides a public service which consists of operating a certain number of national television and radio channels (see paragraph 48 above; compare *Österreichischer Rundfunk*, § 49, cited above).

104. The Government argued that, in contrast to the Court's findings in *Radio France and Others* (cited above, § 26), the applicant institution enjoyed, at least as regards some of its activities, powers beyond those conferred by ordinary law (passing subordinate legislation and having its own inspectors), and that in respect of those powers it was subject to the jurisdiction of administrative and not ordinary courts (see paragraphs 91–93 above).

105. In this regard the Court would first emphasise that, as demonstrated by the facts of the present cases, the applicant institution is in respect of all of its activities (including the collection of the monthly licence fee) subject to the jurisdiction of ordinary courts, save for its power to pass subordinate legislation whose compatibility with the Constitution and laws is reviewed by administrative courts. The Court further refers to its findings in *The Holy Monasteries* case where it held that the applicant monasteries were 'non-governmental organisations' for the purposes of Article 34 of the Convention even though they belonged to the Greek Orthodox Church, which played a direct and active part in public administration and took enforceable administrative decisions which were subject to review by administrative courts like any other decision of public authorities (ibid., § 48). Therefore, the fact that as regards some of its activities the applicant institution may be seen as enjoying some powers beyond those conferred by ordinary law is not decisive for its status of 'non-governmental organisation'. Rather, as stated above (see paragraph 100), what is important for public-law entities to be considered 'non-governmental organisations' is that they do not exercise 'governmental powers', that they are not established 'for public-administration purposes' and that they are completely independent of the State.

106. It therefore remains to be examined whether the applicant institution provides the public service under government control (see *Österreichischer Rundfunk*, cited above, § 49). Given that the applicant institution is a public broadcasting organisation, this means examining whether it enjoys editorial independence and institutional autonomy (see paragraph 102 above).

107. At this juncture the Court notes that the present cases differ from the previous cases lodged by public broadcasting organisations (see paragraph 102 above) in that in examining a very similar issue, namely *locus standi* to lodge a constitutional complaint, the Croatian Constitutional Court held that the applicant institution did not have standing to do so because it was so closely organisationally and functionally connected with the State that it could not be considered as a bearer of the constitutional rights (see paragraphs 19–20 above).

108. In this regard the Court first reiterates that the conditions governing individual applications under the Convention are not necessarily the same as national criteria relating to *locus standi*. National rules in this respect may serve purposes different from those contemplated by Article 34 and, while those purposes may sometimes be analogous, they need not always be so (see *A.K. and L. v. Croatia*, no. 37956/11, § 46, 8 January 2013, and *Norris v. Ireland*, 26 October 1988, § 31, Series A no. 142).

109. It is true that in the specific circumstances of the present cases the criteria for determining *locus standi* before the Court and before the Constitutional Court are very similar, as they both in essence entail an examination of the issue whether the applicant institution was sufficiently independent of the State. This similarity is further corroborated by the fact that the Constitutional Court, in finding that the applicant institution did

not have standing to lodge a constitutional complaint, relied on the Court's and the former Commission's case-law on *locus standi* (see paragraphs 19–20 above).

110. While in such circumstances it may be argued that, having regard to the principle of subsidiarity, the Constitutional Court was better placed to ascertain whether the applicant institution was sufficiently independent of the State, it should be noted that the Court has held that the legal concepts mentioned in Article 34 of the Convention must be interpreted autonomously and irrespective of the relevant domestic concepts (see *Slovenia v. Croatia*, cited above, § 63). That is so because the issue of *locus standi* is the matter that goes to the Court's jurisdiction *ratione personae* which the Court is, like any other question of its jurisdiction, obliged to examine of its own motion (see *Blečić v. Croatia* [GC], no. 59532/00, § 67, ECHR 2006-III, and *Schweizerische Radio- und Fernsehgesellschaft and publisuisse SA*, cited above, § 43). The Court must therefore be very careful before accepting findings of national courts which may have implications for its own jurisdiction.

111. The Constitutional Court's finding that the applicant institution lacked standing to lodge a constitutional complaint because it was not sufficiently independent of the State was based on the Court's and the former Commission's case-law on *locus standi* in general (see paragraphs 19–20 above). However, that court did not refer to more specific case-law concerning the *locus standi* of public broadcasting organisations (see the cases cited in paragraph 102 above).

112. Furthermore, the Constitutional Court's finding was not based on a detailed analysis of the legislative framework, which would be comparable to the one conducted by the Court in *Radio France and Others* (cited above, § 26) and *Österreichischer Rundfunk* (cited above, §§ 48–54).

113. For these reasons (see paragraphs 110–112 above), the Court cannot defer to the Constitutional Court's finding that the applicant institution was not sufficiently independent of the State. Rather, it must carry out its own examination of whether the Croatian legislature has devised a framework which is designed to ensure the editorial independence and institutional autonomy of the applicant institution (see paragraph 102 above).

114. In this connection, the Court first observes that under the Croatian Radio-Television Act the State is the founder of the applicant institution (see paragraph 45 above), its statute has to be approved by the Croatian Parliament (see paragraph 41 above), its resources are to a large extent public (see paragraph 63 above), it provides broadcasting and other services in the interests of the public (see paragraph 50 above) and it is obliged to enter into an agreement with the Government of Croatia defining its programming obligations and their financing (see paragraph 54 above, and compare *Radio France and Others*, cited above, § 26).

115. It is also true that the Director General of Croatian Radio-Television and a large majority of the members of its Supervisory Board and the Programming Council are appointed by the Croatian Parliament (see paragraphs 56, 58 and 60 above), and that all the members of the Electronic Media Council are also appointed by Parliament (see paragraph 42 above).

116. However, the Court also notes that the electronic media in Croatia, including Croatian Radio-Television, are regulated by the Media Act and the Electronic Media Act, both of which contain, *inter alia*, provisions to ensure their objectivity and independence (see paragraphs 32, 36–38 and 52–53 above). The Court further notes that the Croatian Constitution and the Media Act guarantee the freedom of the media (see paragraphs 28 and 30–31 above). Moreover, the Electronic Media Act guarantees the right to full programming freedom of the electronic media (see paragraph 35 above).

117. That means that Croatian Radio-Television, within the bounds of, *inter alia*, the public-service requirements set out in the Croatian Radio-Television Act (see paragraph 50 above), does not come under the aegis of the State but enjoys the freedom of the media and is independent in its operation (see paragraph 62 above). It operates under the control of the Electronic Media Council, an independent regulatory authority (see paragraphs 41–42 above) responsible for monitoring the application of the Electronic Media Act, including the provisions which aim to ensure the objectivity and independence of the electronic media (see the previous paragraph, and compare *Radio France and Others*, cited above, § 26).

118. What is more, even though the State is the founder of Croatian Radio-Television (see paragraph 45 above), the applicant institution finances its activities from the monthly licence (user) fee which it can fix itself (see paragraph 63 above, and compare *Österreichischer Rundfunk*, cited above, § 50). It should also be noted that the Court has considered public broadcasters as non-governmental organisations even when they enjoyed less financial independence from the State, namely when their operation was financed by a special tax (see *Radio France and Others*, cited above, §§ 14 and 26).

119. Croatian Radio-Television does not have a monopoly over television or radio broadcasting and operates in a sector open to competition (see *Österreichischer Rundfunk*, § 52, and *Radio France and Others*, § 26, both cited above). While it is true that the applicant institution could rely on a method of financing which was not at the disposal of private broadcasters (see paragraph 63 above), the Court reiterates that, even where a public broadcaster is largely dependent on public resources for the financing of its activities, this is not considered to be a decisive criterion, while the fact that a public broadcaster is placed in a competitive environment is an important factor (see *Österreichischer Rundfunk*, cited above, § 52).
120. In view of the foregoing considerations, the Court finds that, although Croatian Radio-Television has been entrusted with a public-service mission (see paragraph 48 above) and depends to a considerable extent on the State for its financing (see paragraph 63 above), the Croatian legislature has devised a framework designed to guarantee its editorial independence and its institutional autonomy (compare *Radio France and Others*, § 26, and *Österreichischer Rundfunk*, § 53, both cited above). Therefore, it cannot be said that the applicant institution is under 'government control' (see paragraph 106 above, and, *mutatis mutandis, Österreichischer Rundfunk*, cited above, § 51).
121. Consequently, Croatian Radio-Television qualifies as a 'non-governmental organisation' within the meaning of Article 34 of the Convention and is therefore entitled to lodge an individual application with the Court.

III. Alleged violations of Article 6 § 1 and Article 14 of the Convention on account of divergent case-law of domestic courts

122. The applicant institution complained of the conflicting case-law of the domestic courts because in the twenty sets of civil proceedings in question the domestic courts had ruled against it, while in a number of other cases arising from the same set of facts they had ruled in its favour (see paragraphs 9–13 above). It also complained that, instead of harmonising the divergent case-law of the lower courts, the Supreme Court had itself become the source of uncertainty by declaring inadmissible or dismissing the applicant institution's extraordinary appeals on points of law in those twenty sets of civil proceedings, while allowing such appeals lodged in other similar cases (see paragraphs 18 and 24 above). The applicant institution relied on Article 6 § 1 of the Convention, taken alone and in conjunction with Article 14.
123. Being master of the characterisation to be given in law to the facts of the case (see *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I, and *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 124, 20 March 2018), the Court finds that this complaint falls to be examined solely under Article 6 § 1 of the Convention. The relevant part of that Article reads as follows:

> "In the determination of his civil rights and obligations … everyone is entitled to a fair … hearing … by a … tribunal …"

A. Admissibility

124. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant institution

125. The applicant institution submitted, firstly, that under section 382(2) of the Civil Procedure Act parties were entitled to lodge an extraordinary appeal on points of law if a decision in the case depended on the resolution of a point of law which was important for ensuring the uniform application of the law (see paragraph 71 above). That provision also referred to some situations where a point of law was always considered to be of such importance, for example, where there was divergent case-law of the second-instance courts and the Supreme Court had not yet ruled on the point of law which was in dispute between them (ibid.).
126. In the present cases there had evidently been conflicting case-law of the second-instance courts (see paragraphs 9–13 above), which the applicant institution had stressed and provided examples of in each of its extraordinary appeals on points of law (see paragraph 15 above). The applicant institution could therefore have legitimately expected that the Supreme Court would accept its extraordinary appeals and rule on the merits of each case. Yet, the Supreme Court had in nineteen out of the twenty cases held that the point of law raised by the applicant institution had not been important for ensuring the uniform application of the law (see paragraph 18 above). As a result, the Supreme Court had in the present cases neglected its constitutional role as the court responsible for ensuring the uniform application of the law (it referred to Article 116 § 1 of the Croatian Constitution cited in paragraph 28 above).

127. Secondly, the applicant institution submitted that the Supreme Court had arbitrarily accepted certain extraordinary appeals on points of law lodged by the defendants even though they had not even satisfied the admissibility criteria for lodging that remedy. For example, in its decisions in cases nos. Rev-2800/15 of 3 November 2016 and Rev-1892/14 of 6 December 2017 (see paragraphs 24 above), the Supreme Court had of its own initiative raised a point of law, in the form of a question, which it had considered important for the uniform application of the law. It had done so even though the defendants had not posed any questions and thus had not properly raised any points of law in their extraordinary appeals, which was a formal requirement for the admissibility of that remedy. The Supreme Court had not applied the same approach in any of the cases brought by the applicant institution. It was difficult to discern what the reason for such a difference in treatment had been.
128. Likewise, in case no. Rev-650/14 (see paragraph 24 above), the Supreme Court had decided to examine the defendant's extraordinary appeal as an ordinary appeal on points of law, finding that the conditions set out in subparagraph 3 of section 382(1) of the Civil Procedure Act had been met, namely because the second-instance court had assessed the evidence and/or established the facts differently from the first-instance court (see paragraph 71 above). However, in similar cases where the second-instance court had assessed the evidence and/or established the facts differently from the first-instance court, the Supreme Court had refused to examine the applicant institution's extraordinary appeal as an ordinary appeal on points of law, for example in decision no. Rev-1283/2015-2 of 27 March 2019 (which was the subject of application no. 1939/20, see the appendix).
129. Thirdly, in reply to the Government's argument that the point of law raised in an extraordinary appeal on points of law had to be of a general nature (see paragraphs 134 and 136 below), the applicant institution maintained that in each of its extraordinary appeals it had formulated the point of law in such a way that the adopted legal view could be applied to all other unjust enrichment cases arising from A.K.'s conduct (see paragraphs 5 and 8 above).
130. Fourthly, the most drastic example of how the Supreme Court's case-law had been inconsistent was the fact that in some cases it had considered the points of law raised as being important for the uniform application of the law (decisions nos. Rev-300/14 of 13 March 2018 and Rev-2775/15 of 22 January 2019), whereas in other cases it had held that the very same points of law had not been of such importance (for example, in decision no. Rev-1102/16 of 20 March 2019, as well as decision no. Rev-1283/15 of 27 March 2019, which was the subject of application no. 1939/20 (see the appendix), as well as in many other cases which were the subject of the present applications). The Supreme Court had not provided any reasons for these discrepancies. It had therefore been difficult to discern whether it had consciously departed from its previous decisions and, if so, for what reasons.
131. The applicant institution argued that the inconsistencies in the case-law of the Supreme Court in the present cases were comparable to the situation in the *Vusić* case, where the Court had found a violation of Article 6 § 1 of the Convention (referring to *Vusić v. Croatia*, no. 48101/07, §§ 38–46, 1 July 2010).
132. For the reasons stated above, the Supreme Court had itself become the source of uncertainty and thus could not have consolidated the diverging case-law of the second-instance courts.

(b) The Government

133. The Government submitted that this complaint had to be examined in the light of the specific nature of extraordinary appeals on points of law — a remedy for harmonising case-law in Croatia.
134. The point of law raised in such an appeal had to be of a general nature, so that the legal view taken by the Supreme Court could be applied in future cases (see paragraph 18 above). At the same time, the point also had to be decisive for the case at hand. Thus, the point of law could only be raised in relation to the reasons underlying the lower courts' judgments.
135. The Supreme Court could not of its own motion examine a certain point of law; rather, it acted solely on the initiative of the parties and was limited by the points raised by them. In addition, the Supreme Court could not base its legal view in the case before it on the findings of fact from other cases, even if they all arose from the same event. Therefore, the harmonising of case-law by means of an extraordinary appeal on points of law was circumscribed by the points of law raised by the parties and by the findings underlying the lower courts' judgments. Those findings were in turn defined by the facts adduced and evidence put forward by the parties in each case.
136. All but one extraordinary appeal on points of law lodged by the applicant institution in the present cases had been declared inadmissible because the points of law raised had not been

general in nature but had instead been based on the facts of each case (see paragraph 18 above).

137. The Government further submitted that all of the Supreme Court decisions in the civil proceedings for unjust enrichment instituted by the applicant institution because of A.K.'s conduct could be divided into two groups.

138. The first group concerned decisions in which the Supreme Court had decided on the merits of the extraordinary appeals on points of law lodged by the applicant institution and/or the defendants, having assessed that the parties had met the admissibility requirements for lodging that remedy (see paragraphs 17 and 24–26 above).

139. In those cases the Supreme Court had quashed the lower courts' judgments, having found that the lower courts had failed to establish all the key facts (see paragraphs 24–26 above), save for decision no. Rev-1660/13-2, in which it had upheld the judgments of the lower courts, holding that the relevant substantive law, namely section 1112 of the Obligations Act (see paragraph 73 above), had been correctly applied (see paragraph 17 above).

140. The second group concerned rulings in which the Supreme Court had declared inadmissible extraordinary appeals on points of law lodged by either party, having assessed that the parties had not met the admissibility requirements for lodging that remedy (see paragraphs 18 and 27 above). In each of those cases, the Supreme Court had given reasons as to why the admissibility requirements had not been met, which reasons did not disclose any arbitrariness.

141. Therefore, it could not be argued, as the applicant institution had done (see paragraphs 122 and 126–128 above), that the Supreme Court had issued contradictory decisions on extraordinary appeals on points of law and thereby contributed to legal uncertainty.

142. The Government also challenged the applicant institution's specific argument that in case no. Rev-2800/15 (see paragraphs 24 and 127 above) the Supreme Court had itself formulated a question concerning a point of law it considered important for the uniform application of the law even though the defendant had not raised that point in the form of a question, as required by that court's practice. The Government argued that in the reasoning of that decision the Supreme Court had stated that the defendant had 'referred to several legal concepts in drafting the point of law'. In addition, even though the Supreme Court had no right to go beyond the points raised, it could reduce them to their essence. In decisions nos. Rev-300/14, Rev-2775/15-2 and Rev-2877/14-2 (see paragraph 26 above), the Supreme Court had reduced the points raised in the extraordinary appeals on points of law lodged by the applicant institution to their essence, but had not itself formulated a different point of law from those raised.

143. Lastly, the Government rejected the applicant institution's similar argument that in case no. Rev-650/14 (see paragraph 24 above), the Supreme Court should have declared inadmissible the extraordinary appeal on points of law because the defendant had not raised a point of law. In that case, the Supreme Court had found that the second-instance court had delivered its judgment in accordance with section 373a of the Civil Procedure Act, in which case an ordinary appeal on points of law was admissible (see section 382(1)(3) of that Act, cited in paragraph 71 above), and that remedy did not require parties to raise a point of law important for the uniform application of the law. The Supreme Court had also done so in decision no. Rev-2309/15 (see paragraph 26 above), in which it had examined the extraordinary appeal on points of law lodged by the applicant institution as an ordinary appeal on points of law.

2. The Court's assessment

144. The relevant principles regarding alleged violations of Article 6 § 1 of the Convention on account of divergent case-law of domestic courts are summarised in the cases of *Nejdet Şahin and Perihan Şahin v. Turkey* ([GC], no. 13279/05, §§ 49–58, 20 October 2011) and *Lupeni Greek Catholic Parish and Others v. Romania* ([GC], no. 76943/11, § 116, 29 November 2016 (extracts)).

145. In particular, when dealing with allegations concerning conflicting decisions of domestic courts, the Court must determine in the first place whether the allegedly conflicting decisions concerned identical factual situations (see *Nejdet Şahin and Perihan Şahin*, cited above, § 61). Where the facts are identical but the application of the law by a domestic court or courts differs, the Court must be guided in its examination of the issue by the following criteria: whether 'profound and long-standing differences' exist, whether the domestic law provides for machinery for overcoming these inconsistencies, and whether that machinery has been applied and, if appropriate, to what effect (ibid., § 53).

146. The present applications concern twenty sets of civil proceedings for unjust enrichment instituted by the applicant institution against various individuals seeking to retrieve fees which an employee of its finance department, A.K., had paid them on behalf of the applicant institution for work they had never carried out (see paragraphs 5, 8 and 12 above). In all of the cases, in

judgments adopted in the period between 15 January 2013 and 22 September 2015, the Zagreb County Court and the Pula County Court, as appellate courts, ruled against the applicant institution (see paragraph 13 above).

147. The applicant institution brought in total more than a hundred proceedings for unjust enrichment against persons who had received those payments. It submitted that all of those cases which had been examined on appeal by the Zagreb County Court or the Pula County Court had ended in favour of the defendants, whereas in all the other cases — which had been decided by other county courts — the courts had ruled in its favour (see paragraphs 8–9 above).

148. In the present cases it appears that the difference the applicant institution complained of resides not in the factual situations examined by the different domestic courts, which were identical as they all concerned unjust enrichment resulting from A.K.'s conduct, but in the application of the substantive law (see paragraphs 10–11 above). This was not contested by the Government.

149. In view of this, the Court finds that, admittedly territorial, differences in the case-law of the domestic courts existed at the time when the county courts in the present cases adopted their judgments, namely in the period between 15 January 2013 and 22 September 2015 (see paragraphs 13 and 147 above). It thus remains to be established whether the domestic law provides for machinery for overcoming those inconsistencies, whether that machinery has been applied and to what effect (see paragraph 145 above).

150. In this regard the Court notes that in a number of cases, starting with its decision in case no. Rev-2800/15-5 of 3 November 2016, the Supreme Court set out in detail the relevant legal issues that had to be examined in unjust enrichment cases resulting from A.K.'s conduct. Since the lower courts had not addressed those issues and had thus not established all the relevant facts, the Supreme Court remitted the cases to the first-instance courts, as it could not establish those facts itself (see paragraph 24 above).

151. Moreover, in one of the present cases the Supreme Court held that all the relevant facts had been established by the lower courts and ruled that the substantive law had been correctly applied (see paragraphs 16–17 above).

152. This means that the domestic law provided for machinery for overcoming the above-mentioned inconsistencies in the case-law of the second-instance courts (see paragraphs 146–149 above) and that this machinery was applied.

153. The applicant institution did not argue and there is nothing to suggest that the above-mentioned Supreme Court decisions (see paragraphs 24 and 150 above) did not have the desired consolidating effect for the case-law of the second-instance courts. On the contrary, information available to the Court suggests otherwise (see paragraph 25 above).

154. Lastly, the Court is aware that the second-instance decisions in the present cases were delivered in the period between 15 January 2013 and 22 September 2015 (see paragraphs 13 and 149 above), that is, before the Supreme Court provided guidelines as to how all similar unjust enrichment cases should be dealt with (see paragraph 150 above), and that therefore they could not have been decided in accordance with those guidelines. However, that fact is not sufficient in itself to violate the principle of legal certainty (see, for example, *Albu and Others v. Romania*, nos. 34796/09 and 63 others, §§ 40–41, 10 May 2012, and *Schwarzkopf and Taussik v. the Czech Republic* (dec.), no. 42162/02, 2 December 2008).

155. In view of the above considerations, the Court does not attach particular importance to the alleged inconsistences in the case-law of the Supreme Court itself, which were strongly emphasised by the applicant institution (see paragraphs 127–128 and 130 above), and which do not concern the application of substantive law rules on unjust enrichment but admissibility criteria for lodging an extraordinary appeal on points of law. Specifically, those alleged inconsistencies concern the assessment of whether a certain point of law is important for the uniform application of the law, that is, a statutory criterion linked to the public role of the Supreme Court in the application of which that court, in the nature of things, must enjoy a wide discretion.

156. In any event, the Court considers that, once the Supreme Court has provided relevant guidelines as to how a certain group of similar cases should be dealt with to achieve the uniform application of the law, it does not have to do so in every future such case (see the opinion cited in paragraph 77 above which suggests that the responsibility of supreme courts to ensure and maintain the uniformity of the case-law should not be understood as the supreme court being required to intervene as often as possible, and that the existence of conflicting judgments of lower courts cannot be cured simply by providing for unrestricted access to a supreme court).

157. There has accordingly been no violation of Article 6 § 1 of the Convention on account of divergent case-law.

IV. Alleged violation of Article 6 § 1 of the Convention on account of the lack of access to a Court

158. The applicant institution further complained, also under Article 6 § 1 of the Convention, about the Constitutional Court's decisions to declare inadmissible its constitutional complaints.

1. The parties' submissions

(a) The Government

159. The Government submitted that at the beginning of 2019 the Constitutional Court had extended its new, more restrictive, approach as regards the *locus standi* of public entities before that court to the applicant institution (see paragraph 20 above) and had consistently followed it since then. The resultant restriction had pursued the legitimate aim of preventing various public entities which were closely connected with the State to act as complainants and bearers of the constitutional rights, it being understood that the State was the guarantor of the human rights enshrined in the Constitution and thus could not at the same time be their holder. The restriction in question was proportionate to that aim because the access to a court of such entities, including the applicant institution, was secured before at least two levels of ordinary courts.

(b) the applicant institution

160. The applicant institution submitted that the Constitutional Court's new and restrictive approach as regards the *locus standi* of public entities had completely denied it access to that court. That approach had been based on the Court's case-law which the Constitutional Court had misunderstood and interpreted too extensively, as the applicant institution had explained in its submissions concerning its *locus standi* before the Court (see paragraphs 94–97 above).

2. The Court's assessment

161. The relevant principles emerging from the Court's case-law concerning the right of access to a court and, in particular, access to superior courts, are summarised in *Zubac v. Croatia* [GC], no. 40160/12, §§ 76–86, 5 April 2018. In particular, the right of access to courts is not absolute but may be subject to limitations, which must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired (ibid., § 78).

162. The Court notes that section 72 of the Constitutional Court Act allows the Constitutional Court to declare inadmissible constitutional complaints lodged by legal entities which cannot be holders of constitutional rights (see paragraph 70 above). Relying on that provision the Constitutional Court declared inadmissible the applicant institution's constitutional complaints because it considered that Croatian Radio-Television was so closely organisationally and functionally connected with the State that it could not be considered as a bearer of the rights guaranteed by the Croatian Constitution and thus did not have standing to lodge a constitutional complaint (see paragraphs 19–20 above).

163. While the Court has found that the applicant institution is a non-governmental organisation within the meaning of Article 34 of the Convention (see paragraphs 98–121 above), thus having *locus standi* to lodge an application with the Court, this does not mean that the Constitutional Court should follow the same criteria when granting or restricting access to it. As already noted above (see paragraph 108), the conditions governing individual applications under the Convention are not necessarily the same as national criteria relating to *locus standi*. National rules in this respect may serve purposes different from those contemplated by Article 34 and, while those purposes may sometimes be analogous, they need not always be so (see *A.K. and L. v. Croatia*, cited above, § 46, and *Norris*, cited above, § 31).

164. It is not for the Court to question the interpretation by the Constitutional Court of the admissibility criteria for lodging constitutional complaints, which is a matter in the sole domain of that court (see, for example, *Janković and Others v. Croatia* (dec.), no. 23244/16 and 4 others, 21 September 2021, and the cases cited therein), but rather to ascertain whether the effects of such an interpretation are compatible with the Convention (see *Zubac*, cited above, § 81). In so doing, regard should be had to the domestic proceedings as a whole and to the role played in them by the Constitutional Court, it being understood that the conditions for the admissibility of constitutional complaints may be stricter than for ordinary appeals (see, for example, *Arrozpide Sarasola and Others v. Spain*, nos. 65101/16 and 2 others, § 99, 23 October 2018).

165. Having regard to the proceedings as a whole, the Court notes that the applicant institution's cases were examined on the merits at two levels of court with full jurisdiction. Thus, it cannot be argued that the Constitutional Court declaring its constitutional complaints inadmissible restricted the applicant institution's right of access to a court in such a way or to such an extent that the very essence of the right was impaired.

166. It follows that this complaint is inadmissible under Article 35 § 3 (a) of the Convention as

manifestly ill-founded and must be rejected pursuant to Article 35 § 4 thereof.

For these reasons, the Court
1. *Decides*, unanimously, to join the applications;
2. *Declares*, by a majority, the complaint concerning the divergent case-law admissible;
3. *Declares*, unanimously, the remainder of the applications inadmissible;
4. *Holds*, unanimously, that there has been no violation of Article 6 § 1 of the Convention.

Noot

1. Deze noot betreft het vraagstuk wie het klachtrecht onder het EVRM toekomt. Niet wordt ingegaan op de verhouding van uiteenlopende rechtspraak met het rechtzekerheidsvereiste van artikel 6 EVRM, waarover ook werd geklaagd. Evenmin komt aan de orde de klacht dat het Kroatische constitutionele hof de omroeporganisatie in strijd met artikel 6 EVRM niet-ontvankelijk zou hebben verklaard. Daarvoor verwijzen wij naar de betreffende onderdelen van de uitspraak.
2. Volgens artikel 1 EVRM biedt dit verdrag bescherming aan 'een ieder' die ressorteert onder de rechtsmacht van de verdragsstaten waarbij uit artikel 34 EVRM volgt dat het daarbij gaat om (groepen) natuurlijke personen en niet-overheidsorganisaties ('non-governmental organisations'). Wat betreft deze organisaties hangt het wel van de uitleg van het betreffende verdragsrecht af of dit daadwerkelijk en op eigen titel kan worden ingeroepen, hetgeen bij processuele rechten meer voor de hand ligt dan bij, bijvoorbeeld, het folterverbod. Bovendien kan het vereiste niveau van bescherming ten aanzien van organisaties verschillen van dat met betrekking tot natuurlijke personen. Het maakt echter niet uit of een persoon de nationaliteit heeft van de betreffende staat en ook niet of hij daar al dan niet legaal verblijft. Het feit of een persoon zijn woonplaats heeft in de verdragsstaat is evenmin van belang. Datzelfde geldt ook voor de plaats van vestiging van een organisatie. Personen in bijzondere rechtsverhoudingen tot de overheid — zoals militairen, politieagenten en ambtenaren — vallen in beginsel ook onder het beschermingsbereik van het EVRM, zij het dat bij de toepassing van de verdragsrechten rekening kan worden gehouden met hun bijzondere positie. Overheidsorganisaties en hun organen ('governmental organisations') alsmede natuurlijke personen die namens een dergelijke organisatie opereren komt echter geen beroep op het EVRM toe, ook niet wanneer zij privaatrechtelijk handelen (vgl. EHRM 9 november 2010, *AB* 2012/21, m.nt. Barkhuysen & Van Emmerik (*Demirbas/Turkije*)). Omgekeerd is het zo dat overheidsorganisaties direct gebonden zijn de rechten uit het EVRM na te leven en niet-overheidsorganisaties niet. Dat maakt deze kwalificatie des te belangrijker (vgl. T. Barkhuysen & M.L van Emmerik, *Europese grondrechten en het Nederlandse bestuursrecht*, Deventer: Wolters Kluwer 2023, par. 2.2.3.3.1 en 2.2.3.3.3).
3. Om te bepalen of sprake is van een overheidsorganisatie, is in eerste instantie de rechtsvorm naar nationaal recht van belang. Gaat het om een publiekrechtelijke rechtspersoon, dan zal er in beginsel sprake zijn van een overheidsorganisatie in de zin van het EVRM. Maar ook private rechtspersonen en hun organen zouden vanuit Straatsburgs perspectief voor bepaalde aspecten van hun handelen als een 'overheidsorganisatie' kunnen worden aangemerkt. Doorslaggevend daarbij lijkt de vraag of er bij dat handelen gebruik wordt gemaakt van een bevoegdheid tot het uitoefenen van 'public authority' (openbaar gezag) en of de organisatie al dan niet in de staatsstructuur is ingebed.
4. De laatstbedoelde jurisprudentie is nader uitgewerkt met betrekking tot zogenoemde staatsdeelnemingen, waarvan de bank die in Straatsburg klaagde in de zaak *Ljubljanska* een voorbeeld is (EHRM 12 mei 2015, *AB* 2016/57, m.nt. Barkhuysen & Van Emmerik). Het gaat daarbij om vennootschappen waarin de staat een (vaak meerderheids)belang heeft qua aandelen. Hoe deze te kwalificeren? Daarvoor reikt het Hof een lijstje criteria aan: a) de juridische status van de organisatie (publiek- of privaatrechtelijk); b) de aard van de activiteiten (publieke taak of een commerciële doelstelling); c) de context van de activiteiten (wel of geen monopolie, al dan niet een strikt gereguleerde sector); d) de institutionele afhankelijkheid van de staat; e) de operationele afhankelijkheid van de staat (hoever reikt het toezicht en de controle van de staat?); f) de vraag of de staat direct verantwoordelijk is in geval van financiële problemen van de organisatie; g) het al dan niet aanwenden van inkomsten van de organisatie ten behoeve van andere staatsdoeleinden; h) de mate van afstand tot het dagelijks bestuur van de organisatie; en eventueel i) misbruik van de gekozen ondernemingsvorm. Op basis daarvan concludeert het Hof dat de betreffende bank niet een 'non-governmental organisation' is. Tegelijk zijn deze criteria in meer brede zin van belang, ook voor de vormgeving en kwalificatie van staatsdeelnemingen in Nederland (vgl. N. Jak, *Semipublieke instellingen: De juridische positie van instellingen op het snijvlak van overheid en samenleving* (diss. Amsterdam VU), Den Haag 2014; N. Jak, 'Semipublieke instellingen en aan-

sprakelijkheid uit onrechtmatige daad: een verkenning', *NTB* 2016/8).

5. De hier opgenomen zaak biedt een voorbeeld waarin het EHRM met toepassing van (een deel van) de hiervoor opgesomde criteria tot het oordeel komt dat de omroeporganisatie een niet-overheidsorganisatie is en dus klachtrecht heeft. Dat is ook in het kader van het waarborgen van pluriformiteit van belang, nu zij indien nodig daarmee ook een beroep op artikel 10 EVRM kan doen wanneer de staat haar vrijheid te veel aan banden zou leggen. Het ironische aan de criteria is trouwens dat naarmate een staat meer controle heeft op een omroep de kans groter is dat zij geen bescherming kan ontlenen aan het EVRM. Dat is een punt dat het EHRM nog eens moet doordenken.

T. Barkhuysen & M.L. van Emmerik

AB 2024/52

EUROPEES HOF VOOR DE RECHTEN VAN DE MENS

16 mei 2023, nr. 2394/22, nr. 16898/22, nr. 17964/22, nr. 17969/22, nr. 20458/22, nr. 21460/22, nr. 21477/22, nr. 21481/22, nr. 21487/22, nr. 24888/22, nr. 24889/22, nr. 24893/22, nr. 24894/22, nr. 24897/22, nr. 26634/22, nr. 27719/22, nr. 27723/22, nr. 27758/22, nr. 27827/22

(M. Bošnjak, P. Paczolay, K. Wojtyczek, L. Hüseynov, I. Jelić, G. Felici, R. Sabato)

m.nt. R. Stijnen

Art. 6, 19, 35 EVRM

ECLI:CE:ECHR:2023:0516DEC000239422

Misbruik van recht. Het voeren van afzonderlijke invorderingsprocedures per cliënt teneinde per iedere afzonderlijke zaak proceskosten te claimen levert misbruik van (proces)recht op.

Deze Italiaanse zaken draaien om de invordering van een schadevergoeding die eerder is toegekend op grond van de zogenoemde 'Pinto Act' in verband met overschrijding van de redelijke termijn als bedoeld in art. 6 lid 1 EVRM in de oorspronkelijke procedure. In dit geval hebben de autoriteiten de toegekende schadevergoedingen niet voldaan, zodat procedures tenuitvoerlegging van rechterlijke uitspraken zijn gestart. In zowel de oorspronkelijke procedure, de Pinto-procedure als de tenuitvoerleggingsprocedure kan een belanghebbende of zijn toegevoegde advocaat zelf de rechter verzoeken om een proceskostenveroordeling. Drie Italiaanse advocaten startten daarom tenuitvoerleggingsprocedures per cliënt, ook als meerdere cliënten hun claim konden baseren op dezelfde uitspraak van de nationale rechter. Ook als aan één cliënt meerdere sommen geld werden toegewezen, werd per som geld een tenuitvoerleggingsprocedure gestart. Ook werden dan per geval twee zaken gestart: een voor de cliënt zelf en een voor de advocaat, dit alles om zoveel mogelijk proceskosten binnen te slepen. Verder werden afzonderlijke tenuitvoerleggingsprocedures gestart wegens het niet voldoen van de toegekende proceskosten. De nationale rechters hebben in enkele gevallen procedures samengevoegd. De Italiaanse cassatierechter oordeelde dat de advocaten misbruik van recht maakten door procedures uit elkaar te trekken teneinde zoveel mogelijk proceskostenveroordelingen binnen te slepen. De drie advocaten klagen bij het EHRM dat de nationale autoriteiten in verzuim zijn hun voldoende proceskostenvergoedingen toe te kennen of die ten uitvoer te leggen.

Het Hof brengt in herinnering dat de vraag of een verzoek op grond van art. 35 lid 3 onder a EVRM niet-ontvankelijk moet worden verklaard wegens misbruik van recht ambtshalve kan worden onderzocht. Misbruik moet in dit verband worden begrepen in de gewone zin volgens de algemene rechtstheorie, namelijk het schadelijke gebruik van een recht voor een ander doel dan waarvoor het is ontworpen. Met name in twee typen situaties heeft het Hof geoordeeld dat sprake is van misbruik van recht, namelijk wanneer de klacht kennelijk is gebaseerd op onware feiten en wanneer een klager beledigend, provocatief of dreigend taalgebruik hanteert in de communicatie met het Hof. Er zijn echter meer situaties denkbaar dat sprake is van misbruik van recht. Het gaat in principe om elk gedrag van de klager dat apert in strijd is met het doel van het individuele klachtrecht en dat het functioneren van het Hof belemmert of de rechtsgang belemmert. Dit misbruik van recht kan bestaan uit het doel dat met de klacht is beoogd. Hierbij kan het gedrag van de klager bij zowel de nationale rechtsgang als die bij het Hof in ogenschouw worden genomen. Er moet ook sprake zijn van een subjectief element, namelijk dat het procesgedrag opzettelijk is en deze opzet met voldoende zekerheid kan worden vastgesteld.

Het Hof ziet in de nationale procedures twee strategieën van de drie advocaten. De eerste is het opknippen van tenuitvoerleggingsprocedures door die te voeren per individu op wie een Pinto-uitspraak mede betrekking had. De tweede is om deze procedures ook nog op te knippen per vordering, zodat er per cliënt meerdere tenuitvoerleggingsprocedures werden gestart. Deze onnodige fragmentering van tenuitvoerleggingsprocedures vermeerdert het aantal procedures in negatieve zin, wat een negatieve invloed heeft op de organisatie en werkdruk van de binnenlandse gerechten en on-