Decision 17/2018 (X. 10.) AB

In the matter of a judicial initiative seeking a finding of unconstitutionality by non-conformity with the Fundamental Law of legal provisions, with dissenting opinions by Justices *dr. Egon Dienes-Oehm, dr. Imre Juhász, dr. Mária Szívós* and *dr. András Varga Zs.,* the Constitutional Court, sitting as the Full Court, adopted the following

d e c i s i o n:

1. The Constitutional Court establishes that the text "or" in Section 2/A (1) *(a),* point *(b),* Subsections (2) to (8), as well as the text "and in point 2" in the first sentence of Annex 1, point 1, and Annex 1, point 2, of Joint Decree 27/2008. (XII. 3.) KvVM-EüM on Establishing the Limit Values of Environmental Sound and Vibration Pollution are contrary to the Fundamental Law; therefore, the Court hereby annuls these provisions as of 31 December 2018.

Following the annulment, Section 2/A (1) of Joint Decree 27/2008. (XII. 3.) KvVM-EüM on Establishing the Limit Values of Environmental Sound and Vibration Pollution shall remain in force with the following text:

"Section 2/A (1) The environmental authority shall establish the noise emission limit value of race courses with international licence in accordance with the operator's application on the basis of the noise emission limit values specified *(a)* in point 1 of Annex 1."

Following the annulment, the first sentence of point 1 of Annex 1 to Joint Decree 27/2008. (XII. 3.) KvVM-EüM on Establishing the Limit Values of Environmental Sound and Vibration Pollution shall remain in force with the following text:

"1 Noise emission limit values of operational and leisure noise sources with the exceptions set forth in Section 2 (3) to (4)".

2. The Constitutional Court hereby dismisses the petition seeking a finding of unconstitutionality by conflict with the Fundamental Law and annulment of Section 110 (6a) of Act LIII of 1995 on the General Rules of Environmental Protection.

This decision of the Constitutional Court shall be published in the Hungarian Official Gazette.

R e a s o n i n g

I

[1] 1. The Court of Law of Budapest Region initiated a procedure of specific norm control before the Constitutional Court on the basis of Article 24 (2) *(b)* of the Fundamental Law and Section 25 (1) of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act").

[2] The case in question, which gave rise to the judicial initiative, was brought on 16 April 2012 by the plaintiffs who own real estate in Szilasliget, against a company in exclusive State ownership that operates a race course with international licence in Mogyoród due to excessive noise pollution.

[3] 1.1 In their claim the plaintiffs requested the proceeding court to establish on the basis of Section 84 (1) *(a)* of Act IV of 1959 (hereinafter referred to as the "old Civil Code") that with the unlawful conduct of environmental pollution and damaging, the defendant has been continuously violating the plaintiffs' rights since 2007 granted in Article 18, Article 59 (1) as well as Article VI (1) and Article XXI (1) of the Fundamental Law. They also requested the court to restrict the defendant's activity to organising and carrying out the events of Formula 1 Hungarian Grand Prix and World Series by Renault until the verification by defendant the implementation of environmental protection (noise reduction) measures that protect the plaintiffs from unlawful noise pollution even during the period of normal operation.

[4] As put forth by the plaintiffs, the defendant's conduct is contrary to Section 75 (1) and Section 82 of the old Civil Code; therefore, the ordering of the restriction is justified primarily on the basis of Section 84 (1) *(b)* of the old Civil Code and Section 101 (3) of Act LIII on the General Rules of Environmental Protection (hereinafter referred to as the "Act on Environmental Protection") and secondly on the basis of Section 100 of the old Civil Code. They also filed, on the basis of Section 339 (1) of the old Civil Code, claims for non-material damages itemised and specified by persons, in accordance with the noise pollution suffered by each plaintiff.

[5] 1.2 At the time of bringing the action, Annex 1 of Joint Decree 27/2008 (XII. 3.) KvVM-EüM on Establishing the Limit Values of Environmental Sound and Vibration Pollution (hereinafter referred to as the "Decree") set the maximum noise pollution at

50 dB during daytime (between 6 a.m. and 10 p.m.) regarding the residential area where the plaintiffs reside.

[6] During the time of the court proceedings the Decree was amended by Decree 93/2007 (XII. 18.) KvVM on the Manner of Monitoring Sound and Vibration Emissions and by Decree 91/2015 (XII. 23.) FM on amending Joint Decree 27/2008 (XII. 3.) KvVM-EüM on Establishing the Limit Values of Environmental Sound and Vibration Pollution (hereinafter referred to as the "Amendment Decree") effective as of 1 February 2016. On the one hand, the Amendment Decree increased noise pollution limit values applicable to the noise pollution originating from race courses with international licence and, on the other hand, it established a system of exemptions by introducing Section 2/A into the Decree and by amending its Annex 1.

[7] The judicial initiative summarised the effect of the amendment regarding the residential area of the plaintiffs as follows. Pursuant to point 2.1.1 of Annex 1 of the Decree, in the rural-suburban neighbourhood of the plaintiffs, the noise pollution limit value applicable to the days not affected by the exemption from the noise emission limit value changed from 50 dB to 55 dB, which was not connected to any specific event or programme as it was a general increase by 5 dB. Point 2.2.1 of Annex 1 to the Decree provides, effective as of 1 February 2016, an exemption from the increased limit value for not more than 10 days in a calendar year up to the level of 70 dB with an additional maximum 30 days of exemption in a calendar year up to the noise level of 65 dB.

[8] 1.3 The proceeding court should also apply in the course of adjudicating the claim Section 110 (6a) of the Act on Environmental Protection, which provides that the noise emission of a programme or event of paramount importance in terms of the national economy, tourism, culture, leisure or sport that mobilises a significant mass of people shall not be classified as an unnecessary disturbance of the neighbours, provided that it shall not exceed the noise emission limit value specified in the relevant licence issued by the authorities.

[9] 2. In the view of the court that initiated the procedure of specific norm control, from among the laws to be applied in the lawsuit, Section 110 (6a) of the Act on Environmental Protection and points 2.1.1 and 2.2.1 of Annex 1 to the Decree violate the Fundamental Law. Therefore, the judicial initiative asked the Constitutional Court to establish the violation of the Fundamental Law and to exclude the applicability of the challenged provisions in the litigation. On the basis of the petition, the alleged injury can be summarised in three points.

[10] 2.1 In the court's view, it should be examined whether the introduction by the legislator of Section 110 (6a) of the Act on Environmental Protection negates the concept of unlawfulness of the branch of law existing as a principle in the case law as well as in the theory of law. The legislator's competence should not include the assessment from the point of view of civil law conduct that complies with the administrative norms, as it would impair the right to apply to the courts as regulated in Article XXVIII (1) of the Fundamental Law. The statutory provision is blocking the way of assessing, in a civil action, unlawfulness under civil law as elaborated by legal scholars and by the judicial practice.

[11] The proceeding court points out that the Decision 8/2011 (II. 18.) AB of the Constitutional Court referred back to Decision 37/2001 (VII. 1.) AB, which had established that effective judicial legal protection depended on what the court could review. Although this decision of the Constitutional Court was adopted in the subject of reviewing an administrative decision, the petitioner submits that a parallel may be drawn with the present case as well. It should be emphasised among others that "not only a law which expressly excludes judicial review beyond the question of law or leaves so little room for judicial review in relation to administrative discretion that there can be no question of a substantive assessment of the case within the appropriate constitutional guarantees, but also a law which, by granting the administration unlimited discretion, does not contain any standard of lawfulness for the judicial decision" [Decision 39/1997 (VII. 1.) AB, ABH 1997, 263, 272.].

[12] As a summary, the court claimed that "Section 110 (6a) of the Act on Environmental Protection does not provide the civil court with a room for concluding a fair trial, where the decision is reached as the result of the necessary taking of evidence. By terminating the legal basis for the claim it determines a rejecting judgement, therefore, although recourse to the court is not *ipso facto* excluded, it fails to provide effective judicial legal protection and renders the judicial path nugatory."

[13] 2.2 In the petitioner's view, noise pollution as the consequence of a noise-emitting conduct damaging the environment had already been specified at a definitive level during the effect of the Decree, before the entry into force of the Amendment Decree The increase of the noise pollution limit value means the decreasing of the level of protection achieved that raises the violation of Article XXI (1) Fundamental Law. It is required that the legislator may only derogate from the level of protection under conditions which are capable of justifying a restriction of a fundamental right. In the action, according to the defence presented by the defendant, the positive effect of the

defendant's operation exercised on the national economy enters into conflict with the plaintiffs' fundamental right to a healthy environment. This conflict raises constitutional concerns with regard to points 2.1.1 and 2.2.1 of Annex 1 to the Decree.

[14] 2.3 The judicial initiative contains the following arguments as well: "-[E]xcluding the possibility of paying damages by classifying the pollution as a lawful one also results in preventing the enforcement of the principle of »the polluter pays« described in Article XXI (3) of the Fundamental Law".

[15] 3. The Constitutional Court requested the minister of agriculture who had amended point 2 of Annex 1 to the Decree and who provided information about his standpoint. In the course of adopting the decision, the Constitutional Court evaluated the position taken by the minister.

[16] The Constitutional Court also contacted the petitioner judge in connection with the application of the contested legislation in the proceedings. The reply received has been taken into account by the Constitutional Court as described in point III (Reasoning [32] et seq.).

[17] Finally, upon the Constitutional Court's request, Hungaroring Sport Zrt. provided the Court with the data on noise pollution measured and recorded between 2012 and 2018 in relation to its operation. The company also made a statement on the questions of the application of the legislative environment that form the subject of the Constitutional Court's procedure.

II

[18]1 The provisions of the Fundamental Law affected by the petition read as follows:

"Article XXI (1) Hungary shall recognise and endorse the right of everyone to a healthy environment.

(2) Anyone who causes damage to the environment shall be obliged to restore it or to bear the costs of restoration, as provided for by an Act.

(3) The transport of pollutant waste into the territory of Hungary for the purpose of disposal shall be prohibited."

"Article XXIV (1) Everyone shall have the right to have any charge against him or her, or his or her rights and obligations in any litigation, adjudicated within a reasonable time

in a fair and public trial by an independent and impartial court established by an Act."

[19] 2 The provisions of the Act on Environmental Protection affected by the constitutional review read as follows:

"Section 110 (6a) The noise emission of a programme or event of paramount importance in terms of the national economy, tourism, culture, leisure or sport that mobilises a significant mass of people shall not be classified as an unjust nuisance of possession, the unnecessary disturbance of the neighbours or the jeopardising of exercising their rights, provided that it shall not exceed the noise emission limit value specified in the relevant licence issued by the authorities."

[20] The provisions of the Decree affected by the review of constitutionality read as follows:

"Section 2/A (1) The environmental authority shall establish the noise emission limit value of race courses with international licence in accordance with the operator's application on the basis of the noise emission limit values specified *(a)* in point 1 of Annex 1, or *(b)* in point 2.1 of Annex 1.

(2) For the purposes of the application of Annex 1, point 2.1:

(a) daytime shall mean a period between 8:00 am and 10:00 pm;

(b) limit values shall be values expressed in assessment levels where the assessment time is the continuous period of 8 hours with the highest noise pollution;

(c) no environmental noise source shall be operated on the race course with international licence outside daytime period and for a period of more than ten hours per day, with the exception of building technology equipment serving the operation of constructions that belong to the race course and noise sources placed in closed constructions.

(3) The operator of a race course with international licence shall be exempted in a calendar year for a period not more than specified in point 2.2 of Annex 1 from:

(a) compliance with the noise emission limit value specified on the basis of point 1 of Annex 1, or

(4) compliance with the noise emission limit values specified on the basis of point 2.1 of Annex 1 and with the temporal restriction of ten hours per day as specified in Subsection 2 (c).The operator shall not resort to the exemption under Subsection (3), if there is a health care area among the special areas to be protected from noise.

(5) During the period of exemption under Subsection (3), the noise pollution limit value pursuant to Annex 1 point 2.2 shall be applied, provided that the operator reported the intention to apply the exemption in accordance with Section 11 (5) *(b)* of the Government Decree 284/2007. (X. 29.) Korm. on certain rules of the protection against environmental sound and vibration. In the absence of reporting or in case of a reporting submitted late, the noise emission limit values determined on the basis of Subsection (1) shall be applied to the race course with international licence.

(6) For the purpose of the application of Annex 1 point 2.2:

(a) shall mean a period between 8:00 am and 10:00 pm;

(b) limit values shall be values expressed in assessment levels where the assessment time is the continuous period of 8 hours with the highest noise pollution,

(c) no environmental noise source shall be operated on the race course outside daytime period, with the exception of building technology equipment serving the operation of constructions that belong to the race course and noise sources placed in closed constructions.

(7) In a given calendar year, on the number of days equal to the number of days affected by an exemption under Subsection (3), no environmental noise source shall be operated on the race course with international licence, with the exception of building technology equipment serving the operation of constructions that belong to the race course and noise sources placed in closed constructions.

(8) At the time of determining the number of days affected by the exemption according to Subsection (3), the number of days actually affected by exceeding the noise emission limit value under Subsection (1) shall be taken into account."

"Annex 1 to Joint Decree 27/2008. (XII. 3.) KvVM-EüM

Noise pollution limit values applicable to noise from operational and leisure facilities in the areas to be protected from noise

1. Noise emission limit values of operational and leisure noise sources with the exceptions set forth in Section 2 (3) to (4) and in point 2

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1	area to be protected from noise	Limit Value (LTH) to the LAM assessment level (dB) daytime between 06 and 22 hours	Limit Value (LTH) to the LAM assessment level (dB) night between 22 and 06 hours
2	Recreation area, healthcare area from among the special areas	45	35
3	Residential area (small town-like, suburban-like, village-like, estate-like settlement) the area of educational facilities, graveyards, green area from among the special areas	50	40
4	Residential area (city-like settlement), mixed area	55	45
5	Economic area	60	50

1.2. The LAM assessment level shall be interpreted according to the methodology specified for the measurement of the noise source in the minister's decree on the manner of establishing noise emission limit values and monitoring sound and vibration emissions.

2 Noise pollution limit values of race courses with international licence

2.1. Noise pollution limit value applicable to the days not affected by an exemption from the noise emission limit value

2.1.1 Noise pollution limit values of race courses with international licence on the days not affected by an exemption under Section 2/A (3)

	A	B
1	area to be protected from noise	Limit Value (LTH) to the LAM assessment level daytime (between 08 and 20 hours) (dB)
2	Health care area from among the special areas	45
3	Recreation area	50
4	Residential area (small town-like, suburban-like, villagelike, estate-like settlement) the area of educational facilities, graveyards, green area from among the special areas	55
5	Residential area (city-like settlement), mixed area	60
6	Economic area	65

2.1.2. The LAM assessment level shall be interpreted according to the methodology specified for the measurement of the noise source in the minister's decree on the manner of establishing noise emission limit values and monitoring sound and vibration emissions.

2.2. The noise pollution limit value applicable to the days affected by an exemption from the noise emission limit value

2.2.1 Noise pollution limit values of race courses with international licence on the days affected by an exemption under Section 2/A (3), the maximum number of the days affected by an exemption and the restrictions applicable along with the limit value

	A	B	C	D
1	area to be protected from	the maximum number of days affected by an	Limit Value (LTH) to the LAM assessment	the restrictions applicable along with the limit value

	noise	exemption in a calendar	level at daytime (between 08 and 22 hours) (dB)	
2	Recreation area	40	60 dB	Within the maximum number of days affected by an exemption, in a calendar year, the number of those days when the noise pollution exceeds the level of 55 dB shall be not more than 10 days at the critical point according to the decree on certain rules of the protection against environmental noise and vibration (hereinafter referred to as the "critical point").
3	Residential area (small town-like, suburban-like, village-like, estate-like settlement) the area of educational facilities, graveyards, green area from among the special areas	40	70 dB	*a)* Within the maximum number of days affected by an exemption, in a calendar year, the number of those days when the noise pollution exceeds the level of 60 dB shall be not more than 30 days at the critical point. *b)* Within the 30 days according to point *a),* the number of those days when the noise pollution exceeds the level of 65

				dB shall be not more than 10 days at the critical point.
4	Residential area (city-like settlement), mixed area	30	70 dB	Within the maximum number of days affected by an exemption, in a calendar year, the number of those days when the noise pollution exceeds the level of 65 dB shall be not more than 10 days at the critical point.
5	Economic area	10	70 dB	None

2.2.2 The LAM assessment level according to point 2.2.1 shall be interpreted according to the methodology specified for the measurement of the noise source in the minister's decree on the manner of establishing noise emission limit values and monitoring sound and vibration emissions."

III

[21]The Constitutional Court reviewed the compliance of the judicial initiative with the formal criteria laid down in the "Constitutional Court Act".

[22] 1. The Constitutional Court established that the petition complies with the conditions laid down in Section 25 and Section 52 of the Constitutional Court Act in the scope of Article XXI (1) and Article XVIII (1) of the Fundamental Law {*cf*. Order 3058/2015 (III. 31.) AB, Reasoning [8] to [24]; Decision 2/2016 (II. 8.) AB, Reasoning [26] to [28]; Decision 3064/2016 (III. 22.) AB, Reasoning [8] to [13]}. According to the judicial initiative reinforced in the reply given to the requesting ruling, the challenged rule has to be applied in the main proceedings, the proceedings have been suspended and the initiative is aimed at establishing the conflict with the Fundamental Law, including the legal consequences of the annulment. Therefore there was no formal obstacle of the

Constitutional Court's procedure on the basis of the judicial initiative, delivering a decision on the merits with regard to the two provisions of the Fundamental Law.

[3] [23] 2. The Constitutional Court also determined from a formal point of view the arguments based on Article XXI (3) of the Fundamental Law. In this regard, the Constitutional Court noted that the petition referred to paragraph (3) of the aforementioned Article with respect to the polluter pays principle. This principle can be found, however, in paragraph (2) of the aforementioned Article. This mistake, as a typo, shall not, in itself, make the petition element unsuitable for review on the merits, as petitions are required to be judged upon on the basis of their content. The Constitutional Court therefore examined whether the petition element quoted in point I.2.3 of the reasoning of this decision (Reasoning [14]) complies with the requirement of being explicit, by noting that paragraph (2) instead of paragraph (3) of Article XXI is to be taken into account.

[24] The Constitutional has held that the petition does not contain any constitutionally assessable reasoning in this respect, but confines itself to the sentence quoted. The Constitutional Court emphasises that the request is only considered to comply with the requirement of being explicit as specified in Section 52 (1) of the Constitutional Court Act, if it provides arguments why the challenged provision of the law is held to be in conflict with the indicated rule of the Fundamental Law. The petition is unsuitable to be judged on the merits of it, if it merely indicates the provision of the Fundamental Law that it alleges to have been violated without providing a reasoning, in the form of detailed arguments, why the challenged law or provision of the law is in conflict with the indicated provision of the Fundamental Law. {*See* the summary of the relevant case law: Order 3058/2015 (III. 31.) AB, Reasoning [19]; Decision 2/2016 (II. 8.) AB, Reasoning [26]-[28]; Decision 3064/2016 (III. 22.) AB, Reasoning [8]-[13]}.

[25] As a consequence, the Constitutional Court has not reviewed on the merits the petition element founded on the basis of the violation of Article XXI (2) of the Fundamental Law as it failed to comply with the requirement of being explicit as specified in Section 52 (1) and elaborated in Section 52 (1b) *(b)* and *(e)* of the Constitutional Court Act.

IV

[26] The judicial initiative is in part well-founded.

[27] 1. The Constitutional Court first compared Section 110 (6a) of the Act on Environmental Protection with the right to apply to the courts as a part of Article XXVIII (1) of the Fundamental Law. The Court commenced the assessment by analysing the history and the meaning of introducing the challenged provision into the legal system, it continued with reviewing the case law of the Constitutional Court related to the provisions that raise similar questions, then it extracted the content of the right to apply to the courts and finally it examined the challenged rule in the light of this right.

[28] 2. Section 110 (6a) has been introduced into the legal system, with entry into force on 1 August 2015, by Section 10 of Act CXV of 2015 on the amendment of Act LXXVII of 2011 on World Heritage and Act LIII of 1995 on the General Rules of Environmental Protection (hereinafter referred to as the "Amending Act"). The general reasoning of the draft Act of the Amending Act contains, among others, the following: "from among the programmes and events in Hungary, certain programmes and events of paramount significance in terms of tourism, culture or sport have been representing for a long time an important added value in the field of tourism and at the same time they play an important role in forming the country image. However, there are recurring concerns about the possible disturbing effects on the environment caused by the noise emission of these large events, even if they comply with the required limit values. Such large events and programmes may have, even individually, an importance in the national economy; therefore, in Hungary the proper operation of the whole of this sector is an important public interest.

[29] In view of the fact that the development of a possible unfavourable practice by the law enforcement authorities (a future ban on the activity in question on the basis of subjective criteria) could jeopardise the operation of the entire sector, the public interest manifested in this justifies the creation of special legislation and the establishment of an objective system of categories for the environmental impact of noise emissions [...].

[30] This regulatory demand is supported in particular by the fact that the programmes and events concerned typically imply a long preparation phase as well as significant investments that may reach the order of magnitude of billions Hungarian forints. An unfavourable judicial practice would open up the way for a multitude of litigations that would, even in the short run, result in significantly shrinking the supply of the sector, and not only the market part of it, and it would serve neither the public interest nor the interests of the silent majority, who are not of the litigating type of people, who wish to support and enjoy the programmes and events concerned."

[31] According to the minister's reasoning attached to Section 10 of the Amending Act, "in line with the amendment, there will be no prejudice to rights, if the limit values established in the decree are complied with, thus holding the event shall not qualify as unnecessary disturbance. The principle of necessity and proportionality should always be taken into account for the purposes of tourism."

[32] On the basis of the above, it may be concluded with regard to the meaning of Section 110 (6a) of Act on Environmental Protection that noise emission by entertainment events of major importance shall not result in the disturbance of possession and it shall not be qualified as being unnecessarily disturbing, especially for the neighbours, provided that the noise protection limit values set by the law or by the authorities are complied with. Conducts complying with the limit values shall not be classified as unlawful, thus no liability for damages may be established as their legal consequences. The adoption of this exempting regulation is based on public interest as stressed in the minister's accompanying annotation. Public interest is the concept where, at the national and community level, all the beneficial effects of the entertainment events of major importance are condensed to form a counterweight to higher noise emission.

[33] 3. The Constitutional Court carried out a review of constitutionality with respect to three decisions ordering annulment in the scope of statutory provisions similar to the subject matter of this case. All of them had challenged the provisions of Act C of 2003 on Electronic Communications (hereinafter referred to as the "Electronic Communications Act"). The decisions to be followed are the following: Decision 42/2006 (X. 5.) AB (hereinafter referred to as the "2006 Court Decision"); Decision 10/2014 (IV. 4.) AB (hereinafter referred to as the "2010 Court Decision"); Decision 18/2015 (VI. 15.) AB (hereinafter referred to as the "2015 Court Decision").

[34]In the 2006 Court Decision the Constitutional Court annulled, among others, Section 96 (2) of the Electronic Communications Act. Pursuant to this decision, "An electronic communications installation shall be located on the property in such a way that it does not interfere with the exercise of the rights of the owners of neighbouring properties or interferes with them to the least extent possible under the circumstances, in which case the installation and its operation shall not constitute an unnecessary interference as defined in the Civil Code". The Constitutional Court founded its decision on the basis of the right to property granted in Article 13 (1) of the Constitution. It established that Section 96 (2) of the Electronic Communications Act justifies the lawfulness of the installation of the communications structure if the disturbance is of the least extent

possible, thus excluding the application of the old Civil Code's rules pertaining to the restraint of the right to property and possession. "The criteria for determining what constitutes the least possible disturbance are not specified in the contested rule and it is left to the discretion of the competent authority to determine them. In these circumstances, the restriction on property cannot be accepted as proportionate and therefore constitutional." (the 2006 Court Decision, ABH 2006, 520, 533).

[35] The 2010 Court Decision has already been adopted under the force of the Fundamental Law. Section 96 (4), introduced by the legislator into Act after the 2006 Court Decision, was one of the two challenged provisions. Pursuant to this provision, "the disturbance caused by the installation and the operation of antennas, antenna-bearing structures and the connected constructions necessary for providing mobile telephone services shall not be regarded as an unnecessary disturbance specified in the Civil Code, provided that the limit values determined by the laws on the environment, public health, public safety and building are complied with." Due to the lack of an explicit request, the Constitutional Court did not adopt a decision on the merits of the complaint element (the 2010 Court Decision, Reasoning [23]). However, it annulled the provision that had set the temporal applicability of the above paragraph. It was necessary as Section 163/F of the Electronic Communications Act implemented a regulation of adverse content with retroactive effect, breaching Article B (1) of the Fundamental Law (the 2010 Court Decision, Reasoning [21] and [22]).

[36] The 2015 Court Decision annulled Section 96 (4) of the Electronic Communications Act. In the relevant case, a court proceeding with a claim for damages turned to the Constitutional Court. The petition was based on Article T) (3), Article I (3), Article XIII (1) and Article XXVIII (1) of the Fundamental Law that contains the right to apply to the courts. The Constitutional Court annulled the challenged provision due to the violation of the right to property.

[37] It should be recalled that in the 2015 Court Decision the Constitutional Court established the following: "as the old Constitution and the Fundamental Law regulated and regulates essentially the same way the right to own property, former decisions adopted in this subject matter may be referred to and quoted" (the 2015 Court Decision, Reasoning [19]). It should also be pointed out that the Constitutional Court reinforced its former practice pursuant to which "the possession of property and the law relating to neighbours as well as their enforceability enjoy property protection based on Article XIII of the Fundamental Law" (the 2015 Court Decision, Reasoning [23]).

[38] The Constitutional Court then continued the procedure with ascertaining the

necessity and the proportionality of the restriction. The Court accepted public interest as a ground justifying the necessity of the restriction, but it has not accepted its proportionality. Indeed, it underlined that "the Fundamental Law's sentence establishing social responsibility also applies to the entities installing and operating relay antennas. As profit-oriented business organisations, they are surely expected without exception to mitigate, in an equitable manner, for the persons involved the damaging effects of the disturbance necessarily implied with each and every installation, provided that it qualifies as the violation of the law relating to neighbours. [...] While the norm itself reckons with the disturbance, as it mentions »disturbance caused«, it narrows down the concept of unnecessary disturbance by linking its actual existence to exceeding a specific limit value. This way it actually excludes the enforcement of the right before the court in cases where the unnecessary disturbance takes place without exceeding the limit values" (the 2015 Court Decision, Reasoning [44] and [45]). This way the legislator incorporated into the Electronic Communications Act a provision serving a constitutionally acceptable purpose in a manner resulting in the disproportionate restriction of the right to property (the 2015 Court Decision, Reasoning [46]).

[39] The constitutional requirements concerning the general substantive rules on damages under civil law were derived by the Constitutional Court also from the right to own property based on Article XIII (1) of the Fundamental Law. The Court has made two important findings so far. First, the right to receive compensation for damages cannot be derived from Article XIII (1) of the Fundamental Law as a fundamental right. {Decision 32/2015 (XI. 19.) AB, Reasoning [135]; Decision 3025/2016 (II. 23.) AB, Reasoning [28]}. On the other hand, the legislator's obligation to develop a system for the allocation of damages that keeps the balance between the positions of the entity that caused the damage and that of the party suffering the damage (Decision 498/B/2001 AB, ABH 2003, 1392, 1398.). However, in line with the current judicial practice, the detailed rules of the system do not form part of the constitutional protection of property.

[40] Based on the above, the Court established that the rules on the protection of possession, the provisions on the law relating to neighbours and the rules of substantive law on damages fall within the scope of application of the right to own property granted in Article XIII (1) of the Fundamental Law.

[41] 4. The petition infers the violation of the right to apply to the courts from Decision 39/1997 (VII. 1.) AB [Decision 39/1997 (VII. 1.) AB, ABH 1997, 263, 272.].

[42] The Constitutional Court maintained, even after the fourth amendment to the

Fundamental Law, the findings it had made in the aforementioned case {Decision 13/2013 (VI. 17.) AB, Reasoning [27] to [33]} and determined their meaning in the light of the provisions of the Fundamental Law in force. Considering administrative justice as an achievement of the historical Constitution, the Court established that the interpretation found in Decision 39/1997 (VII. 1.) AB may also be referred to even after the fourth amendment {Decision 17/2015. (VI. 5.) AB, hereinafter referred to as the the "Second 2015 Court Decision", Reasoning [87]}. Pursuant to the Second 2015 Court Decision, "the judicial review of the legality of administrative decisions cannot be constitutionally restricted to the assessment of the lawfulness purely on the basis of formal criteria, limited to compliance with the procedural rules. The court proceeding in an administrative case is not bound by the facts of the case as determined in the public administration decision, and it may, indeed, it should, also review the discretion made by the administrative body" (the Second 2015 Court Decision, Reasoning [88]).

[43] As a consequence, the right to apply to the courts has a particular aspect, namely the part that is enforced during the review of constitutionality of the statutory regulations on the judicial review of administrative decisions. Accordingly, in order to have an effectively operating and not only a formally existing administrative justice, the legislator should lay down rules, as a part of the fair court procedure, that allow, among others, the court to review the lawfulness of the discretionary decision adopted by the administrative body acting as the defendant. This requirement is based, on the one hand, on the defendant being bound by the law, that is, it is obliged to act pursuant to the provisions of substantive and procedural law and, on the other hand, it is within the administrative court's duties and competences to decide on the lawfulness of the defendant's decision within the limits of the claim. Conceptually, the procedure by the judge adjudicating in the administrative action can only be fair and equitable if it is not bound by the defendant's decision. This is when the plaintiff's right to apply to the courts is really enforced, through which the subordination of administration to the law is realised.

[44] The Constitutional Court also established in a decision based on a criminal case that on the basis of the right to fair procedure and the resulting equality of arms principle, both the accusing party and the defence should be provided with equal opportunities to represent and support their standpoints. "On the other hand, the weighing (reviewing) of evidence raised in the procedure is to be decided solely by the court. While other procedural acts in the scope of taking evidence (motioning, examination of the means of evidence) take place with the active participation of the parties, weighing is an activity of the court. The evidentiary force of the pieces of

evidence is to be determined according to the inner conviction of the judge and it is only limited, to satisfy the requirement of fair procedure, by the accountability of the judge (obligation of reasoning) concerning his free discretion {Decision 3265/2014 (XI. 4.) AB, Reasoning [37]—[38]}. The Court emphasises, however, that Section 110 (6a) of Act on Environmental Protection does not determine the evidentiary force of the pieces of evidence.

[45] Section 110 (6a) of Act on Environmental Protection is to be applied not in an administrative action but in the procedure before the initiating civil court. The fact whether there has been an unnecessary disturbance, that is, unlawful conduct in the legal relationship of the neighbours can be established, among others, on the basis of interpreting this provision, as it is a necessary but not sufficient condition of accountability under civil law, in accordance with the general form of liability for damages. This court procedure is not preceded by an administrative procedure and no official administrative decision is made. Thus it would be conceptually unfounded to presume the existence of a law that provides the administration with unlimited discretion. The purpose of freedom of discretion elaborated by the Constitutional Court, in the decisions referred to above, is to unchain the administrative court from the administrative authority in accordance with the principle of fair procedure. Consequently the right to apply to the courts should not be considered to include the content mentioned in the judicial initiative.

[46] In accordance with the above, Section 110 (6a) of the Act on Environmental Protection should not be assessed by the Constitutional Court in the light of the administrative justice. Pursuant to the previous decisions of the Constitutional Court, "the right to take judicial action, that is, to have one's case judged by a court includes as an essential element the quality of the procedure: it is the reason behind applying to the courts" {first in Decision 35/2002 (VII. 19.) AB, ABH 2002, 199, 211.; reaffirmed in Decision 26/2015 (VII. 21.) AB, Reasoning [62]; Decision 3212/2015 (XI. 10.) AB, Reasoning [16]}. "The possibility to use the judicial path is not, in itself, a sufficient precondition for the fairness of the procedure, it is only considered to be granted if the court reacts on the merits of (that is, decides on) the applications submitted in the action. {Decision 26/2015 (VII. 21.) AB, Reasoning [62]} The latter statement has already been reaffirmed in other decisions of the Constitutional Court {see for example the Decision 3212/2015. (XI. 10.) AB, Reasoning [16]}.

[47] Therefore the right to apply to the courts raises a general requirement for the regulation to allow the proceeding court to pass a decision on the merits of the claims

submitted in the action. For this, the legislator should offer a procedure in which the judge may decide on what is lawful and what is not in the light of the applicable provisions of the law. The fundamental right concerned is therefore intended to protect the quality of the proceedings. Indeed, the meaning of applying to the courts is the possibility of obtaining a decision on the merits, which measures the claims in dispute against the applicable substantive and procedural law. During a court procedure, the court is required to identify all essential issues of law and decide them by way of interpreting the law. This is the approach that complies with the set of requirements elaborated by the Constitutional Court, summarised in Decision 7/2013 (III. 1.) AB with regard to the fair court procedure. Pursuant to this decision, "the constitutional requirement of a fair trial imposes a minimum requirement on judicial decisions that the court must assess the observations of the parties to the proceedings on the merits of the case in sufficient depth and report on its assessment in its decision" {Decision 7/2013 (III. 1.) AB, Reasoning [34]}.

[48] 5. The general clause on the law relating to neighbours referred to in the claim of the basic case, as the Constitutional Court shall in the following limit its examination to it in the light of the petition, was in Section 110 of the old Civil Code and Section 5:23 of Act V of 2013 on the Civil Code (hereinafter referred to as the "Civil Code") contains the same provision word by word. While the rule settling in general the legal relation of neighbours can be found in the codices of civil law, the special provision introduced by the Amending Act is in the Act on Environmental Protection.

[49] The provisions of private law on the prohibition of unnecessarily disturbing the neighbours and the rule that may be derived concerning tolerating the necessary disturbance can be found in civil law. Not only the rules contained in any of the above codices are regarded to be provisions of civil law, as any provision the subject matter of which is the legal relationship of neighbours, that is, the totality of their conflicting rights and obligations, and that have legal consequence(s) under private law, qualifies as a rule on the law relating to neighbours, thus as a provision of civil law. Section 110 (6a) of the Act on Environmental Protection is such a provision, as well.

[50] The legislator originally regulated the legal relationship of the neighbours with a general rule and later on it added a special provision regarding disturbing by noise. In assessing this rule, the decisive factor is not in which source of law the legislator formally placed it, but the legal relationship it regulates as well as the legal consequences that originate from it. As long as the clarity of norms is not prejudiced, the legislator could have inserted the challenged provision into the codices of civil law the same manner as

it incorporated that into the Act on Environmental Protection. The relation regulated by the two laws show an overlap, since the noise-emitting activity burdens the environment on the one hand and it may also unnecessarily disturb the neighbours on the other. The first phenomenon affects the administrative law and the unlawful exercising of it may imply administrative sanctions, while the latter falls in the scope of civil law and the unlawful exercising of it may imply accountability under private law.

[51] It is a regulatory question to be decided by the legislator within the limits of the Fundamental Law whether the law should use two standards or just one. Under the Amending Act, in the case of complying with the noise pollution limit value specified by the law or by the authority, lawfulness should be assessed by using one standard. It is a question of interpretation to be decided by the civil court whether or not the standard laid down in Section 110 (6a) of Act on Environmental Protection is violated by the noise emitting party with respect to its neighbour. It is by applying the challenged provision that the court must respond to the substance of the application, the procedure for which is not hindered by the rule at issue, but provides the substantive legal framework for the interpretation of the law by the court. The challenged provision is one of the norms within the limits of which the proceeding civil court may freely weigh the pieces of evidence and judge the facts of the case established by it.

[52] The right to apply to the courts as part of the right to a fair trial does not prevent the legislator from deciding whether it wishes to regulate the private law relationship between neighbours by means of a general rule, a special rule or a combination of the two techniques. It is an important feature of the general clause that it provides the civil courts with a greater margin of appreciation than the one offered by the special rule. The legislator may, however, reset the limits of the margin by amending the Act. The specification of a general rule by a specific provision does not, therefore, in itself affect the right to apply to the courts. Indeed, the effect of applicability of this fundamental procedural right grasps the court proceedings in accordance with the Constitutional Court's interpretation established in point IV.3 (Reasoning [53] to [59]).

[53] The special provision of the law relating to neighbours is characterised by a higher degree of predictability although it makes the interpretation of the law less flexible in terms of presenting the peculiarities in the decision. Nevertheless, the courts seised must always be careful to determine the content of the law, and not the law itself, in the exercise of their freedom of interpretation in a particular case.

[54] In the light of the above, the Constitutional Court dismissed the element of the

petition, which stated that Section 110 (6a) of the Act on Environmental Protection violated the right to apply to the courts as part of Article XXVIII (1) of the Fundamental Law. As the Constitutional Court explained in point IV.2 (Reasoning [44] to [52]): the rules on the law relating to neighbours, including the law on damages, are also subject to the requirements of constitutionality, although their constitutional protection can be traced back to the right to own property enshrined in Article XIII (1) of the Fundamental Law.

V

[55] The Constitutional Court considered whether points 2.1.1 and 2.2.1 of Annex 1 to the Decree are in conflict with Article XXI (1) of the Fundamental Law that enshrines the right to a healthy environment. During such consideration, the Court first examined the meaning of the provisions at issue and those closely linked to them, then it reviewed the content of the fundamental right involved and finally compared it with the challenged regulations and contrasted the right to a healthy environment with the right to enterprise.

[56] 1. Section 11 and Annex 4 to the Amending Act established Annex 1 to Decree effective as of 1 February 2016. The following conclusions may be drawn from comparing the aforementioned provisions and the amended rules.

[57] 1.1 The title and the regulatory subject of Annex 1 to the Decree has not been changed. It reads as follows: "Noise pollution limit values applicable to noise from operational and leisure facilities in the areas to be protected from noise". The regulations in force split this Annex into two parts. Point 1 of Annex 1 of the Decree specifies the general noise pollution limit values of operational and leisure noise sources in various area-categories (recreation area, two types of residential areas and economic area). The limit values and the categories laid down here are fully identical with the provisions in force prior to 1 February 2016. It should be emphasised that these limit values have been the same in the environmental regulation of Hungary since 23 January 1984, although they can now be found in the third ministerial decree of this kind [*cf*. Annex 1 to Decree 4/1984 (I. 23.) EüM on Establishing the Limit Values of Environmental Sound and Vibration Pollution, Annex 1 to Joint Decree 8/2002 (III. 22.) KöM-EüM on Establishing the Limit Values of Environmental Sound and Vibration Pollution and Annex 1 to the Decree].

[58] 1.2 Point 2 of Annex 1 to the Decree is about the noise pollution limit values of the noise originating from race courses with international licence. These are the special rules applicable to a specific type of operational and leisure noise sources. Pursuant to Section 2 *(y)* of the Government Decree 284/2007 (X. 29.) Korm on Certain Rules Applicable to the Protection Against Environmental Noise and Vibration, a race course with an international licence is a course built for the purpose of motorcycle and car races together with its service facilities, where motorcycle speed races or car speed races can be organised according to the licence issued by the *Fédération Internationale de Motocyclisme* (FIM), the *Union Européenne de Motocyclisme* (UEM) or by the *Fédération Internationale de l'Automobile* (FIA) respectively. The provisions under point 2 of Annex 1 to the Decree were not included in the prior regulation. Accordingly, point 2 is the new element of Annex 1. One should note that in Hungary there is one race course with an international licence: Hungaroring, the party in the underlying case. Thus the amendments to the Decree are essentially rules tailored to the race course operated by the defendant in the main proceedings, although one may not exclude that another race course might also obtain an international licence in the future.

[59] It should be stressed that, in the following analysis, the Constitutional Court had to review the contested rule from a constitutional point of view, since the review of the rule requires an in abstracto analysis, and consequently it cannot be adapted to the historical calendar of the track currently in operation or to the competitions planned for the future. This approach is also justified by the fact that the race calendar of the operator is not a law and another race course in the territory of Hungary may also obtain an international licence during the force of the challenged regulation.

[60] Section 10 of the Amendment Decree introduced Section 2/A into the Decree as of 1 February 2016. These rules regulate the manner of establishing, by the environmental authority, the noise pollution limit values of race courses with international licence as well as the additional requirements applicable to the operator. Section 2/A is closely linked to Annex 1, point 2, of the Decree, and the two apply in relation to each other, with multiple references to each other. It should be noted that pursuant to Section 2/A of the Decree, the operator of the race course with an international licence is entitled to choose: either to follow the general or the special rules.

[61]The essence of the new special rules can be summarised as follows. The legislator provided two tables on the noise pollution limit values of race courses with international licence. The first (point 2.1.1 of Annex 1 to the Decree) applies to the days not affected by the exemption, between 8 a.m. and 8 p.m.. On these days, in all area categories to

be protected from noise, with the exception of healthcare areas, the limit values are by 5 dB higher than in the daytime period (between 6 a.m. and 10 p.m.) specified in point 1 in the same manner as in the former regulation. The second (point 2.2.1 of Annex 1 to the Decree) applies to the days affected by the exemption. The referring court alluded to this regime as the system of exemptions. On these days, between 8 a.m. and 10 p.m., the allowed limit values are even higher than the values specified in point 2.1.1. They are higher by an additional 10 dB in recreation areas, by 15 dB in small town-like residential areas, by 10 dB in city-like residential areas, by 5 dB in economic areas. The number of days affected by exemption in a calendar year are 40, 40, 30 and 10 for the aforementioned area categories respectively. With respect to the first three area categories, there are additional rules on the number of days within the days affected by an exemption when the level of the maximum noise pollution may be as much as 70 dB without interruption for 10 days between 8 a.m. and 10 p.m..

[62] It is important to point out, however, that Section 2/A of the Decree sets new restrictions for the operator. Outside the daytime period and for more than ten hours a day, it is prohibited to operate an environmental noise source on the race course. The general rules allow noise emission at night up to the levels of 35, 40, 45, 50 dB in the aforementioned area categories respectively. While pursuant to the general rules, the daytime period lasts from 6 a.m. to 10 p.m., the special rules set this period between 8 a.m. and 8 p.m.. In a given calendar year, on the number of days equal to the number of days affected by an exemption, no environmental noise source shall be operated on the race course with international licence, with the exception of building technology equipment serving the operation of constructions that belong to the race course and noise sources placed in closed constructions. The operator must report the intention to apply the exemption 15 days prior to the days concerned.

[63] The Amendment Decree also inserted, as of 1 February 2016, a provision into Section 4 (1c) and (1d) of Decree 93/2007 (XII. 18.) KvVM on the Manner of Establishing Noise Emission Limit Values and Monitoring Sound and Vibration Emissions (hereinafter referred to as the "Noise Decree") providing that the operator shall build and install a monitoring system suitable for continuous measuring for the monitoring of the noise emission of race courses with an international licence. The operator shall continuously operate this monitoring system every day between 8 a.m. and 10 p.m.. The Amendment Decree also introduced a rule in Section 5/A (1) of the Noise Decree requiring the annual reporting of data by the operator of the race course to the environmental authority.

[64] According to the statement obtained from Hungaroring Sport Zrt., before 2015,

there had been casual noise measurements in the impact area of the race course based on an obligation imposed by the Government Office. (There were cases, however, in the summer of 2015 when noise pollution exceeding the limit values was detected on four consecutive race-days .) In this period, the laws did not address at all the environmental effects resulting from the special activity of the race course. From 1 January 2018 it is possible to measure the noise level on a continuous basis. At the same time, the calculation of the noise level detectable on the critical points pursuant to the legal regulation in force is still insecure due to regulatory deficiencies. Therefore the determination of the noise pollution at the critical points during the term of specific events can be carried out either by using measuring devices placed in a targeted way, or by calculations made with the software operated by the company for the purpose of modelling the noise pollution.

[65] Hungaroring Sport Zrt. explained in its preparatory document that it operates the race course in the "exemption system" granted by the Decree. According to the data sent, measured and calculated according to the above, there were 21 days in 2016, 16 days in 2017 (with one day reaching the limit value of 70 dB) and so far 20 days in 2018 that fell into the noise level range of the exemption. These data result from the annual accumulation of events of 2-3 days.

[66] 1.3 Following the description of the previous and post-amended legislation, the Constitutional Court examined whether and in what direction the contested legislation established by the amendment had brought about a change in the area of the race course. For this purpose, the new guarantee elements introduced into the regulation, the modification of the limit values and the changes of other circumstances had to be evaluated.

[67] The assessment had to take account of the fact that, in the field of environmental protection concerned by these proceedings, similarly to the protection of the quality of water and air, or the area of vibration protection, emission limits are among the legal protection's basic pillars of substantive law. These are the actual restrictions of the activities that burden the environment. In the case of noise, the legal specification of the noise protection limit values embody the substantive law core of the regulation. Thus the limited level of the noise is in the focus of the protection. Limit Values, however, are not enforced individually, as they do so together with several other provisions of substantive and procedural nature, such as organisational and administrative ones, in order to have the limit values complied with in practice.

[68] The introduction of more onerous or more stringent provisions other than limit

values cannot automatically affect the assessment of whether the limit value should be increased where the question to be decided is whether the level of protection of the environment afforded by the legislation has been reduced compared with the level previously afforded. This is because the noise emitted on the increased limit value shall not be less noisy no matter what other legal provisions of substantive law are in force. One may also conclude, however, that increasing the limit value should not be automatically regarded as decreasing the level of protection. In such cases a careful assessment is required to evaluate whether the potentially increased environmental load resulting from the increase of the limit value is duly counterbalanced by other rules of substantive and procedural law or by organisational provisions.

[69] The Constitutional Court points out at the same time that evaluating the derogation requires more than a mere calculation. Despite of the primary importance of the emission limit and the principle of prudence, it may even be established in a given case that the amendments of the law, in their totality, have not lessened the level of protection although the limit value did increase.

[70] Accordingly, with regard to the supplementary provisions connected to the increase of the limit value, the operation of the monitoring system, the annual data reporting obligation and the introduction of the prior reporting obligation were not qualified as factors that are suitable to counterbalance the increase of the limit value. These are administrative rules that have no influence on the level of environmental load. Their functional role is limited to the compliance with the limit values, the control of the noise emitting entity's lawful operation, that is, to make the operator of the race course comply with the new, optionally applied regime. Therefore they should not be interpreted as compensating provisions.

[71] The Constitutional Court points out as another criterion that in the course of the review of constitutionality connected to the emission limits, the circumstances of the maximum noise emission pursuant to the regulation should be used as the basis. It follows from the legal nature of the limit value that the emitting entity's burdening the environment is lawful up to the fixed limit even if it does not happen on each calendar day. It also follows from the legal nature of the limit value that the environmental load should be aligned with the maximum limit value and not the other way round. With regard to the challenged norm, the potential decrease in the level of protection can only be assessed on the basis of determining the load level reaching the upper limit. The race course is a permanent facility where operational and leisure noise sources may be operated even on a continuous basis, with the exception of the obligatory break of

the period identical to the number of days affected by the exemption, in line with the rules of the regulatory environment. The regulations do not prohibit the continuous emission of noise from noise sources operating on the race course at a level generally higher than 5 dB and for a period of 40 days associated with a high level of noise during the period of the day specified in the exemption scheme. Therefore, the fact that the operator may choose between general and specific regulation has no impact on the qualification of the regulation, nor does the fact that the operator does not always exhaust his margin of manoeuvre in terms of noise emissions. The question is whether, if the specific regime is chosen, the overall level of protection will be reduced when following the new regime.

[72] The Constitutional Court also stresses that the subject matter of the challenged provisions is "the noise" itself "from the race courses with international licence". It means that the noise regulated by the amended provisions of the Decree is not the noise detectable at the race course during the event, but the level of the noise perceived in the impact area of the race course. Consequently, it is not unlawful when the noise level measured at the race course during an event significantly exceeds the special rules of the Decree, and at the same time the limit values are complied with in the impact area of the race course due to the elaboration of appropriate protective measures. It should be noted that the increasing of the limit value cannot be counterbalanced by establishing a protective forest or protective wall. This is because the noise protection limit value defines the maximum of the noise measured in the impact area according to the methodology laid down in the Decree. Accordingly, in a village-like or small townlike area, if the upper limit is increased from 50 dB to 55 dB or to 70 dB, then the forest or the wall to be established should be such as to keep the noise level under the increased limit value at the measuring point, that is, one that grants to keep the noise under the level of 55 dB or 70 dB and not one granting the noise level not to exceed the original 50 dB.

[73] Thus, the subject matter of the norm control procedure as a whole is not the noise emission of the temporary *ad hoc* events measured in the territory of the race course and not even the evaluation of the actual noise load according to the race calendar of the race course. The subject matter of the norm control procedure is the limit value regulation specifying the maximum noise emission potential in the impact area that may also be regarded lawful in the light of the other regulatory elements in comparison with the provisions of the Decree prior to the amendment, as the Constitutional Court laid down above that the evaluation of the derogation requires more than a mere calculation.

[74] The Constitutional Court also examined what separates Decision 3114/2016 (VI. 10.) AB and the present case. The Constitutional Court's recent decision related to the noise protection regulation of temporary events established that, with reference to the position taken in the case by the minister of agriculture and the materials of the World Health Organisation, the Constitutional Court cannot handle as a scientifically verified fact the health-damaging effect of short-term (8 days/event) exposure to noise and thus the derogation from the level of protection achieved. As explained in the decision, "according to the information available to the Constitutional Court, increased exposure to noise to a small extent and for a short temporary period cannot be considered to be in a causal relation with hearing impairment, and no such causal relation is considered to exist with damaging health in the wide sense. Based on the above, no derogation from the level of protection achieved, as the basis for the violation of fundamental rights alleged by the petitioner, may be established. {Decision 3114/2016 (VI. 10.) AB, Reasoning [48]}. For the reasons explained above, the review of constitutionality related to the noise emission of temporary events should be assessed differently from the review of constitutionality of the long-term noise protection regulation applicable to operational and leisure facilities.

[75] In the aforementioned decision, the Constitutional Court judged upon the noise emission of *ad hoc* events of short terms. In contrast with that, the noise emission regulation subject to this procedure allows continuous noise generating operation at the race course on each day of the year. The subject matter of the Decree is, independently from the number of actual race days, the potentially continuous noise emission of the race course, qualified by the legislator as a sub-type of operational leisure facilities, that expressly necessitates the protection of (human) life conditions due to the operational nature of it (continuous functioning). It should also be noted that while Decision 3114/2016 (VI. 10.) AB referred to the noise emission of not more than 65 dB emitted by short-term events, the subject matter of the present case is the continuous operational noise emission reaching 70 dB for as much as 40 days.

[76] In the above case, the Constitutional Court therefore held that the increased noise emissions of short-term ad hoc events did not constitute a derogation within the scope of Article XXI of the Fundamental Law and did not infringe Article XX of the Fundamental Law, in the absence of a causal link.. The above statements were made by the Constitutional Court focusing on the manner noise affects human hearing (health) and on the fact that in the above case the legal debate was connected to temporary events held once a year in the territories concerned. The former decision of the Constitutional Court did not examine the question of assessing a situation when several

subsequent temporary events are or can be held in the same territory even continuously year after year. On the other hand, the Constitutional Court again points out that in the present case it was not reviewing a normative regulation on noise emissions from temporary events, but, as already indicated above, a legal regulation which allows, on the one hand, a general increase of 5 dB and, on the other hand, an excessive noise exposure for 40 days. It should also be noted that as the judicial initiative has not referred to Article XX of the Fundamental Law, the evaluation of the health-damaging effect should not be put into the focus of the present case.

[77] Due to the differences in the term, the subject matter of the regulation and concerning the fundamental rights referred to, the arguments laid down in the Decision 3114/2016. (VI. 10.) AB of the Constitutional Court, applicable to the short-term (not more than 8 days/event) increase of the noise protection limit values in the case of temporary events, should not be followed in this procedure.

[78] 1.4 Following these considerations, it can be concluded that the contested legislation contains elements that are capable of counteracting the increase in the exposure limits values. These elements include the restrictions applicable to the night, the decreasing of the length of the daytime period, and the prohibition of operating the environmental noise source for the same number of days as the period affected by the exemption. The changes of the limit values and the above regulatory elements had to be evaluated in their complexity.

[79] The Constitutional Court established that in the specific case the combination of those three factors did not compensate for the fact that the contested provisions allow noise emissions increased by 5 dB between 8 a.m. and 8 p.m. on each day of the year. In particular, they fail to provide a counterweight regarding the levels applicable to the days subject to an exemption, although these levels are well above the levels according to the general rules and they may be used continuously during as much as 40 days without interruption. The Constitutional Court recalls that emission limits are among the legal protection's basic pillars of substantive law. The continuous nature of the increased noise level puts an extraordinary load on the environment. The assessment should also take into account the fact that within the 40 days the noise load may reach the level of as much as 70 dB even through 10 days without interruption. A regulation applicable not to the constant daytime noise emission measurable in the impact area of the race course but to the *ad hoc* events of the race course, by aligning to the features of such events without a general increase, would be assessed differently in the complex review, as it was in fact assessed differently in the Decision 3114/2016 (VI. 10.) AB. In

such a case, the danger posed by the continuous noise pollution of increased level would not form part of the complex review.

[80] On the basis of the complex review carried out by taking into account all elements of the regulation, the Constitutional Court established that the noise pollution regulation applicable to race courses with international licence is a derogation compared to the provisions in force prior to 1 February 2016. Accordingly, as a whole, the level of protection against noise as an environmental damage has decreased. The decrease is not a short-term one, as the challenged regulation is applicable to the whole year, and it is also aggravated by the system of exemptions.

[81] 2. In keeping with the case law of the Constitutional Court, the arguments, legal principles and constitutional connections based on Article 18 of the Constitution may be used to answer the questions of constitutionality that affect Article XXI (1) of the Fundamental Law. {*See* for the first time in Decision 3068/2013 (III. 14.) AB, Reasoning [46]; reaffirmed for example in Decision 16/2015 (VI. 5.) AB, Reasoning [90]}. The Constitutional Court pointed out that the Fundamental Law not only preserved the level of protection of the fundamental right to a healthy environment as it contains more elaborate provisions. This way the Constitutional Court developed further the environmental approach and the environmental values. [Decision 16/2015. (VI. 5.) AB, Reasoning [91]; Decision 3223/2017. (IX. 25.) AB, Reasoning [26]}.

[82] 2.1 In the light of these considerations, the Constitutional Court first examined whether the amendment to the noise protection regulation falls within the scope of Article XX or Article XXI of the Fundamental Law. As it has been established in an earlier decision, the legislator provides for the protection against noise in regulations in the form of Acts of Parliament and decrees, among others, by setting the permissible noise levels. This obligation of the State to regulate and to apply the law in public administration shows the strongest connection with Article XXI (1) of the Fundamental Law. {Decision 3075/2016 (VI. 18.) AB, Reasoning [26]}. Therefore, the increase of the noise protection limit value regulated in the Decree should be assessed on the basis of the content of the right to a healthy environment.

[83] It should be pointed out that the Constitutional Court stated in connection with the right to a healthy environment that although it "is not a subjective fundamental right in its present form; still, it is more than a mere constitutional mission (or State objective) as it is part of the objective institutional protection side of the right to life, specifically mentioning the State’s duty to maintain the natural foundations of human life as an independent constitutional right" {Decision 48/1998. (XI. 23.) AB, ABH 1998,

333, 343., quoted by the Decision 16/2015. (VI. 5.) AB, Reasoning [85]}.

[84] Article P (1) of the Fundamental Law lays down the obligation of protecting the environment (extending beyond the provisions of the former Constitution) for the State and for everyone. A substantive standard of absolute character related to the state of the natural resources and thus to the conditions of the environment follows from Article P) of the Fundamental Law and it raises objective requirements concerning the State's activity at all times {Decision 28/2017 (X. 25.) AB, Reasoning [30] to [32]}.

[85] It is necessary to bear in mind that the scope of interpretation of the right to a healthy environment is closely linked to the content of Article P (1) of the Fundamental Law on the use of the environment and the rational management of natural resources, as well as to Article XX of the Fundamental Law, because the environment around man also affects his health. This fundamental link is reflected in the title of the fundamental right, which provides for the provision of a “healthy environment” and, in so doing, defines the subject matter of the fundamental right. The quality of life is significantly determined by the state of nature and the environment. The protection of life and health is inconceivable without the protection of nature and the environment, and cannot be reduced to human life alone.

[86] Pursuant to the provisions referred to above, the subject of the fundamental rights' legal relationship is "everyone", that is, all people, the obliged party is the State, and the aspect of institutional protection is decisive and determining with regard to its content. Consequently, the acceptable level of using the environment is to be specified by the State through creating laws as well as procedural and organisational guarantees. The object of the obligation of institutional protection by the State is not just human life as it is, but also the maintenance of the natural foundations of life in general.

[87] 2.2 The institution of the prohibition of derogation had been part of the content of the right to a healthy environment earlier as well. However, while the former Constitution only declared the right to a healthy environment, and it had been primarily filled with content by the case law of the Constitutional Court, after the entry into force of the Fundamental Law, it follows directly from the Fundamental Law, as the will of the legislator who adopted the Fundamental Law, that human life as well as its vital conditions should be protected in a way not derogating it in any way, in accordance with the generally accepted principle of non-derogation. {Decision 28/2017. (X. 25.) AB, Reasoning [28]}. Non-derogation is now interpreted by the Constitutional Court in unity with the principles of precaution and prevention. The Court argued that according to the prohibition of derogation-back, as laid down in Article P (1) and Article XXI (1), "in

every case where the regulations on protecting the environment are amended, the precautionary principle and the principle of prevention should be also taken into account by the legislator as »the failure to protect nature and the environment may induce irreversible processes«" {most recently: Decision 13/2018 (IX. 4.) AB, Reasoning [20]}. Consequently, this substantive approach should be enforced as follows during examining the right to a healthy environment.

[88] The principle of non-derogation was developed as a dogmatic concept at the very beginning of the judicial practice of the Constitutional Court [*first* in Decision 28/1994 (V. 20.) AB, ABH 1997, 133, 140.] and it has been enforced continuously under the force of the Fundamental Law as well {Decision 3068/2013 (III. 14.) AB, Reasoning [46]; Order 3011/2015 (I. 12.) AB, Reasoning [10]; Decision 3114/2016 (VI. 10.) AB, Reasoning [45]; Decision 3223/2017 (IX. 25.) AB, Reasoning [28]; Decision 28/2017 (X. 25.) AB, Reasoning [28]}.

[89] The Constitutional Court defined the reason behind and the essence of non-derogation as a regulatory standard as follows: "as the failure to protect nature and the environment may trigger irreversible processes, the adoption of the regulation on the protection of the environment can only be carried out by taking into account the precautionary principle and the principle of prevention" {most recently: Decision 3223/2017 (IX. 25.) AB, Reasoning [27]}.

[90] In line with the consistent practice of the Constitutional Court, it is a substantive requirement that a specific level of protecting the environment, once achieved, should not be decreased, as expressed in what is known as the principle of *non-derogation*. It should be stressed on the basis of the above that non-derogation in the fields of both environmental protection and nature conservation was derived by the Court from the argument that a derogation and the decreasing of the protection may trigger irreversible processes that should be prevented for the sake of preserving the foundations of (healthy) life.

[91] The Constitutional Court points out that not only derogations, which may result in the irreparable damage to nature or the environment are prohibited by the principle of *non-derogation* that may be deduced from the Fundamental Law. The precautionary principle and the principle of prevention make it a question of whether there is a chance of damage occurring.. In this respect the constitutional protection of nature and of the environment share the same functional roots: They protect the conditions of (human) life. The irreparable damaging of the environment is typically the result of processes in the long run. The time-scale cannot be specified in general: A few decades, a

generation's time, a century or even a longer period of time may be necessary for certain environmental damages to happen. However, damaging the nature can happen in the short run as well. Accordingly, this is the difference between the constitutional protection of nature and of the environment by interpreting Article XXI (1) of the Fundamental Law in accordance with the function of the fundamental right.

[92] The principle of non-derogation does not apply to specifying the level of protection, but it is enforced when the legislator derogates from the already existing limitations of the environmental load that may even result in triggering irreparable processes damaging the environment. Reducing the protection against continuous noise emissions over a long period of time is one of these measures, in the light of the precautionary principle and the principles of prevention.

[93] The Constitutional Court also points out that non-derogation, which forms part of the fundamental rights aspect reaching beyond the objective institutional protection side of the right to a healthy environment, that is, belonging to the subjective side of the fundamental right, raises substantive requirements against the possibility of restriction on the level of protection already secured by the law, in accordance with Article I (3) of the Fundamental Law. As established in Decision 13/2018 (IX. 4.) AB , "if a regulation or a measure may affect the state of the environment, the legislator should verify that the regulation is not considered as a derogation and, thus, it does not cause any irreparable damage [...]". As established by the Court, this verification should be beyond doubt: "if, in the case of a regulation, it cannot be verified beyond doubt that it does not cause a derogation, then the constitutionality of the derogation shall be considered in accordance with Article I (3) of the Fundamental Law" (Reasoning [20] and [21]).

[94] Consequently, on the one hand, where the environmental regulations are amended, the reference point is the level of protection achieved earlier by the norm, rather than the untouched original state of the environment or the expected level that might be scientifically justified. On the other hand, it follows from the above that the right to a healthy environment is not an absolute right, it may be restricted in accordance with the test laid down by the Constitutional Court for the restriction of fundamental rights. As interpreted by the Court, "it follows from both the subject and the dogmatic peculiarities of the right to environmental protection that the State must not reduce the degree of protection of nature as guaranteed under law unless necessary to realise other constitutional rights or values. Even in the latter case, however, the degree of protection must not be reduced disproportionately with the objective set

forth" {summarised in Decision 16/2015 (VI. 5.) AB, Reasoning [80]; Decision 3223/2017 (IX. 25.) AB, Reasoning [27]}.

[95] Accordingly, non-derogation is not automatic as it is enforced according to its function. One should examine if there is a derogation concerning the level of protection, whether the derogation falls within the scope of Article XXI (1), and finally the constitutionality of the restriction manifested in the derogation should be examined in the light of Article I (3) of the Fundamental Law.

[96] 2.3 In order to answer the above questions, we need to recall that "the principle of non-derogation applies evenly to the regulations of substantive law, procedural law and the organisational rules, applicable to the protection of the environment and the nature, as only these together can secure the full enforcement of the principle as it follows from the Fundamental Law. [...] Therefore, in order to have the principle of non-derogation enforced to its full extent, the legislator and the judiciary should indispensably have an attitude that enforces a long-term continuous codification and planning activity that may even arch over government cycles and that follows from the special features of the affected life situations, rather than a short-term approach, which is often based on the economy" {Decision 3223/2017 (IX. 25.) AB, Reasoning [28]}.

[97] Article X (2) of the Fundamental Law is to be followed also by the Constitutional Court; accordingly, the Constitutional Court is not competent to decide in issues of scientific truth as only scientists are entitled to determine the scientific value of research. Thus, in line with the Fundamental Law, the Constitutional Court's procedure may not be aimed at taking a stand in a question debated or debatable in science {Decision 3292/2017 (XI. 20.) AB, Reasoning [23]}. In this case, however, this is not necessary for the constitutional enforcement of the fundamental right to a healthy environment. For the review of constitutionality of the challenged regulation, it is enough to place noise pollution in the fundamental right's range of interpretation. As verified by the international professional literature (*see* for example: Helmut Strasser–Johannes Hesse: *Larmbekampfung im Betrieb* in: Personal: *Mensch und Arbeit im Betrieb,* 1988/10. 402), by several documents of the United Nations Organisation and of its specialised agencies (*see* for example: UN A/CONF.48/14/Rev.1: Report of the United Nations Conference on the Human Environment: Action Plan for the Human Environment Recommendation 2, Stockholm, 1972.; studies downloadable from the website of the World Health Organisation: www.euro.who.int/en/health- topics/environment-and-health/noise/publications), as well as by legislation adopted by the institutions of the European Union (*see* for example: Directive 2002/49/EC of the European Parliament and

of the Council (25 June 2002), the legal restriction of noise as a form of using the environment is widely accepted. Noise pollution has been confined within limitations since decades by the Hungarian law as well.

[98] Thus noise protection is within the range of interpretation, that is, it enjoys the same position in the improved value-system of the fundamental rights protection as other fields of environmental protection. This is a basis upon which the review of constitutionality of the legal institutions serving the purpose of protection against noise can be carried out. The constitutional question that falls into the Constitutional Court's scope of duties and competences is the assessment of the decrease of the institutionalised level of protection, that is, the one guaranteed by laws, rather than the verification or the questioning of professional-scientific knowledge related to noise.

[99] Based on the above, protection against noise pollution, in particular noise protection guaranteed by the environmental laws, is within the scope of protection under Article XXI (1) of the Fundamental Law. Restricting the legal institutions of environmental protection to an extent that qualifies as a derogation may take place in the interest of the enforcement of another fundamental right or constitutional value (necessity) at a proportionate level in accordance with Article I (3) of the Fundamental Law.

[100] Consequently, the subjective law content of the right to a healthy environment can be found in the prohibition of derogation. The prohibition is not enforced automatically: the constitutionality of the law can only be questioned with regard to the restrictions, which are not justifiable with the enforcement of another fundamental right or constitutional value and which force the aspects of the right to a healthy environment to retreat in a disproportionate way {*See* most recently in: Decision 13/2018 (IX. 4.) AB, Reasoning [21]}.

[101] 3 The Constitutional Court reviewed the aspects that may justify the increase of noise pollution limit values of the noise originating from race courses with international licence. In the course of the review of constitutionality, from these aspects, the Constitutional Court could only take into account the ones that can be traced back to a fundamental right or a constitutional value.

[102] 3.1 For the purpose of identifying the constitutional rights and values that may be set against the decrease in the level of environmental protection achieved through legislation, the Constitutional Court took into account the endeavours closely related to the amendment of the noise protection regulation as mentioned in the reasoning

provided by the minister for Section 110 (6a) of the Act on Environmental Protection. Indeed, despite of the fact that the statutory rule was formulated by the National Assembly and not by the minister of agriculture, point 2 of Annex 1 to the Decree is aligned with the legislative intention fitted to Section 110 (6a) of the Act on Environmental Protection due to the following reasons. The Act on Environmental Protection provided an authorisation to adopt the Decree. Among the top entertaining programmes, there are several events organised in Hungary at the race course with international licence. The Formula 1 World Championship Hungarian Grand Prix is undoubtedly one of them. However, the scope of application of Section 110 (6a) of Act on Environmental Protection is not limited to the assessment of the noise generated by the race course with international licence. It applies to the noise emission of each and every programme or event of paramount importance in terms of the national economy, tourism, culture, leisure or sport that mobilises a significant mass of people. On the other hand, the points 2.1.1 and 2.2.1 of Annex 1 to the Decree only apply to a race course with international licence. As quoted in point IV.1 of the reasoning of this decision (Reasoning [39] to [43]), the Amending Act justifies with the public interest the amendment applicable to the noise emission of top priority entertainment programmes.

[103] The Constitutional Court also took into account the reasoning provided in the position taken by the minister of agriculture. In keeping with the accompanying annotation provided by the minister, the impugned regulation, in addition to taking into account the enforcement of the right to a healthy environment, respects to the interests of the national economy, of the local governments and of the local population, in particular the quality of life as well as catering and accommodation services.

[104] On the basis of point IV. 1 of the reasoning (Reasoning [39] to [43]) and of the aforementioned, the following consequences may be drawn with regard to the operation of the race course with international licence and the restriction on the fundamental right enshrined in Article XXI (1) of the Fundamental Law.

[105] The operation of an internationally licensed race course has a positive impact on tourism, motor sports, and Hungary's domestic and international image, and it also has beneficial effects on the national economy, such as an increase in tax revenues, especially local tourism tax and VAT. It should also be noted that the special services offered by the race course (during the top races) are available in the territory of the country and since 1986 these events have attracted a large number of domestic and foreign visitors. The operation of the race course with international licence may enjoy a

remarkably valuable position within the usually changeable system of objectives and tools of sectoral policies, in line with the current endeavours of the Government.

[106] All these factors supported the position that it is of public interest to operate in Hungary a race course with an international licence. Accordingly, it had to be examined on the one hand whether the above content of the public interest found in the operation of the race course with an international licence could be put in contrast with decreasing the noise protection; on the other hand, whether the derogation could be justified with the right to enterprise.

[107] 3.2 With regard to the first scope of questions, the Constitutional Court concluded that the reference to the public interest with the content detailed above, that is the actual and verified public interest found in the operation of a race course with international licence, does not, in itself, justify the restriction on the right to a healthy environment. The restriction on the right to a healthy environment may be carried out in the classic manner, in order to give effect to a fundamental right or constitutional value, in a proportionate manner and by the use of the least restrictive means of restriction. The public interest, fundamentally and finally representing economic interests, referred to in the minister's accompanying annotation attached to the Amending Act, namely that it is useful to operate in Hungary a race course with international licence, does not reach the level of values protected in the Fundamental Law and it cannot be traced back to any fundamental right acknowledged in the Fundamental Law as one enforceable in contrast with the right to a healthy environment.

[108] There is no identifiable provision of the Fundamental Law that would make assessing the operation of the race course similar to, for example, the public interest found in the traditional functions of the State. The interest of the community in the maintenance of public order and public safety, or in the operation of public health, may be manifested in a particular case in such a way as to elevate the specific public interest to the rank of a constitutional value or to make it derivable from a right guaranteed by the Fundamental Law. For example, the Constitutional Court justified the raising of public interest up to a constitutional level on the basis of Article XXI (1), Article XV (5) and Article XVI (1) of the Fundamental Law in the following way: "the medium and long-term improvement of the public health status of the society through repelling smoking among young people is a priority objective of public health presented not only in the regulation of Act on tobacco shops, but it is also a constitutional (public) interest that serves the protection of the fundamental rights mentioned above" {Decision 3194/2014

(VII. 15.) AB, Reasoning [30]}. Accordingly, the constitutional background of the public interest is granted; thus, it is suitable for being in conflict with the right to a healthy environment.

[109] In line with the consistent practice of the Constitutional Court, the right to own property may be restricted in the public interest. {*See* for the first time in Decision 64/1993 (XII. 22.) AB, ABH 1993, 380-382, most recently in Decision 3238/2017 (X. 10.) AB, Reasoning [60]}. This is due to the fact that property is a social responsibility under the Fundamental Law and that property can also be expropriated in the public interest, also by reference to the Fundamental Law.

[110] 3.3 The Constitutional Court also examined, in the light of the criteria of necessity and proportionality, whether the contested legislation, which constitutes a restriction, that is to say, a derogation in noise protection, could be justified by the fundamental right to enterprise. The operation of the race course with international licence qualifies as an enterprise and pursuing this activity results in the noise pollution of the environment.

[111] Pursuant to Article M (1) of the Fundamental Law, it is a fundamental principle that "the economy of Hungary shall be based on work which creates value, and on freedom of enterprise". As stated in the first sentence of Article XII (1), "everyone shall have the right to choose his or her work, and employment freely and to engage in entrepreneurial activities."

[112] In line with the consistent case law of the Constitutional Court, "the right to enterprise is not an absolute one and it may be subject to restrictions: no one has a subjective right to engage in entrepreneurial activity in a specific occupation or field, nor to a particular legal form of an entrepreneurial activity. The right to enterprise means only, but this much is set as a constitutional requirement, that the State should not prevent or make impossible to become an entrepreneur {Decision 54/1993 (X. 13.) AB, ABH 1993, 340, 341-342.; reaffirmed in Decision 32/2012 (VII. 4.) AB , Reasoning [155]}. The Constitutional Court also pointed out in the determination of the constitutional content of the fundamental right to enterprise that »the right to enterprise should not be considered to bear a meaning according to which the legal environment applicable to functioning enterprises could not be changed« {Decision 282/B/2007 AB, ABH 2007, 2168.; reaffirmed in the Decision 32/2012 (VII. 4.) AB, Reasoning [161]}. In the case law of the Constitutional Court, the fundamental right to occupation, enterprise receives the same protection from State interference and restriction that is afforded to other freedoms and liberties. [...] What endangers the right

to occupation, enterprise the most is if a person is precluded from engaging in that activity, if he is not permitted to choose it. The prescription of subjective requirements is also a restriction on the freedom of choice. However, the fulfilment of these requirements is available to everyone in theory (if not, the restriction is an objective one)." {Decision 3194/2014 (VII. 15.) AB, Reasoning [28]}

[113] In light of the above findings, the Constitutional Court concluded that although engaging in the retail trade activity of tobacco products is protected under the right to enterprise, the regulation challenged in the quoted case restricted it in a necessary and proportionate manner. {Decision 3194/2014 (VII. 15.) AB, Reasoning [30] and [31]}. Therefore the Constitutional Court dismissed the complaint against Act CXXXIV of 2012 on Repelling Smoking Among Young People and on the Retail Trade of Tobacco Products (also) within the scope of Article XII of the Fundamental Law.

[114] In its case law, the Constitutional Court examined the restriction of the business activity, due to the provisions of Article M (1) and Article XII (1) of the Fundamental Law, on the basis of Article I (3) of the Fundamental Law. In other words: It also attributed constitutional protection to the business activity pursued. Therefore the fundamental right to enterprise embodied in operating a race course may be put into contrast with the right to a healthy environment. Consequently the Constitutional Court examined whether the restriction of the right to a healthy environment (the derogation) took place in the interest of enforcing the right to enterprise, to the extent absolutely necessary and in proportion with the purported objective.

[115] With regard to necessity, the Court established the following: The purpose of a race course with international licence is to host international car and motorcycle races, and it may also serve as the venue of other (domestic) races and events. Such events are naturally associated with the operation of noise sources. Accordingly, when the challenged noise protection regulation allowed a higher noise emission compared to the general rules by imposing certain restrictions (restrictions at night, restrictions during the daytime period, counterbalancing the system of exemptions, operating the monitoring system, data reporting, advance reporting), it essentially secured the operation of the race course. Such events are typically associated with a noise emission higher than usual one. Therefore the Constitutional Court established that the derogation in the noise protection regulation is considered necessary in the interest of the enforcement of the right to enterprise.

[116] The Constitutional Court also examined the proportionality of the restriction. In this respect, it took into account all the regulatory elements presented in detail in point

V.1 of the reasoning (Reasoning [68] to [92]) and listed briefly in the previous paragraph. The totality of the above justify the classification of the optionally selectable special regime as a derogation in the level of protection of the environment. In the relation of the right to a healthy environment and the right to enterprise, the question arises as follows. Does the regulation, the necessity of which has already been established above by the Court, restrict in a proportionate manner the level of noise protection already secured by laws for the purpose of enforcing the right to enterprise? In the course of assessing the proportionality, one should take into account the requirement of implementing the restriction by applying the least restrictive means. Thus the Constitutional Court examined whether the solution applied by the legislator was proportionate, rather than finding out how the necessary restriction should have been implemented. It is the duty and the responsibility of the legislator to choose from the potential solutions.

[117] It is recalled by the Constitutional Court that the challenged norms are not aligned with the special features of the events to be organised at the race course. On the one hand, there are no races on each day of the year, but the increase of 5 dB is a general one. On the other hand, the noise emission is periodic according to the predefined schedule of the race days, while the system of exemptions applies a rule of 40 consecutive days, which, for that matter, is not justified by the factual data of the past years. Therefore, the restriction of the right to a healthy environment is not proportionate to the necessity which may be derived from the exercise of the right to enterprise. Thus the legislator has not selected one of the most moderate means suitable for achieving the purpose, but it institutionalised one disproportionately expanding over these. The functional operation of the race course with an international licence does not require to have, subject to the decision of the course operator, noise emission higher by 5 dB even on each day of the year, or to have, in the exemption system, a significantly higher noise emission during a continuous period of as much as 40 days.

[118] It should be noted that according to point 1 of the Government Decision 1657/2016 (XI. 17.) Korm on the Reallocation of Appropriations Necessary for Raising the Share Capital of Hungaroring Sport Zrt., the Government "agrees with allocating funds to Hungaroring Sport Zrt. for the purpose of [...] compliance with the noise protection measures, the duties, investments related to monitoring the noise pollution" by reallocating budgetary appropriations. Consequently, the problem of noise pollution caused by the race course with an international licence is well known by the legislator, and it considered this problem manageable even without the disproportionate

decrease of the level of environmental protection already guaranteed by laws.

[119] Based on the above, the Constitutional Court established that although the derogation concerning the level of noise protection already achieved had been necessary for the enforcement of the right to enterprise, it is held to be disproportionate as the legislator failed to select one of the most moderate restrictive solutions.

[120] 3.4 In view of the above, the Constitutional Court established that points 2.1.1 and 2.2.1 of Annex 1 to the Decree violate Article XXI (1) of the Fundamental Law, as they decreased the level of noise protection already guaranteed by laws with regard to a specific type of operational and leisure noise sources where the proportionality of the decrease was not justifiable on the basis of Article I (3) of the Fundamental Law.

[121] 4 On the basis of the above, the Constitutional Court ruled as follows.

[122] 4.1 After the review of the merits of the case, the Constitutional Court dismissed the petition submitted against Section 110 (6a) of the Act on Environmental Protection, since it does not violate the right to apply to the courts as a part of Article XXVIII (1) of the Fundamental Law.

[123] The Constitutional Court established, however, that points 2.1.1 and 2.2.1 of Annex 1 to the Decree violate Article XXI (1) of the Fundamental Law, as the set of conditions specified in it applied to the continuous operational noise emissions measurable in the impact area of the race course, instead of being aligned with the features of the *ad hoc* events of the race course, without a general increase. Therefore, as of 31 December 2018, the Constitutional Court annulled these points on the basis of Article 24 (3) *(a)* of the Fundamental Law by exercising its competence according to Article 24 (2) *(b)* of the Fundamental Law.

[124] The Constitutional Court ordered *pro futuro* annulment on the basis of Section 45 (4) of the Constitutional Court Act with regard to providing sufficient time for the legislator to take the necessary financing or regulatory measures by drawing the consequences of the conflict with the Fundamental Law. The setting of the annulment day is in line with stating that the irreparable damaging of the environment is typically the result of processes in the long run.

[125] 4.2 Article 24 (4) of the Fundamental Law allows the Constitutional Court to examine the provision of the law that are not requested to be reviewed and to annul it if necessary, provided that its content is closely connected to the provision of the law requested to be reviewed.

[126] For the sake of legal certainty, the Constitutional Court also annulled as of 31 December 2018 the provisions of the Decree that were in a close substantial connection with points 2.1.1 and 2.2.1 of Annex 1 to the Decree and that are inapplicable without the points in question.

[127] Due to the annulment, Section 2/A (1) of the Decree shall remain in force with the following text: "Section 2/A (1) The environmental authority shall establish the noise emission limit value of race courses with international licence in accordance with the operator's application

(a) on the basis of the noise emission limit values specified in point 1 of Annex 1."

[128] The Constitutional Court annulled the other paragraphs of Section 2/A of the Decree.

[129] The introductory sentence of point 1 of Annex 1 to the Decree shall remain in force with the following text:

"1. Noise emission limit values of operational and leisure noise sources with the exceptions set forth in Section 2 (3) to (4)".

VI

[131] Pursuant to the first sentence of Section 44 (1) of the Constitutional Court Act, this Decision shall be published in the Hungarian Official Gazette.

Budapest, 2 October 2018

Dr. Tamás Sulyok,
Chief Justice of the Constitutional Court

Dr. Tamás Sulyok,
President of the Constitutional Court,
on behalf of
Dr. Egon Dienes-Oehm
Justice of the Constitutional Court
prevented from signing
Dr. Ildikó Hörcherné-Marosi,
Rapporteur Justice of the Constitutional Court

Dr. Béla Pokol,
Justice of the Constitutional Court

Dr. Balázs Schanda,
Justice of the Constitutional Court

Dr. Ágnes Czine,
Justice of the Constitutional Court

Dr. Attila Horváth,

Justice of the Constitutional Court

Dr. Imre Juhász,
Justice of the Constitutional Court

Dr. László Salamon,
Justice of the Constitutional Court

Dr. István Stumpf,
Justice of the Constitutional Court

Dr. Marcel Szabó,
Justice of the Constitutional Court

Dr. András Varga Zs.,
Justice of the Constitutional Court

Dr. Mária Szívós,
Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. Imre Juhász*

[132] I do not agree with point 1 of the operative part in the Decision and the reasoning thereof due to the following.

[133] 1 Before the amendment to the Decree on 1 February 2016, there had been no special regulation applicable to race courses with international licence, therefore during the amendment of 2016 the legislator, instead of raising the limit value of an existing noise protection category, adopted a provision, by remedying its constitutional omission, that enumerated the health effects in accordance with the recommendation of the WHO.

[134] Thus the regulation is to be regarded a novelty (as I pointed out above: since 1986, the starting date of the operation of Hungaroring, there had been no special noise protection applicable to race courses in force), consequently there can be no derogation and therefore the assessment contained in this decision about the proportionality of the derogation is unreasonable.

[135] 2 Provided that the Constitutional Court takes seriously the consistency of its case law, it should not have established the disproportionality of the derogation even if we accept the position taken by the majority about Formula 1 car racing being a simple "leisure activity" that does not require any special regulation.

[136] The Constitutional Court has already examined Section 2 (4) of the Decree with respect to temporary events, and in the Decision 3114/2016. (VI. 10.) AB it dismissed the petition seeking a finding of a conflict with the Fundamental Law. In the decision referred to above, the Constitutional Court made, among others, the following statements: "As pointed out in the study of the world health organisation, the

epidemiological studies showed no success of detecting a causal relation between noise and health damage even in the case of an exposure of a constant noise under 70 dB (page 22). Another statement is also quoted here, according to which even a lifelong exposure to a noise slightly under 70 dB fails to cause a lasting hearing impairment. [...] According to the study of the WHO, and the position taken by the minister acting as the legislator, the health-damaging effect of short-term noise exposure, and thus the derogation from the level of protection achieved, cannot be handled by the Constitutional Court as a scientifically verified fact (Reasoning [47] and [48]).

[137] Still the majority decision adopted in the present case is based on the assumption that certain provisions of Section 2/A (1) and Annex 1 to the same law (Decree) are contrary to the Fundamental Law, notwithstanding the strict restrictive rules specified by the legislator, because of allowing the exceeding of the limit value increased, with a seasonal limitation, by only 5 dB for a maximum of 10 days per calendar year or for a maximum of 30 days (thus for a maximum of 40 days per year).

[138] Thus, with the present decision, by establishing the disproportionality of the derogation-back, the Constitutional Court departed from its earlier case law without a constitutionally relevant reason.

[139] 3 With regard to orienting the legislator, and last but not least the justice seeking public, I hold it in particularly worrying that the majority decision refers to Article P) of the Fundamental Law and to the Decision 13/2018. (IX. 4.) AB adopted recently on the basis of the petition submitted by the President of the Republic (in a case with completely different potential consequences even according to the state of science). This way the present decision suggests, which may as well be an unintentional consequence, that even the possibility of an irreversible process has been considered due to the failure to protect nature or the environment in the context of the provision reviewed. This reference may have a consequence in the lawsuits similar to the present case where any norm setting limit values and relevant guarantees, independently from the scientific foundations of it, could be made subject to the Constitutional Court's subjective review on the basis of Article P) of the Fundamental Law.

[140] 4 Finally I did not support point 1 of the operative part of the majority decision also because I hold that on the basis of its reasoning it is impossible to find out the constitutional aim of annulling the affected provisions of the Decree and accordingly what regulation would be held by the Constitutional Court as one being in line with the Fundamental Law.

Budapest, 2 October 2018

Dr. Imre Juhász,

Justice of the Constitutional Court

[141] I hereby second the above dissenting opinion.

Budapest, 2 October 2018

Dr. Tamás Sulyok,

Chief Justice of the Constitutional Court,

on behalf of

Dr. Egon Dienes-Oehm

Justice of the Constitutional Court prevented from signing

[142] I hereby second the above dissenting opinion.

Budapest, 2 October 2018

Dr. Mária Szívós,

Justice of the Constitutional Court

[143] I hereby second the above dissenting opinion.

Budapest, 2 October, 2018.

Dr. András Varga Zs.,

Justice of the Constitutional Court