19/2009. (II. 25.) AB határozat

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of the petition submitted by the President of the Republic concerning the preliminary normative control of certain provisions of an Act passed by the Parliament but not yet promulgated, the Constitutional Court, with dissenting opinions by *Dr. Elemér Balogh, Dr. László Kiss and Dr. Barnabás Lenkovics* Judges of the Constitutional Court, has made the following

decision:

The Constitutional Court holds the following: Section 15 of the Act adopted on the session of the Parliament of the 2nd of June, 2008 on amending the Act LVII of 1996 on the Prohibition of Unfair Market Practices and of the Restriction of Competition is unconstitutional because of the violation of Article 57 para. (1) of the Constitution.

The Constitutional Court publishes this Decision in the Hungarian Official Gazette.

Reasoning

I

1. The Parliament adopted on its session of the 2nd of June, 2008 an Act amending the Act LVII of 1996 on the Prohibition of Unfair Market Practices and of the Restriction of Competition (hereinafter: AUC). Section 15 of the adopted Act (hereinafter: AUCA) adds a new Section 93/A to the AUC. According to the main provisions of the amendment, if there is a final and enforceable resolution adopted by the competition supervision authority or by the court establishing the fact of certain violations of the law breaching the provisions of AUC – along with imposing a fine –, further sanctions are to be applied – in two phases – against the senior officials of the condemned company or cooperative. The Hungarian Competition Authority (hereinafter: CA) shall adopt another decision on establishing – on the basis of the company registry – who the senior officials of the company were in the period of committing the breach of the law and then pass yet another decision stating that those persons may not hold such positions for two years. The decision establishing the identity of the persons may be applied against in a non-litigious public administration procedure, while the prohibiting decision may be challenged in a non-litigious procedure. The CA shall supervise the execution of the prohibition of holding senior official positions, and if necessary it may initiate a legal supervision procedure at the registry court to have the decision enforced.

2. The President of the Republic did not sign the Act due to his concerns – with regard to Section 15 of AUCA – based on the principle of fair trial enshrined in Article 57 para. (1) and on the requirement of the presumption of innocence specified in Article 57 para. (2) of the Constitution. Acting in his scope of competence granted in Article 26 para. (4) of the Constitution, the President of the Republic initiated in the petition dated 24 June 2008 the prior constitutional review of the above provisions of AUCA, based on Section 1 para. (1) item a), Section 21 para. (1) item b), and Section 35 of Act XXXII of 1989 on the Constitutional Court (hereinafter: ACC). As pointed out in the petition of the President of the Republic, Section 15 of AUCA establishes in the competition supervision procedure an obligation for the CA and the court to apply a “special prohibition from an occupation”. As

this legal sanction can be compared to the subsidiary punishment of prohibition from an occupation regulated in the Act IV of 1978 on the Criminal Code (hereinafter: CC), it is considered to function as a criminal sanction. However, on the basis of the challenged regulation, the sanction can be applied in a non-litigious procedure, without an open hearing and without taking evidence by hearing witnesses, practically on the basis of the presumption of guiltiness, founded on the objective responsibility of the affected senior officials – with due account to the restrictions specified in Section 1 para. (2) of the Act XVII of 2005 on the amendment of the Act III of 1952 on the Civil Procedure (hereinafter: ACP) and on certain regulations applicable in certain non-litigious public administration procedures (hereinafter: ACPA).

As explained by the President of the Republic in the detailed reasoning of the petition – with regard to the standing practice of the Constitutional Court – Article 57 para. (1), interpreted with account to Article 2 para. (1) of the Constitution: the requirement of fair trail guarantees more than the right to turn to court – as the content of it is concerned. This provision is a guarantee of the right to the judicial way and of the judicial trial, containing several elements (e.g. the equality of arms, the requirement of verbality) that secure the realisation of further guarantees defined in Article 57. The President of the Republic underlined that according to the decisions of the Constitutional Court, the requirement of fair trial is not limited to the criminal procedure, and the same opinion is formed by the European Court of Human Rights (hereinafter: the "Court") in the course of applying Article 6 para. (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the "Convention"), promulgated in Hungary in Act XXXI of 1993. Taking also into account the fact that Article 50 para. (2) of the Constitution specifically guarantees the judicial review of public administration resolutions, the requirement of fair trial, beyond doubt, covers public administration resolutions as well. Similarly, the presumption of innocence is to be followed not only in the criminal procedure, as it is a fundamental principle of the rule of law, to be enforced by all means in a "procedure aimed at imposing a preventive-repressive sanction connected to an unlawful conduct".

3. During its procedure, the Constitutional Court has obtained the opinion of the Minister of Justice and Policing as well. The minister submitted his position in a document filed jointly with the president of CA.

II

In respect of the motion submitted by the President of the Republic, the Constitutional Court took note of the following statutory provisions:

1. The relevant provisions of the Constitution are as follows:

"Article 2 (1) The Republic of Hungary is an independent democratic state under the rule of law."

„Section 50 (…)

(2) The courts shall review the legality of the decisions of public administration."

"Article 57 (1) In the Republic of Hungary everyone is equal before the law and has the right to have the accusations brought against him, as well as his rights and duties in legal proceedings, judged in a just, public trial by an independent and impartial court established by law.

(2) In the Republic of Hungary no one shall be considered guilty until a court has rendered a final legal judgment determining criminal culpability."

2. The relevant provisions of AUCA:

The following Section 93/A shall be added to AUC:

"Section 93/A (1) If a final and enforceable resolution of the competition supervision authority or – in the case of the judicial review of the resolution of the competition supervision authority – the final and enforceable decision of the court established that a company or a cooperative (hereinafter jointly: "company") had violated the law by way of the direct or indirect fixing of purchase or sales prices between competitors, or by way of the compartmentation of the markets by the competitors, and if a fine was imposed on the company in the decision, then the person who had been the senior official of the company in the period of committing the violation of the law, may not act for two years as the senior official of a company.

(2) The Hungarian Competition Authority shall pass a specific ruling on establishing the identity of the persons who fall under the effect of paragraph (1) on the basis of the company registry; the ruling shall be adopted within eight days from the date of expiry of the deadline open for initiating the judicial review of its decision mentioned in paragraph (1), or – in the case of the judicial review of CA's decision – from the communication of the court's final resolution. The ruling is to be notified to the affected persons and the affected enterprises. Within fifteen days from the date of communicating the ruling, an independent appeal may be filed against it, to be judged upon in a non-litigious public administration procedure performed by the competent county court having jurisdiction on the basis of the registered address of the company.

(3) The legal sanction specified in paragraph (1) shall not be applicable to any senior official who had not taken part directly in making the decision that had formed the basis of the company's breaking the law, and to the senior official who participated in it but raised objections against it. For the purpose of the application of this paragraph, if the conduct of the senior official could only indirectly contribute to committing the unlawful act, then it would not qualify as a direct participation in the decision-making; in particular, defining the company's operating structure as well as its internal order of responsibility and supervision shall qualify as indirect contribution. The lack of the participation of the senior official in the decision-making shall be deemed to be verified if the official proves that the company activity affected by the breach of the law was outside his/her scope of liability or activity, save if there are other evidences supporting his/her direct participation in the decision-making.

(4) The provisions specified in paragraph (3) can only be applied on the basis of a judicial decision passed in a non-litigious procedure started by the affected senior official.

(5) The non-litigious procedure specified in paragraph (4) can be started at the county court having jurisdiction on the basis of the seat of the company in sixty days from the date of the specific ruling passed according to paragraph (2) becoming final, or – in the case of seeking legal remedy – from the date of the resolution passed in the non-litigious public administration procedure becoming final.

(6) In the course of the non-litigious procedure, on the request of the petitioner, the court shall bind the Competition Authority to indicate the persons whose active participation in committing the breach of the law is verified by the evidences collected in the competition supervision procedure; together with the above declaration, the Competition Authority shall forward the documents of the case to the court.

(7) The prohibition under paragraph (1) shall take effect upon the expiry of the deadline open for starting the non-litigious procedure specified in paragraph (4), or – in the case of starting a non-litigious procedure – at the time of finishing it with final force.

(8) The resolution passed on the merits of the case in the non-litigious procedure according to paragraph (4) shall be communicated to the Competition Authority as well. After the resolution becoming final, the Competition Authority shall check in the company registry whether the appointment of the senior official falling under the effect of the sanction under paragraph (1) was terminated or not at the company concerned. If the appointment of the affected senior official has not been terminated, the Competition Authority shall initiate a legality supervision procedure by the registry court.

3. The provisions of ACPA:

„Section 1 (…)

(2) In the non-litigious public administration procedures – unless otherwise provided by an Act of Parliament – only documentary evidences can be taken."

III.

The petition is, in part, well-founded.

1. The Constitutional Court has examined in several decisions the requirement of fair trial and the principle of the presumption of innocence, with due regard to several provisions of the Constitution and with account to the role of the above principles in the procedures of various types. The Constitutional Court elaborated the content and the essential elements of these principles gradually, in the subsequent decisions built upon each other, also taking note of the relevant judicial practice of the Court. As shown clearly in the decisions, these constitutional provisions are material requirements determining the quality of the procedure and directly influencing the "legal status" of the persons affected by the procedure – to be taken into consideration in the examination of the constitutionality of the character of the applied sanction, irrespectively to the type of the procedure.

According to the consistent approach of the Constitutional Court: "The requirement of a 'fair trial' is not simply one of the requirements set out here for the court and the procedure (e.g. as a 'just trial'), but – in addition to the requirements specified in the Constitution (…), – particularly in the respect of criminal law and criminal procedure, it encompasses the fulfilment of the other guarantees of Article 57, in accordance with the Covenant [the International Covenant on Civil and Political Rights adopted at Session XXI of the General Assembly of the United Nations on 16 December 1966 and promulgated in Hungary in the Law-Decree 8 of 1976] and the European Convention on Human Rights. Moreover, according to the generally accepted interpretation of their articles that contain procedural guarantees, forming the basis of the content and structure of Article 57 of the Constitution, fair trial is a quality factor that may only be judged by taking into account the whole of the procedure and all of its circumstances. Therefore, a procedure may be 'inequitable', 'unjust' or 'unfair' even despite lacking certain details or complying with all the detailed rules." [Decision 6/1998. (III. 11.) AB, ABH 1998, 91, 95].

As pointed out in several decisions of the Constitutional Court, the fairness of the procedure is a quality factor that can only be assessed with due regard to the whole of the procedure. In the relevant decisions, the Constitutional Court elaborated the general criteria to be taken into account when reviewing the fairness of a procedure. As underlined by the Constitutional

Court, “there can be no other fundamental right or constitutional aim to be weighed against [the right to fair trial] as the right itself is the result of weighing” [e.g. Decision 14/2002. (III. 20.) AB, ABH 2002, 101, 108; Decision 15/2002. (III. 29.) AB, ABH 2002, 116, 118–120; Decision 35/2002. (VII. 19.) AB, ABH 2002, 199, 211; Decision 14/2004. (V. 7.) AB, ABH 2004, 241, 256].

The Constitutional Court stressed several times that the direct constitutional guarantees may not be set aside for reasons of economy, practicality, and with reference to simplifying the procedure or the requirement of expediency [see in details in e.g.: Decision 11/1992. (III. 5.) AB, ABH 1992, 77, 84-85; Decision 49/1998. (XI. 27.) AB, ABH 1998, 372, 376-377; Decision 5/1999. (III. 31.) AB, ABH 1999, 75, 88-89; Decision 422/B/1999. AB, ABH 2004, 1316, 1320, 1322]. The regulation can only be founded on Article 57 para. (1) of the Constitution, granting that everyone has the right to a just, public trial by an independent and impartial court.

As explained by the Constitutional Court in the decision 58/1995. (IX. 15.) AB, the openness of the trial and the public promulgation of the court’s decision guarantees control by the society over the operation of the judiciary. The Constitutional Court emphasized, with regard to the restrictability of openness, that the rules of the Covenant and the Convention are to be followed: restrictions can only be allowed for the protection of the morals, public order, national security, State secrets or the privacy of the parties, and in certain cases the application of restrictions might be considered due to special circumstances on the sides of the parties or in the interest of protecting other fundamental rights (ABH 1995, 289, 292-293).

The Constitutional Court examined the requirement of the enforcement of the right to fair trial in several different types of procedures in addition to the criminal procedure. As established with general force by the Constitutional Court in several decisions: Article 57 para. (1) of the Constitution guarantees everyone to have his/her rights enforced in front of an independent and impartial court. As a consequence, the State is bound to provide a judicial way for judging upon rights and obligations. [e.g. Decision 9/1992. (I. 3.) AB, ABH 1992, 59, 67; Decision 59/1993. (XI. 29.) AB, ABH 1993, 353, 355; Decision 1/1994. (I. 7.) AB, ABH 1994, 29, 35; Decision 46/2007. (VI. 27.) AB, ABH 2007, 574, 580]. As established in the decisions, Article 57 para. (1) of the Constitution is a requirement to be followed in the public administration procedure as well, guaranteeing the judicial review of the merits of public administration decisions. Since Article 50 para. (2) of the Constitution explicitly grants the judicial review of public administration resolutions, in the course of the court procedure in the judicial review, the same constitutional guarantees are to be enforced as in the case of other procedures. However, neither in this case is it enough to merely declaring statutorily the existence of the judicial way. The essential element is what exactly the court can review. Only those procedures comply with Article 57 para. (1) of the Constitution, in the course of which the court can review the merits of the litigated rights and obligations, and the factors of assessment weighed in the public administration procedure [Decision 32/1990. (XII. 22.) AB, ABH 1990, 145, 146; Decision 39/1997. (VII. 1.) AB, ABH 263, 272].

As pointed out in the Constitutional Court’s decision 39/1997. (VII. 1.) AB, with regard to the procedures by the chambers, the disciplinary procedures, implying serious sanctions extending – in fact – to the application of a prohibition from an occupation, must offer a way for judicial review (ABH 1997, 263, 271). The Constitutional Court established in the respect of the constitutional review of crime prevention control that in the judicial procedure reviewing the result of the prevention procedure, the “subject” of taking evidences may not be extended to the preconception of the authority in charge about the future conduct of the affected person, formed on the basis of uncontrollable factors. The decision-making competence of the court should not be a formal one, limited to simply “approving” the decisions of other organs, without review on the merits and discretion [Decision 47/2003. (X.

27.) AB, ABH 2003, 525, 541–542]. In the context of the procedure related to administrative offences, the Constitutional Court held that it would be unconstitutional not to have an open trial even in the case of passing a decision on the supplementary questions after a final resolution, even if the previous decision was adopted by the court [Decision 1/2008. (I. 11.) AB, ABK January 2008, 4, 11].

1.2. According to the practice of the Constitutional Court, the concept of fair trial specified in Article 57 para. (1) of the Constitution is a complex requirement the enforcement of which in a concrete case is most of the time closely related to the other constitutional provisions regulated in Article 57. In the procedures implying the application of sanctions based on individual responsibility – depending on the character of the sanction as well – the connection between fair trial and the presumption of innocence enshrined in Article 57 para. (2) can be in particular strong. This principle has been considered by the Constitutional Court, ever since the beginning of its operation, as a fundamental principle of the rule of law, a constitutional regulation restricting the punitive power of the State and a constitutionally protected fundamental institution of criminal law that may not be restricted with reference to another constitutional fundamental right and the "non-complete" enforcement of which is excluded on conceptual basis. As detailed in the decisions, the presumption of innocence is a fundamental right in the system of criminal law, related to the process of establishing criminal liability and to the procedure of taking evidence, designed to offer protection for the accused person against damages that cannot be repaired later on. It is a mandatory order for the authorities acting in criminal cases, according to which the accused person may not be treated as guilty until having adopted a judgement of final force. To enforce the principle, the authorities empowered to make a decision in the criminal procedure have to comply with the requirement of showing an unbiased and impartial attitude and the with the prohibition of showing prejudice – i.e. taking account of the specific elements contained in Article 57 para. (1). [e.g.: Decision 11/992. (III. 5.) AB, ABH 1992, 77, 83; Decision 3/1998. (II. 1.) AB , ABH 998, 61, 67; Decision 26/B/1998. AB, ABH 1999, 647, 649–650; Decision 428/B/1998. AB , ABH 2004, 1236, 1238–1240; Decision 719/B/1998. AB, ABH 2000, 769, 772–774; Decision 26/1999. (IX. 8.) AB, ABH 1999, 265, 271; Decision 685/B/1999. AB, ABH 2004, 1363, 1375–1376; Decision 1037/B/2001. AB, ABH 2003, 1675, 1681–1682; Decision 41/2003. AB, ABH 2003, 430, 436]

However, the Constitutional Court has always interpreted the presumption of innocence as a constitutional principle extending beyond the realm of the criminal procedure and it construed this principle by expanding the applicability of it to other – different – realms of the law. At the same time, the Constitutional Court pointed out that the constitutional protection based on Article 57 para. (2) of the Constitution may not be expanded without limitations. The Constitutional Court would assess case-by-case whether the statutes reviewed in a given case are the elements of the legal responsibility system in the broad sense, the application of which elements imply this principle indispensably. It is the common essence of the above decisions that "the presumption of innocence – in addition to applying it in the course of adopting a decision in the question of liability – is primarily aimed to prevent the legal injury that might be caused by the legal sanctions – without a chance of subsequent remedy – applied in the absence of an established liability in the course of a procedure held in accordance with the law" (Decision 26/B/1998. AB, ABH 1999, 647, 649–650).

2. The Constitutional Court established that the procedure regulated in the provisions to be inserted by Section 15 of AUCA into AUC as Section 93/A is unconstitutional as it fails, in more than one aspect, to meet the requirements of fair trial enshrined in Article 57 para. (1) of the Constitution.

2.1. According to the provision challenged in the petition, the CA or the court shall pass a final decision on the sanction to be applied against the senior official of the company, prohibiting him/her for two years from holding the office. This decision is linked to the procedure by the Competition Authority completed with final force against the company.

The applied sanction – with regard to its consequence, weight and character – is similar to the supplementary punishment of prohibition from an occupation applied in the substantive criminal law and to the legal sanctions applied in the disciplinary and ethical procedures, implying the provisional loss of the rights connected to exercising a profession. Therefore, with account to the direct effect of the legal sanction on the affected persons, the procedure of establishing the sanction should be subject to the requirement of fair trial, as a principle determining the quality of the procedure. This is, however, not the case in the regulation under review.

With regard to the constitutional review, it is important to underline as an important factor that the procedure started against the company because of distracting the market connections, the wilful distortion of the price competition on the market and the application of business methods unreasonably restricting the consumers' freedom of choice is not a procedure aimed at clarifying the responsibility of the senior officials and no evidences are taken there in this respect. According to the Decision 239/B/2005. AB – adopted in another context, but making a statement of general force – the fine imposed by the CA is the legal sanction of the unlawful conduct of the company, and the main aspect of imposing the fine is to act effectively against such unlawful conducts (ABH 2007, 1850, 1853). This statement is to be applied in the present case as well.

However, the legal sanction to be applied in a uniform and automatic manner against the senior officials is based upon the assumption that the official is necessarily individually responsible for committing the serious breach of the competition law established with regard to the company. The CA does not exercise any discretionary power at the time adopting the related ruling, neither in the respect of the application of the sanction, nor with regard to the period of the prohibition [cp. Section 93/A para. (1), paras (2)-(3)]. Accordingly, it may not differentiate between the persons holding offices of different importance – concerning the operation of the company – for different times, as it may not examine the question of individual culpability. It applies declarative logics, drawing all senior officials under the umbrella of the "same judgement" and it applies a repressive decision striking them equally. The affected persons may only be exempted in the judicial phase of the procedure [Section 93/A para. (4)]. However, as the court is to act according to the rules of the public administration and civil non-litigious procedure, it may only take evidences in a limited scope, outside the trial. Following from the possibility of having an exemption and from the nature of the causes of exemption, the liability of the senior official is not an objective one – although it is strictly regulated – moreover, some causes of exemption require a discretionary assessment. Such a question is for example, according to the provisions under Section 93/A para. (3), the degree of the contribution of the senior official and the evaluation of the role this contribution actually played in reaching the result prohibited under the competition law. Nevertheless, in the procedure of the CA, the factors forming the basis of the assessment are not revealed – in the absence of taking evidence. At the same time, the procedural rules applicable to the non-litigious procedure offer only limited possibilities for taking evidence in order to support the discretionary assessment and to supply foundations for the decision-making, and – based on the character of the process under procedural law – there is no possibility of reparation after having a resolution in favour of the affected persons.

The CA is a public administration organ and it's procedures are governed on the one hand by the substantive and procedural rules specified in AUC and on the other hand (according to Section 44 of AUC) the provisions of Act CXL of 2004 on the general rules of the procedures and the services of public administration authorities (hereinafter: APAP). Regarding the legal remedies, AUC orders to apply its own rules as well as the rules of ACP on litigation in public administration matters. Further provisions to be taken into account are the rules on the non-litigious procedure established in ACPA as well as in the classic Decree of the Council of Ministers No. 105/1952. (XII. 28.) MT (hereinafter: "MT Decree") on the measures necessary for putting into force the Act III of 1952 on the Civil Procedure (ACP). However, from the above rules, in the procedure under review, only the rules on the two different types of non-litigious procedures are applicable. Accordingly, the possibilities of taking evidence are quite limited. In the non-litigious procedure the requirements of verbality, directness and openness as well as the principle of having the parties heard in the framework of a contradictory procedure are not enforced, there is no possibility to have witnesses heard, and there are limited possibilities (based on the judicial practice and not according to the legislation) to take evidence by way of experts. According to ACPA, the scope of taking evidence is even narrower than in the classic non-litigious procedure, as Section 1 para. (2) only allows for taking documentary evidence. Only another Act of Parliament might provide for derogation in this respect. No such derogation can be found in the provisions under review here. Shrinking the judicial review procedure against the decision of CA into the framework of the non-litigious procedure, and establishing certain essential elements of the facts of the case solely within the limits of the public administration non-litigious procedure would hinder the affected natural persons in debating the merits of the content of the decision, and as a result, they cannot contest it by supplying evidence in an appropriate procedure, although their personal liability had not been clarified in the basic procedure either.

2.2. As established in the Decision 1211/B/1996. AB in principle, the protection of the cleanness and the freedom of competition on the market is a central element of the procedure of CA, which has a special function and special duties. In this procedure, the interests of individually non-defined market stakeholders and consumers are protected – as public interest (ABH 2002, 768, 771). According to the extrajudicial character of CA, the requirements of fair trial can only be found in it's procedure partially, in certain elements.

As a consequence, however, the judicial procedure aimed at adopting a final judgement in the questions of reviewing the decision passed by CA in a chamber procedure, establishing the individual liability of the senior official and also applying a legal sanction should be – with due account to the character and the weight of the sanction as well – in compliance with the requirements contained in Article 57 para. (1) of the Constitution. In the procedures establishing personal liability and implying the application of a legal sanction, the right to fair trial may not be restricted.

As established by the Constitutional Court in the Decision 39/1997. (VII. 1.) AB – also with regard to exercising the rights connected to one's occupation – in the course of passing the relevant decision, it is not necessary at al levels to have "»court-like« institutions and procedures required by Article 57 of the Constitution", but the judicial procedure delivering the final decision may not get along without meeting the requirements of fair trial. To have this realised, the court should be in a position of judging upon the merits of the case and the constitutional criteria of a fair trial – first and foremost the right to just and open trial – are to be enforced. Having a document-based procedure is conceptually in contradiction with the requirement of open trial. "Supervising the legality of the decisions of public administration therefore cannot be limited constitutionally to reviewing only the formal legality of the decisions of this kind. In an action for judicial review of an administrative decision the court

is not bound by the facts of the case as determined by the public administrative body, further the court can also review the legality of administrative discretion. (...) In this aspect, the unconstitutionality of a statute can be established not only on the basis of explicitly excluding the judicial review going beyond any question of law or limiting the scope of judicial review to a minimum against the discretion in public administration to the extent that one cannot consider to have the case »judged upon« on the merits with adequate constitutional guarantees, but the issue of unconstitutionality may arise also in the respect of the statutes that grant unlimited possibilities of discretion for the administration, not providing any standard of legality for the judicial decision either." (ABH 1997, 263, 271-272)

In the case under review as well, the fundamental rights of the senior official are restricted [Section 70/B para. (1)]. In the procedure without an open trial and without taking evidence, the court is deprived of the possibility of examining the liability of the affected person and the extent of it as well as the merits of the evidences that support this liability, even though, in fact, no such examination had been performed in the previous procedure either. The liability of the affected person is declared in the procedure at CA on the basis of an external condition (establishing the liability of the company), but at the same time it is declared automatically and with binding force, and in the judicial procedure the affected person is not in a position of initiating the taking of evidence in the required extent, in the course of a trial providing constitutional guarantees.

As pointed out by the Constitutional Court in the Decision 15/2002. (III. 29.) AB, the content of Article 57 para. (1) of the Constitution is deemed to be narrowed down unconstitutionally when the statute contains general restrictions upon taking evidence relevant in the respect of supporting the well-foundedness of the resolution to be passed in the case, and upon the access to the evidences (ABH 2002, 116, 120). In the Decision 398/B/2007. AB, the Constitutional Court held that it was a constitutional condition to provide judicial review against the decision passed in the preliminary procedure in the case of the employer's objective liability for an unlawful act committed by the employee, together with offering a chance for the condemned party to initiate the taking of evidence on the merits and on the full scale, regarding the causes of exemption (ABH 2007, 2180, 2183). All these requirements are not fulfilled in the procedure under review. Certain elements of the challenged provisions [e.g. the last sentence of Section 93/A para. (3)] vest an obligation of proof on the senior officials, but the further rules on the method of the procedure cut them off from using effective tools of supplying evidence.

2.3. Beyond doubt, the regulations related to the procedure of taking evidence, deducted from the principle of risk sharing and connected to the burden of proof are in general linked to the presumption of innocence granted in Article 57 para. (2) of the Constitution. At the same time, as explained in points 2.1 and 2.2, in the present case, the constitutional problem is not related to the allocation of the burden of proof; the provisions determining the course of the procedure cut the affected persons away from the chance of supplying evidence on the merits of the case in line with the requirements of fair trial. The lack of the right to a just, public trial by an independent and impartial court is a violation of Article 75 para. (1) of the Constitution, but the violation of Article 57 para. (2) of the Constitution may not be established on this ground.

2.4. The Constitutional Court emphasizes that on the basis of duly considered reasons, even in the case of unlawful acts in the field of competition law, the legislation may decide on imposing personal sanctions (in the framework of competition law procedure) upon the senior officials of companies, together with – or even in the absence of – sanctions imposed upon the company. The present constitutional review is not aimed at examining whether the legal

sanction selected by the legislation is constitutionally acceptable or not, or whether the deprivation of rights resulting from it is adequate or not. In the present decision the Constitutional Court has examined nothing else but the question whether the procedural provisions of Section 93/A to be inserted into AUC by Section 15 of AUCA comply with the guarantees that follow from the constitutional provisions specified in the petition.

Nevertheless, in the course of examining the adequacy of the guarantees, the Constitutional Court is not bound by the legislative classification of the given sanction into a branch of law. It is a fact that in the course of the development of the law, the sanctions have traditionally differentiated in the codified law and they have taken a form generally characteristic of the specific fields of law. However, with account to the overlaps between the branches of law and the constructions of the legal sanctions becoming more complex, today they can only be systematically differentiated on the basis of their content with broken dividing lines. Therefore, in the course of examining them according to their constitutionality, the character of the sanctions is to be determined on the basis of their content and not on their classification into any branch of law.

As a consequence of the above arguments, the Constitutional Court established that – taking into account the character of the sanction – the quality of the procedural order to be introduced by Section 15 of AUCA does not comply with the requirement specified in Article 57 para. (1) of the Constitution, therefore it is unconstitutional.

The Constitutional Court publishes this Decision in the Hungarian Official Gazette (*Magyar Közlöny*) in view of the establishment of unconstitutionality.

Budapest, 23 February 2009.

Dr. Péter Paczolay
President of the Constitutional Court

Dr. Elemér Balogh
Judge of the Constitutional Court

Dr. András Bragyova
Judge of the Constitutional Court

Dr. András Holló
Judge of the Constitutional Court

Dr. László Kiss
Judge of the Constitutional Court

Dr. Péter Kovács
Judge of the Constitutional Court

Dr. Barnabás Lenkovics
Judge of the Constitutional Court

Dr. Miklós Lévay
Judge of the Constitutional Court, Rapporteur

Dr. László Trócsányi
Judge of the Constitutional Court

Dissenting opinion by *Dr. Barnabás Lenkovics* Judge of the Constitutional Court

I do not agree with the holdings of the decision and neither do I agree with the reasoning connected to it. In my opinion, the unconstitutionality of Section 15 of AUCA cannot be established on the basis of the reasoning found in the decision.

1. According to the preamble of the Constitution, one of the primary aims of the Constitution is to facilitate the peaceful transition to the rule of law realising a social market economy. This abstract objective is concretised in Article 9 paras (1) and (2) of the Constitution guaranteeing the market economy and the freedom of economic competition. As

it has been pointed out by the Constitutional Court already in the Decision 1211/B/1996. AB, the *protection of the public interest in maintaining the cleanness and the freedom of economic competition on the market* is a fundamental duty of CA as an organ with a special function and special duties. In order to fully perform this duty, applying the tools regulated in AUC, CA supervises the market operation and structure securing the competition; *it protects and secures the enforcement of public interest in the mutual relations between the actors on the market* (ABH 2002, 768, 771). According to the provisions of the Constitution and the cited decision of the Constitutional Court, having clean i.e. fair competition is a constitutional value and the public interest related to it is at the same time a constitutional interest, too.

2. Protecting the public interest in the fairness of competition is not a new phenomenon in the Hungarian legal system as the importance of it was also stressed by Ödön Kuncz and Elemér Balázs P. in the explanation of the Act V of 1923 on unfair Competition: "The law condenses the procedures, habits and morals of a fair merchant by making those norms binding equally upon all traders. (…) Unfair practices must first of all be excluded as the trader who employs unfair means to strengthen his own position is in general damaging all of his fairly operating competitors. Thus unfair competition is a public menace. Another important aspect, which makes the protection necessary, is that if we allow or tolerate the application of unfair means in the economic competition, then we poison commerce as a profession and we kill the faith in the possibility of making profit in a fair way. If a fair trader is not protected appropriately against unfair competition, he will have to face the embarrassing alternative of either going bankrupt or to employ unfair means himself. (…) No further explanation is needed to demonstrate that unfair competition is not only a public menace, but it is also against the society and the nation." The above arguments may be called upon even today as constitutional reasons.

3. Prior to concretely examining the challenged provisions of AUCA, one should note that companies need representatives to act on behalf of them as without the will, the legal representations and the actions of the senior officials, companies can't cause any legal effect. As a consequence, for committing a breach of competition law the senior official – on the basis of his/her decision-making position – necessarily bears individual liability, which is an aggravated one.

As stated in Section 30 para. (2) of the Companies Act, the senior officials shall discharge the duty of managing the company *with the diligence generally expectable from persons holding such offices*, and – unless otherwise provided in this Act – on the basis of the priority of the interests of the company. The aggravated liability of senior officials is also enforced in the field of economic competition: in the course of the operation of the company, they shall act lawfully and fairly, complying with the general and special regulations of the Act on unfair market practices.

4. As a consequence of the aggravated liability of senior officials as compared to the general standard of liability [Section 4 para. (4) of the Civil Code], they have limited possibilities of exemption as well. To get exempted from the liability, the senior official has to prove not only to have acted as expected generally in the given situation, but he/she must also prove that he/she acted *with the diligence generally expectable from persons holding such offices.*

Section 15 of AUCA introduced a new special liability regulation, which is fully harmonised with the legal status of senior officials and with their generally enforced aggravated liability. The legislation – using the experiences of CA gained in applying the law in the field of protecting the cleanness of competition – took account of the present state of

business morals and fairness, and it intended to react on the raising number of competition-restricting acts (cartels) to counteract their considerable volume and the damaging effects on the national economy and the budget. The legislation assessed correctly that the fines imposed on the companies have not proved to be preventive sanctions of adequate weight, thus it was necessary to establish concrete rules to sanction the senior officials, too, in line with their aggravated liability. Rather than widening the scope of sanctions under criminal law or sanctions of punitive nature (Section 296/B of the Criminal Code), to reach the above goal, the legislation remained deliberately within the realm of civil law (exculpatory) liability, and it opted for applying a new sanctioned case of incompatibility already accepted in company law (Section 23 of the Companies Act) and applied there in a differentiated manner, and also used in Section 61 of the Act CXXIX of 2003 on public procurements. The classification by the legislation of the concrete normative rule into a branch of law is of constitutional importance.

5. In my opinion, neither the statutory (*ex lege*) prohibition of holding a senior office, nor the procedure aimed at establishing it are unconstitutional. The primary function of sanctions under competition law is to enforce the requirements of fair competition, to protect the community interests safeguarded by competition law, and to make interventions for the purpose of the restitution of it. In the basic procedure – on the basis of the evidences collected by the investigator – the competition council of CA (or the court in the case of a judicial review) establishes the fact with final force that the companies violated the law by fixing the prices or by appropriating the market. Then CA *declares* (and not *constitutes*) – on the basis of the law, i.e. *ex lege* – who the senior officials of the company were at the time of committing the unlawful act, and – similarly, based on Section 93/A para. (2) – establishes that those persons may not act as senior officials of any company for two years. The statute offers a legal remedy against this resolution in the form of starting a non-litigious judicial procedure where documentary evidence can be supplied [based on Section 93/A para. (6), using the documents obtained and created in the course of the procedure by CA, and the newly submitted documentary evidence]. One should note that offering a non-litigious court procedure may be necessary in order to have an independent court examining the existence of any exempting cause, instead of the “biased” authority, which has already established the liability of the company in the basic procedure and imposed a fine upon it.

6. In the petition of the President of the Republic, a great emphasis was laid on presenting the presumption of innocence in the context of the constitutional concerns about applying the sanction against the senior official, as in the case of the application of a legal sanction of penal nature it would be expectable to grant the affected person a chance to present his/her arguments in a maximally correct procedure, safeguarded by guarantees. However, the case concerned is quite different. Imposing the sanction upon the senior official is preceded by a procedure of the Competition Authority, which indeed had not *prima facie* examined the official’s personal liability, but it would be conceptually impossible to fully rive the company – which needs a representative at all times – from its senior officials. As a consequence, the presumption of innocence is not jeopardised at all, thus the decision was correct in the respect of not expanding it any further.

In my opinion, neither is the right to fair trial violated by this solution, as the gravely culpable cartel-conduct of the company – as a fact – has already been established with final force. The shadow of this gravely culpable conduct is cast on the senior official in charge, whose liability is evident in the case of personally performing the culpable conduct. Should the senior official have acted by way of his/her delegate, he/she has to bear aggravated liability for the acts of his/her delegate as well.

By supplying documentary evidence, one may prove beyond doubt that the senior official did not take part in making the decision violating the law, or he/she raised objections against it, or his/her conduct contributed to committing the unlawful act only indirectly, or his/her activity affected by the breach of the law was out of the company's scope of liability. In my opinion, in this case, there is no constitutional provision necessitating the application of a contradictory procedure and neither is it required by practicality. The procedure of the investigator unfolding the activities of the company, the subsequent examination by the Competition Council and the resolution of the Competition Authority based on it, together with the applicable judicial remedies against them, and finally the personal liability established in a separate ruling together with the repeated possibility of a judicial remedy grant adequate guarantees for having concluded a fair trial.

With regard to all the above arguments, I hold that the applied sanction of declaring incompatibility for not more than two years is both necessary and proportionate, and the procedure to establish it is both reasonable and just, in other words it is fair.

Budapest, 23 February 2009.

Dr. Barnabás Lenkovics
Judge of the Constitutional Court

I concur with the dissenting opinion:

Budapest, 23 February 2009.

Dr. Elemér Balogh
Judge of the Constitutional Court

Dr. László Kiss
Judge of the Constitutional Court

Constitutional Court file No.: 666/A/2008.
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