



LJN: BG6117, **Facility judge Court of law The Hague** , 324464 / KG ZA 08-1486

Date of verdict: 28-11-2008

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Territorial jurisdiction: Civil other

Type of procedure: **Summary proceedings**

Contents indication: **Magic mushroom injunction.** The claims of the National Smartshop Association (VLOS) and co are directed against the State as Legislator in the main issue. With her claims, she wants to render inoperative a general committing regulation. For establishing the claimed facilities or another facility with the same effect, it is necessary that the measure is in contradiction with the higher legislation or general principles of the law. There is only room for interference by means of a temporary facility if the counteracted measure is unmistakably non-binding. This distantness is cohere to the given that the judge does not have as task to determine or weigh the interests that play on this terrain. This task is pre-eminently restricted to the legislator. The domain of the judge limits itself to the - as referred to, a limited - testing of the lawfulness of the counteracted measure. With that, the judge in interlocutory proceedings at least fits a reserved position. The facility judge comes to the conclusion that, within the limited framework of this interlocutory proceeding, it cannot be concluded with the demanded level of plausibility that carelessness towards de Vlos and co comes up. Neither did the by de Vlos and co advanced contradiction with the Opium Act or the First Protocol become sufficiently plausible. This leads to the conclusion that the order in council is not unmistakably non-binding and that the claims need to be rejected.

Verdict
COURT OF LAW THE HAGUE

Sector civil law – facility judge

Verdict in interlocutory proceeding of November 28, 2008,
made in the case, with case number- / list number: 324464 / KG ZA 08-1486 of:

the association with full legal capacity
Association National Deliberation Smartshops,
settled in Baarn,
and 67 others,
all having chosen residence in The Hague,
plaintiffs,
lawyer Mr. W.J.E van der Werf in The Hague,

versus:

the State of the Netherlands (ministry of Health, Welfare and Sports),
to be registered in The Hague,
defendant,
lawyer Mr. A.J Boorsma in The Hague.

Parties will hereafter be called 'de Vlos and co' (singular) and 'the State'.

1. The proceeding development

De Vlos and co has served summons on the State at November 21, 2008, to appear in court of the facility judge of this court of law on November 25, 2008. The proceedings are treated on that date and verdict is made on November 28, 2008 by means of a shortened interlocutory. The subjoined is the elaboration of that.

2. The Facts

By virtue of the documents and the traded at the court session of November 25, 2008, the following is assumed in this proceeding.

2.1. Plaintiff sub 1 (hereafter: 'de Vlos') promotes the interests of the branch in order to create the most advantageous possible climate for her members in which the activities of smartshops can take place. The other plaintiffs are growers of (for one) hallucinating mushrooms (hereafter also: 'magic mushrooms'), wholesaler's and traders of (for one) magic mushrooms to consumers.

2.2. The hallucinating effects of magic mushrooms is caused by the active constituents psilocin and psilocybin. These constituents are on list I of the Opium Act and are taken up in the Convention of Psychotropic Substance. The mushrooms itself are not taken up in this convention. From the verdict of the High Council (HC November 5, 2002, NJ 2003, 488) follows summarized that dried magic mushrooms are prohibited and fresh magic mushrooms in itself are not.

2.3. At March 29, 2007, Lower Chamber member Joldersma (as well as a couple of others) tabled a motion in which the government is requested to research whether fresh magic mushrooms and what can be taken up in the Opium Act.

2.4. In a letter of May 14, 2007 the minister of Health, Welfare and Sports (hereafter: 'the Minister') reported at the Lower Chamber that he has given Coordination point Assessment and Monitor new drugs ('CAM') to execute a risk evaluation with regard to the usage of magic mushrooms and that he will inform if and whether changes he thinks necessary based upon this report.

2.5. The report 'Risk evaluation of psilocin and psilocybin containing mushrooms (magic mushrooms) 2007' (hereafter 'the CAM-report 2007') concludes – summarized – that there is no risk on balance for the individual health with the usage of magic mushrooms. Although there are no scientific research details, according to the CAM the usage of magic mushrooms in combination with other psychoactive means seems to form an extra risk. The CAM estimates the risk the highest for the usage by persons who are not familiar with the effect of the usage and for those who take the product in an environment that is unknown for them, such as foreign tourists. In general, the risk for the national health is estimated small. In his report, the CAM also points to the larger part of the usage goes without problems and that magic mushrooms, in comparison to other means, score relatively low on the risk scale. The most important risks that the CAM signals are variable composition and quality, too large packaging units, bad information and easy availability of the magic mushrooms. The CAM advises to develop high-quality information materials and further regulation of the trade. The risk evaluation in 2007 does not differ from the executed evaluation of the CAM in 2000. Due to this, the CAM regards essential revision of the magic mushroom policy not necessary. According to the CAM, a prohibition seems a disproportionate heavy means in relation to the damage that originates by the current usage, in which the risk is valid that more dangerous alternatives will be used.

2.6. In the enclosed Information Report Mushrooms added to the CAM-report 2007 as a schedule, which contains an overview of the literature since 2000, is referred to the article 'Psilocybin can occasion mystical-type experiences having substantial and sustained personal meaning and spiritual significance' of R.R. Griffiths and co (hereafter: 'Griffiths') from 2006. The Information Report states about this research, for one:

"A recent study of Griffiths and co (...) yet reported that 22% (...) of the volunteers who got 30 mg psilocybin (...) administered, have had a period of substantial fear/dysphonic during the total session. In some cases, the thoughts of paranoia that were of transitory nature also occurred. So, these symptoms occurred even though there was a gathering and there were pre-sessions with guides (...). Of the carefully chosen volunteers, who were treated with the high dosage of 30 mg/70 kg, 31% received significant fear experiences and 17% paranoia of transitory nature. Moreover, the study was executed in a comfortable setting under good surveillance. With insufficient surveillance, such effects can escalate in panic attacks and dangerous behaviour."

2.7. In October 2007, the CAM brought out a supplementary report on request of the Minister, in which especially a couple of incidents are pursued with (predominantly) tourists in Amsterdam and The Hague. These incidents are related to the magic mushroom usage. In this report is concluded that based upon the details of the municipal medicine and health service Amsterdam and partly estimated sales details of magic mushroom trade is calculated that with 1 ? 2 on the 100.000 consumptions of magic mushrooms there was reason for clinical admission in connection to physical injury. Furthermore, the CAM concludes that of the eight researched incidents in 2007, in four cases a potential serious live-threatening situation came up. Of these four incidents, polydrug usage came up in three cases. The fourth case concerned a 17 year-old French woman who committed suicide by jumping off a bridge after magic mushroom usage. It turned out that she tried to commit suicide at an earlier time too. Of the other cases, in ?? cases polydrug usage is suspected and in two of these cases further research proved (at least) that no magic mushroom usage came up.

2.8. With the letter of October 19, 2007 (Chamber pieces II 2007/07, 24 077 and 30 515, nr. 199), the Minister reported to the Lower Chamber that he decided to place unprocessed magic mushrooms on list II of the Opium Act. In this letter, the following is stated:

"(...) The reasons for the decision are:

- the usage of magic mushrooms can lead to unpredictable effects, and with this to risky behaviour;
 - it is not practicable to guarantee such safe usage situation that the consequences of a possible "bad trip" can be limited;
 - there is no or barely no difference in health risk between dried (processed) and fresh (unprocessed) magic mushrooms.
- (..);
- magic mushrooms are prohibited in most EU-countries.

(..)

In the CAM-report, a research [of Griffiths; facility judge] is described in which even in a controlled, safe situation, fear experiences and paranoia occur. (...) With insufficient surveillance those effects can escalate in serious panic attacks and dangerous behaviour. In contradiction to the CAM, on grounds of these percentages we come to the conclusion that the

chance for fear experiences, and with that the change for risky behaviour, is significant. The unpredictability of the effects is further increased because the users are not familiar with the proportion of active substances in the magic mushrooms, which can vary strongly. Besides, the dose-effect relation can strongly vary among individuals also plays part. After all, an extra risk is formed by the fact that after consuming a magic mushroom it takes some time before the effects are noticeable. This also increases the chance for a too high dosage and unpredictable behaviour.

The frequency of the number of ambulance rides as a consequence of magic mushroom usage in Amsterdam supports our conclusion that the risks of magic mushrooms are too large. (...)

The conditions that the CAM sets to a safe setting for usage are of such nature that they factually underline the risky and unpredictable character of the usage, and with this are contra-indications for us for the advice to keep the hallucinating mushrooms in the free – although in regulated - sales. It is not possible to take such measures that these conditions (...) can be guaranteed. (...) Moreover, the stated research of Griffiths and co clearly proved that with a significant number of the users fear attacks and paranoia also occur in a safe environment.(..)"

2.9. In the Winter of 2007, both the Association of Netherlands Municipalities (ANG) and the mayor of Amsterdam expressed to see certain objections to (the execution of) a magic mushroom prohibition.

2.10. The Bureau Research and National Expenses ('BOR') brought out a report on January 9, 2008 as a result of the CAM-reports for the benefit of the plenary debate about the drugs policy. In this, the BOR concludes that the cabinet passes by the recommendations of the CAM too easily and also uses a reasoning which is too weak. With the letter of February 4, 2008, the Minister counteracted the conclusions of the BOR.

2.11. In the debate about the Dutch drugs policy at March 6, 2008 Minister gave the following elucidation on the reasons for introduction of a prohibition (Acts II 2007/08, nr. 60, 24077, p. 4242, 4243):

(..) The most important might be that the usage of magic mushrooms are risky by definition (...). With alcohol, the abuse of it is risky. The usage as such of alcohol is not risky by definition. Magic mushrooms could bring along unpredictable reactions. The consequences than tell it right and have been also an occasion for many countries to come to a prohibition. The consequences are quite excessive. People commit suicide or jump out of the window. Half a year ago, a Danish man unexpectedly attacked his friend in Amsterdam. (...) We know the example of the French girl who met her death in Amsterdam, as well as the example of the dog that was ripped to pieces in a car. (...) It is an effect that is quite unpredictable at the moment one uses magic mushrooms. (...) The tenor is: make sure that you use in a quiet environment and that there is surveillance, because it could happen that a frightening, hallucinating effect occurs, which leads to risks. It is difficult to imagine that we admit a product in free trade that, due to the unpredictable character of it, has to be surrounded by so much caution and that the dramatic effects has that I just depicted."

2.12. With the letter of April 29, 2008 the Minister sent the draft of a decision, changes retained of list I and II belonging to the Opium Act in connection to the placement on list I or oripavin and in connection to the placement on list II of hallucinating mushrooms (hereafter 'the AmvB'), to the Lower and Higher Chamber. According to the Note of elucidation, the mushrooms that are placed on list II concern mushrooms that contain the substance psilocin or psilocybin by nature (part A) or of which is assumed that they contain this substance and mushrooms that contain muscimol and ibotene (part B). No risk evaluation has taken place for the latter category. In the Note of elucidation it is stated that it is chosen to put the latter category on the list because muscimol is known that it is a hallucinating substance and ibotene gives a dreamy and sleepy feeling. The list is (largely) derived from an overview that is taken up in the article 'A Worldwide Geographical Distribution of the Neurotropic Fungi, an Analysis and Discussion' of Gusman, Allen and Gartz from 2000. In the report 'Hallucinogenic mushrooms: an emerging trend case study' of the European Monitoring Centre for Drugs and Drug Addiction ('EMCDDA') from 2006, this article is also referred to.

2.13. As a result of the AmvB, members of the Lower Chamber (in two sessions) asked questions, which the Minister answered. During a meeting at September 24, 2008, the Fixed commission of Health, Welfare and Sports took note of the answers.

2.14. In a letter submitted by de Vlos and co of November 8, 2008 Dr. J. Gartz, scientist of the University of Leipzig and co-author of the previously referred to overview article of 2000 (hereafter: 'Gartz'), as an answer to questions of van de Vlos, declared, for one, that of 116 types of the mushrooms as stated at part A it is not scientifically proven that they contain psilocin or psilocybin.

2.15. At November 11, 2008 the Minister made public to forbid the sales of fresh magic mushrooms as of December 1, 2008.

2.16. Prof. Dr. F.A. de Wolff, toxicologist and member of the CAM until the end of 2006 (hereafter: 'De Wolff'), has declared (business reproduced), for one, as an answer to the questions of van de Vlos in a letter of November 21, 2008, that in none of the incidents in Amsterdam and The Hague is determined that magic mushrooms really had been used and neither that the observed clinical effects can be attributed to magic mushrooms, if they are used. Furthermore, de Wolff declared that the comparison of the Minister with alcohol, with which the suggestion could be created that magic mushroom usage is more risky and / or more damaging than alcohol, is scientifically incorrect.

2.17. In an e-mail of November 24, 2008, Prof. Dr. Th. W. Kuyper (hereafter: 'Kuyper') confirmed to de Vlos that he believes that the list of mushrooms of the Minister is not thorough, for one because some mushrooms on the list do not contain hallucinating substances and some sorts probably do contain that but are not on it. Moreover, he declared that a part of the mushrooms on the list is also on the Red List of endangered mushrooms of the minister of Agriculture, Nature and Food quality.

3. The claims, the grounds for that and the defence

3.1. De Vlos and co claims business reproduced:

Primary

to forbid the State to execute and apply the AMvB, as well as the General Measure of Management to the taking effect of the AMvB, as far as these relate to the placement on list II of the Opium Act of hallucinating mushrooms, at least to declare these non-binding so far;

alternatively

to forbid the State to execute and apply the previously referred to AMvBs, as far as these relate to the placement on list II of the Opium Act of hallucinating mushrooms of which is not scientifically proven that these mushrooms contain psilocin and psilocybin and / or the usage of it does not fulfil to the criteria of article 3a subsection 2 Opium Act;

more alternatively

to forbid the State to execute and apply the AMvB, with regard to the mushrooms that, to the judgement of the Facility judge by means of temporary judgement, do fulfil to the criteria of article 3a subsection 2 Opium Act, as far as the State has not provided an adequate financial compensation with regard to plaintiffs subsection 2 up to and including 68, at least providing another facility in a good judiciary.

3.2. Therefore, de Vlos and co produces summarized the following.

Initially, the AMvB is determined in contradiction with article 81 Constitution and directions 34 and 223 of the Directions of the regulation and therefore needs to be regarded unmistakably non-binding. The AMvB changes the Opium Act without following the constitutional procedure of the determination of laws in formal terms. Moreover, the change is in contradiction with the directions 34 and 223 of the Directions for the regulation resulting from the Constitution.

Furthermore, the AMvB is in contradiction with article 3a subsection 2 Opium Act because damage to the health of humankind and the society is not proven. The researches of the CAM turn out that on balance there is no risk for the individual health with the usage of magic mushrooms and that the risk for public health and the public order is estimated as slight. The CAM does not see a necessity for a legal prohibition but advises regulation. The Minister wrongly stated that the usage of magic mushrooms, different than alcohol, is damaging by definition. Furthermore, as justification, the Minister has pointed to incidents in which the causal connection between the incident and the usage of magic mushrooms is not determined. A reinforced explanation obligation rests upon the Minister, now he – different than usual – came to a totally different conclusion than the CAM, which advises against a magic mushroom prohibition, more because the BOR now determined that the recommendations of the CAM are passed by too easily. For all these reasons, the AMvB needs to be regarded unmistakable non-binding.

Moreover, the prohibition is disproportionately heavy in relation to the goal that is to be served; the effects are insufficiently weighed in the decision-making. A limited number of Amsterdam possible magic mushroom incidents does not justify a national prohibition. The criticism of the VNG and the mayor of Amsterdam confirm this point of view. Furthermore, the list with present means – as proven by the declarations of Gartz and Kuyper – came about in an careless way and therefore needs to be declared non-binding. A 116 kinds of stated types in the list are not scientifically proven to contain psilocin or psilocybin and the damaging or hallucinating effect of the mushrooms as stated in part B is not determined.

After all, the Minister acted in contradiction to article 1 Protocol with the Treaty for protection of the rights of humankind and the fundamental freedoms (hereafter: 'First Protocol'). The decision to place the mushrooms on the list directly affects the undisturbed pleasure of the ownership of plaintiffs. For the companies of those plaintiffs who are fully facilitated to selling and / or growing magic mushrooms, de facto confiscation of the ownership as a consequence of the prohibition. Those for whom the growing and selling is only ?? part of the main activities, will lose a large part of their customers due to the measure, which leads to large turnover loss and a decrease of the value of the company. The requirement of fair balance between the general interest on one hand and the protection of individual rights on the other hand is not fulfilled to because the regulation puts down an disproportional burden on plaintiffs subsection 2 up to and including 68 without damages. Furthermore, it is of importance that (i), when paid attention to the limited risks, the general interest is only served in a very limited extent by the prohibition, (ii) the violation of the ownership right is very large, (iii) a financial compensation lacks, (iv) de Vlos and co could trust the sales in a justified way to remain legal when taking the advice of the CAM into account, (v) the term at which the measure takes effect is reasonable short and last, that (vi) there are less radical measures on hand.

3.3. The State puts forward a motivated defence, that hereafter, as far as necessary, will be elucidated.

4. The evaluation of the dispute

4.1. Now de Vlos and co underlied her claims that the State acts unlawfully by application of the AMvB towards her, the civil court is – in this case the facility judge in interlocutory proceedings – authorized to perusal of the claims. In her claims, de Vlos and co is also susceptible. She turns against a general measure of management, which means a general committing regulation. No other course of proceedings is open for de Vlos and co of that she contemplates with her claims.

4.2. With regard to the claims of De Vlos, the requirements of article 3:305a Civil Code are fulfilled to. Apart from that, this is not in dispute between parties. In this respect, De Vlos is also susceptible in her claims.

4.3. The claims of de Vlos and co aim for the State as legislator in the main case. With her claims, she wants to idle a general committing regulation. For establishing the claimed facilities, or of another facility with the same effect, it is necessary that the measure is in contradiction to the higher regulation or general principles of law. For interference by means of temporary facility is only space if the contradicted measure is unmistakable non-binding. This distantness is linked to the given that the judge does not have determining or weighing the value or the social weight of the interests that are active on this terrain as task. This task is pre-eminently restricted to the legislator. The domain of the judge is limited to the – as indicated limited – examination of the contradicted measure. In this the judge in interlocutory proceedings at least fits a distant attitude.

4.4. First of all, de Vlos and co advanced that the AMvB is determined in contradiction to article 81 Civil Code. This point of view can also not be followed. Article 120 Civil Code is in the way of the examination of article 3a Opium Act of the Civil Code de Vlos desires. It has been the choice of the legislator to, despite of possible objections that can be advanced against this, to take up the possibility to change the lists belonging to this act by means of general measure in article 3a subsection 2 Opium Act. At that time, this possibility was determined in correspondence with article 81 Civil Code. Apart from that, the possibility for the Lower Chamber to participate exists in the change of the Opium Act as referred to. The acting in contradiction to Directions for the regulation, a circular of the minister-president, does not lead to the State acting unlawfully and that the regulation originating from this acting can be regarded as unmistakable non-binding.

4.5. Furthermore, it is to be determined whether the AMvB is in contradiction to the determined in the Opium Act. On the basis of article 3a subsection 2 Opium Act, means can be added to list II by general measure of the management if it is proven that het means influence the consciousness of humankind and could lead to damage of the human's health and the society when using it. Because it is discussed that magic mushrooms can influence the consciousness of the human, the question remains whether the usage of magic mushrooms could lead to damaging of the human's health and damage to the society.

4.6. It is put first and foremost that the criterion of the Opium Act gives the Minister a wide judgement freedom. After all, it is about whether the usage could lead to damage of humans and society. Furthermore, it is of importance that the Minister has let the CAM execute risk evaluations before and that he has always followed the CAM in his conclusions and recommendations. With regard to the magic mushrooms, the Minister came to a different conclusion than the CAM. This brings along a heavier justify duty, more because the Minister passed by the proposed alternatives of the CAM in his intention to change list II without good foundations, this according to the BOR report.

4.7. In the framework of this interlocutory proceeding, de Vlos and co has made sufficiently plausible that deficiencies stick to the foundation of this point of view of the Minister. At the session, the State confirmed that in none of the incidents that the Minister refers to a causal connection is determined between magic mushroom usage and the incident. The CAM-report 2007 and the study of Griffiths also prove that a (limited) risk exists that magic mushroom usage leads to fear and paranoia, which could lead to panic attacks and dangerous behaviour with insufficient surveillance. With this, the – approachable – requirement of article 3a Opium Act is fulfilled to. In his grounds, the Minister pointed to this risk of magic mushroom usage set the point of view (for one) that it is not practicable to guarantee a safe user situation to prevent a possible 'bad trip'. Therefore, the Minister has chosen to come to another measure than the CAM advised, which is a policy decision. Within the limited examination framework in this interlocutory proceeding it cannot be said that the choice of the Minister that differs from the CAM-report could lead to a temporary unmistakable non-binding measure at this moment.

4.8. Furthermore, the facility judge comes to the question whether the list came about in such careless way and that this needs to be declared unmistakably non-binding. The mushrooms that are placed on list II originate from an overview article of Guzman, Allen and Gartz. The EMCDDA also referred to this article in his report. Furthermore, the Minister adopted the position that creating an expanded list was a conscious decision in order to prevent that the prohibition is by-passed by bringing alternative mushrooms to the market. Under these circumstances, within the framework of this interlocutory proceeding it cannot be judged that the list is obviously careless. In this, it is of decisive importance that an interlocutory proceeding is not available for determining the scientific value of every mushroom on the list.

4.9. De Vlos and co is just as little followed in her point of view that has to be regarded non-binding only because of the lack of a risk estimation for the mushrooms in part B of the list. An obligation to execute a risk estimation cannot be found back in article 3a Opium Act nor in the legal history. In the Memorandum of elucidation belonging to the change of the Opium Act is stated that with the addition of new means an assessment by the Minister takes place, who can let himself lead by a risk estimation of experts (Chamber documents II 2000/01, 27 874, nr. 3, p. 4). With the State, the facility judge for the present judges that no obligations originates from this for the Minister to let such estimation execute.

4.10. The previous leads to the conclusion that the primary claim and the subsidiary claim of de Vlos and co will be rejected.

4.11. The question that then rises is whether the application of the AMvB contradicts with the determined in article 1 First Protocol without any compensation. On the basis of this article, every (legal)person is entitled to an undisturbed pleasure of his ownership. The State has primary advanced that ownership does not come up. Subsidiary, the State – short reproduced – has contended that no deprivation of ownership comes up but that the AMvB at the very most comes down to a regulation of ownership, which is authorized because a fair balance is present between the general interest on one hand and the protection of the individual rights on the other hand. First of all, the facility judge will assess the subsidiary defence of the defendant. On the supposition that ownership comes up, the following is applied.

4.12. For the question whether a confiscation of ownership comes up, the effects of the measure on the affected companies in the entirety needs to be looked at. From the administration of justice of the European Court of Human Rights follows that confiscation only comes up when every significant usage has become impossible and that the company does not have any economical value anymore (for example, please check EHRM February 18, 1991, Series a nr. 192, Fredin/Sweden). In the present procedure it is insufficiently settled that such – also of companies of which is determined that they are only occupied with growing or selling of magic mushrooms – is the case. After all, it cannot be excluded that the affected companies will also have economical value after the prohibition.

4.13. With regard to the regulation it is considered that this is authorized as far as a fair balance is present between the general interest and the protection of individual rights on the other hand. Within that framework, it is to be assessed whether the regulation in the general interest is justified and is proportional without damages towards the goal that is strived for with this. No proportion comes up if the rule leads to an individual and excessive burden for the affected person.

4.14. On the face of the objective of the national health, the Minister thought a – on itself for the branch radical – prohibition necessary. With the judgment of the question whether this prohibition fulfils to article 1 First Protocol, it is taken in consideration that this is a weighty objective and that the legislator in principle is to judge which measures are necessary and acceptable to reach this objective. In this it cannot be said that the consideration between the general interest of the protection of the national health on one hand and the interests of the magic mushroom entrepreneurs on the other hand clearly turned out unreasonable, because it is not proven that the Minister exceeded the wide margin or appreciation that is entitled to him with the disputed prohibition. In that framework it is of importance that the presence of (less radical) alternatives on itself are not sufficient to conclude that the violation is unjust (for example, check EHRM December 19, 1989, Series A nr. 169, Mellacher/Austria, HR November 16, 2001, NJ 2002, 469, NVV/State). Furthermore it is relevant that, different than de Vlos and co believes, the branch could have taken a possible interference into account from May 14, 2007. She was at least familiar with the decision of the Minister to go over to such prohibition from October 19, 2007. The facility judge follows the point of view of van de Vlos, that she could fairly trust that the sales would remain legal and that the term of taking effect was unreasonably short, but also not, more now the change possibility is taken up in the Opium Act. Moreover, it generally counts that the State has a wide amount of freedom to change its legislature, also when earlier expectations or prospects will be annulled. Initially, this belongs to the entrepreneur's risk. In this case, there are no special circumstances that lead to another conclusion.

4.15. In the present case, the situation does not come up that a certain group, in relation to the disadvantage that the entire affected branch suffers, disproportionate damage is suffered, which could bring along an obligation to damages, different than the quoted Leffers-arrest (HR January 18, 1991, NJ 1992, 638) by van de Vlos and co. After all, the entire smartshop branch is affected by the measure. An appeal to article 1 First Protocol is therefore rejected.

4.16. The conclusion of the previous is that within the limited framework of this interlocutory proceeding it cannot be concluded with the required degree of plausibility that carelessness towards van de Vlos and co comes up. Nor the contradiction with the Opium Act or the First Protocol van de Vlos and co advanced became sufficiently plausible. This leads to the conclusion that the AMvB is not unmistakably non-binding and that the claims need to be rejected.

4.17. De Vlos and co will be, as the party put in the wrong, convicted to the costs of this proceeding.

5. The decision

The facility judge:

- rejects the claimed;
- convicts de Vlos and co to settle the costs of this proceeding within fourteen days after date of this verdict – so far estimated at the side of the State to ? 1.070,--, of which ? 816,-- to the salary lawyer and ? 254,-- to court levy – to the State, with stipulation that de Vlos and co in default with timely payment is indebted the legal interest over the proceeding costs;
- declares these proceeding costs verdict to be provisionally enforceable.

This judgment is pronounced by Mr. R.J. Paris and delivered at November 28, 2008.

SAVE OUR SHROOMS.org
Translated from Dutch to English by Saveourshrooms.org/ Pslawyer