Decision 16/2018 (X. 8.) AB

On a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of Section 9/C of Act V of 2006 on Public Company Information, Company Registration and Winding-up Proceedings

In the matter of a judicial initiative and a constitutional complaint seeking a finding of unconstitutionality by non-conformity with the Fundamental Law of certain legal provisions, with the concurring reasoning by Justice *dr. Mária Szívós*, the Constitutional Court, sitting as the Full Court, has adopted the following

decision:

1. The Constitutional Court hereby holds that Section 9/C of Act V of 2006 on Public Company Information, Company Registration and Winding-up Proceedings is in conflict with the Fundamental Law and annuls said provision effective as of 31 December 2018.

2. The Constitutional Court hereby dismisses the petition seeking a disqualification of application in the individual case No Ktf.V.40.297/2015 pending before Pécs Regional Court of Appeals.

3. The Constitutional Court also dismisses the constitutional complaint lodged against Order No Gfv.VII.30.047/2016/3 of the Curia.

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

Reasoning

I

[1] 1. The Constitutional Court has received two petitions in connection with Section 9/C of Act V of 2006 on Public Company Information, Company Registration and Winding-up Proceedings (hereinafter referred to as the "Companies Act"), in force as of 15 March 2014, as laid down in Section 112 (5) of Act CCLII of 2013 on the Amendments to Certain Acts in Connection with the Entry into Force of the New Civil Code.

[2] 2. The judge presiding at Pécs Regional Court of Appeals in the case pending before it No Ktf.V.40.297/2015, in addition to ordering a stay in proceedings, filed a petition for individual norm control with the Constitutional Court pursuant to Section 25 (1) of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"), in which the judge sought a finding that the provisions of Section 9/C, first sentence, reading "or in the preceding year" is unconstitutional by virtue of its conflict with the Fundamental Law, his

petition being founded on the basis of Article B (1), Article O, Article I (3), Article XII (1), Article XXIV (1) and Article XXVIII (1) of the Fundamental Law. The judge who brought the petition also requested the Constitutional Court to order a general disqualification on the application of the contested provision in all pending cases or to exclude its application in the individual case before it.

[3] In the case at issue, Zala County Tax Directorate of the National Tax and Customs Authority (NAV) initiated the dissolution of the company concerned on 6 January 2015 pursuant to Section 91 (1) of the Companies Act, after the company's tax number has been stricken pursuant to Section 24/F (6) (a) of Act XCII of 2003 on the Rules of Taxation. By order No Cgt.20-15-000030/3, the Court of Registration declared the company dissolved and ordered the initiation of involuntary de-registration proceedings. This order acquired the force of *res judicata* on 5 March 2015. During the involuntary de-registration proceedings, the National Tax and Customs Authority filed a creditor's claim.

[4] By its order No Kt.20-15-000030/12, the Court of Registration ordered the involuntary de-registration of the company pursuant to Section 118 (2) of the Companies Act and at the same time ordered the disqualification of the sole member and executive officer. The executive officer has lodged an appeal against this order. In the appeal, the executive officer submitted that he had not been the sole member of the company since 6 June 2014 and that he had resigned as managing director on 15 November 2014. Subsequently, the company did not have a executive officer until 1 March 2015, when an administrator was appointed. The tax number was deleted on 6 January 2015 and involuntary de-registration proceedings were instituted on 15 February 2015. In other words, at the time the proceedings leading to the commencement of the involuntary de-registration proceedings were opened, the executive officer had no longer been the company's director and had no control over the company; therefore, the company's de-registration could not be imputed to him.

[5] The petitioning judge relied on the fact that, pursuant to Section 118 (2) and Section 62 (4) of the Companies Act, the Court of Registration shall strike the company off the register and order the disqualification. The possibility to disapply the disqualification is only possible on the basis of Section 118 (1) and (6) of the Companies Act. According to the petitioning judge, Section 9/C of the Companies Act must also be applied compulsorily, without any possibility of discretion.

[6] The petitioner considers the contested wording of Section 9/C of the Companies Act to be in contravention of Article B (1) of the Fundamental Law, since the requirement of legal certainty becomes impeded by the fact that the disqualification is also imposed on former members and executive officers whose liability cannot be ascertained as a result of the initiation of involuntary de-registration proceedings, nor does the Companies Act provide for a possibility of their exculpation.

[7] The petition also alleged a violation of Article XII (1) of the Fundamental Law, since Section 9/C of the Companies Act restricts the free choice of occupation and freedom of enterprise of the person who is disqualified from exercising an occupation. During the period of the disqualification from the exercise of the occupation, the person concerned may not

participate at all in economic life in a role of managing a company. This restriction cannot, however, be reasonably imposed on persons who have acted as members or executive officers of a lawfully operating company until the termination of their status as such. Therefore, the restriction of the fundamental right in their case violates Article I (3) of the Fundamental Law, which lays down the requirement of necessity and proportionality.

[8] Article O of the Fundamental Law is infringed, in the view of the petitioner, because Section 9/C of the Companies Act provides for the application of sanctions to certain persons for a breach of the law for which the person concerned cannot be held liable, has not contributed to it by his conduct and cannot exculpate for it. In doing so, it renders certain persons (members and / or company directors) liable for the conduct of other person(s).

[9] The petitioner also invoked Article XXIV and Article XXVIII (1) of the Fundamental Law, which enshrine the right to a fair hearing by public authorities and a fair trial. The right to a fair hearing in the context of the contested provision of the Companies Act is infringed in the proceedings before the Court of Registration because the former members and officers of the companies affected by the involuntary de-registration, against whom the disqualification sanction is applied, are not parties to the proceedings, are not aware of the initiation of the proceedings and therefore cannot take measures to restore the lawful operation of the company. As such, said persons have no possibility to declare their liability exculpated in the involuntary de-registration proceedings and, therefore, the application of the disqualification at the end of the proceedings is effected without their participation (possibility to intervene).

[10] 3. In his constitutional complaint, the other petitioner initiated a procedure for a finding of unconstitutionality and annulment of Section 9/C of the Companies Act relying on the constitutional provisions of the Fundamental Law, namely Article XII (1), Article O and Article XXVIII (1) of the Fundamental Law. This petitioner also sought a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of the order of the Curia Gfv.VII.30.047/2016/3 pursuant to Section 27 of the Act on the Constitutional Court Act in light of Article XII (1) of the Fundamental Law.

[11] In the case underlying the constitutional complaint, Miskolc Regional acting as a Court of Registration ordered the involuntary de-registration of the company of which the petitioner was formerly a executive officer by order No Kt.05-15-000056/10. From 16 October 2006 to 24 April 2014, the petitioner was a member and managing director of the two-person LLC concerned. The involuntary de-registration proceedings were initiated more than six months following the termination of his membership and office, on 23 January 2015.

[12] The first instance order of the Court of Registration found that the company undergoing involuntary de-registration had no assets on the basis of its records. Nevertheless, a claim was filed against the company by the National Tax and Customs Authority. The reason for the involuntary de-registration, according to the first instance order, was that the National Tax and Customs Authority had stricken the company’s tax number. The disqualification was imposed on the petitioner and the private individual who was the company's managing director until the involuntary de-registration proceedings were initiated, pursuant to Section 9/C and Section 118 (2) of the Companies Act. In the case of the petitioner, the reason for the

disqualification was that he had been an executive officer of the company for one year prior to the opening of the compulsory liquidation proceedings, that is, 23 January 2015.

[13] The petitioner challenged the order of disqualification, on the basis of which Debrecen Court of Appeals, by order No Ktf. III. 30.643/2015/2. upheld the first instance order. The Court of Appeals found that the involuntary de-registration proceedings were commenced on 23 January 2015, the appellant had performed the duties of managing director until 24 April 2014, and was therefore also managing director in the year prior to the commencement of the involuntary de-registration proceedings. On the basis of Section 118 (2) and Section 9/C of the Companies Act, the appellant submitted that the court may not consider, in the context of the disqualification, whether the conduct of the executive officer to be disqualified may have contributed to the company being subject to involuntary de-registration. "The law lays down objective criteria to determine who the court must order to be disqualified in the circumstances of the case", that is, the person who was a executive officer at the time when the involuntary de-registration proceedings were instituted or in the preceding year.

[14] The petitioner lodged a request for review of that decision. By decision No Gfv.VII.30.047/2016/3, which is the subject of the petition, the Curia upheld the final order. The Curia found that, according to the company register of April 2015, the person who acted as a executive officer in the company subject to involuntary de-registration following the petitioner was a executive officer of several companies that were subject to involuntary de-registration. It also found that the company was subject to a claim by the National Tax and Customs Authority and that the company was devoid of assets. The order of the Curia referred to the fact that before the transfer of the petitioner's share, the company had no debts, that it had fulfilled its obligations to the tax authorities and that the tax number was deleted only six months after the transfer of the share. The petitioner also stressed in his request for review that, having sold his share and resigned as managing director, he had no connection with the company. The Curia explained that the de-registration of the company was not due to its tax number having been stricken from the register, but to the company becoming a shell company, as its legal representative was nowhere to be found. It explained, referring to Section 118 (2) and Section 9/C of the Companies Act, that in the view of the Curia, the purpose of the creation of the rules on involuntary de-registration and disqualification was aimed at "protecting the integrity of economic life against persons or companies which do not withdraw from economic life in the manner provided for by law, that is, within the context of liquidation or winding-up proceedings, but circumvent such rules, possibly by accumulating substantial debts and to the considerable detriment of creditors. [...] The other objective was to ensure the availability of persons and companies that had accumulated debts and were liable to creditors, preventing the creditors from being circumvented by divesting the company and subsequently by the unavailability of the company or its legal representative." The Curia added, however, that "by extending the severe sanction of disqualification to persons who have held an office or a specific shareholding in a company or who have assumed responsibility for it for a year before the opening of involuntary de-registration proceedings, the law also sets out the social requirement that a member who divests himself of his shareholding should act with due care and conclude a transaction with a person who does not jeopardise the integrity of economic

life". With regard to the interpretation of Section 9/C of the Companies Act, the Curia held that the provisions on disqualification do not provide the courts with discretionary competence and explained that the provisions of the Companies Act on disqualification and involuntary de-registration do not raise any constitutional concerns in view of the data concerning the new executive officer of the company succeeding the petitioner.

[15] In his constitutional complaint, the petitioner invoked Section 27 and Section 26 (1) of the Constitutional Court Act.

[16] With regard to the contested decision of the Curia, the petitioner submitted that the decision infringed Article XII (1) of the Fundamental Law, since the Curia, by applying the disqualification without discretion, had infringed his right to the free choice of occupation and the right to enterprise. The petitioner contends that the purpose of the disqualification under Section 9/C of the Companies Act is to penalise persons unfit to take part in economic life and, at the same time, to ensure the purity of economic life by disqualifying such persons from being associated with any company for a specified period of time. He explained that the company in question had operated properly under his management, had not become a shell company, nor did it have any debts. The petitioner also claimed that, according to the documents available, he was reasonably informed of the identity of the new manager or owner. However, he could not reasonably have been expected to inform himself about the future conduct of the new owner and to ensure that he influenced that conduct. In view of this, by applying Section 9/C and Section 118 (2) of the Companies Act without discretion, the Curia "significantly" restricted the petitioner's participation in economic life and his right to enterprise. In this context, the petitioner also invoked Article O and Article 28 of the Fundamental Law, in the latter context arguing that the interpretation of the law contrary to the legislator's purpose (failure to exercise discretion) also violated the Fundamental Law. On the basis of Article O of the Fundamental Law, the responsibility for one's own conduct was emphasised by the constituent power, the petitioner submits that the provisions of the Companies Act referred to were drafted by the legislator in order to apply the sanction of disqualification to persons who, by their conduct, gave rise to the legal supervisory procedure or involuntary de-registration. However, the interpretation of the rule by the Curia allows for the possibility of applying the disqualification also to persons who have ceased to be involved in the undertaking during the period of the involuntary de-registration proceedings. Therefore, the contested decision infringes Article XII (1) of the Fundamental Law and, in this context, Article O and Article 28 thereof.

[17] In his original complaint pursuant to Section 26 (1) of the Constitutional Court Act, the petitioner initiated a review of constitutionality of Section 9/C and Section 118 (2) of the Companies Act on the grounds of a violation of Article XII (1) and Article O of the Fundamental Law. In his supplement to the petition, he also pleaded infringement of Article XXVIII (1) of the Fundamental Law. In his view, if Section 9/C of the Companies Act does not allow for judicial discretion in relation to the disqualification, and therefore a disqualification is applied without being based on conduct for which the person concerned is not responsible, or if the subsequent conduct of persons over whom the person concerned by the disqualification had no control, leads to the initiation of involuntary de-registration proceedings, this raises a

breach of Section 9/C of the Companies Act, in particular an unnecessary and disproportionate restriction of the right to enterprise, albeit for a constitutional purpose. The legislation infringes Article XXVIII (1) of the Fundamental Law because it allows, without any judicial discretion, the disqualification of persons who are not in any way responsible for the involuntary de-registration of the company in question. The petitioner has not submitted any independent arguments, either in his original petition or in his supplementary petition, in connection with Section 118 (2) of the Companies Act or Article O of the Fundamental Law.

[18] In the supplement to the petition submitted at the request of the Secretary General of the Constitutional Court, the petitioner sought a finding that the contested order of the Curia and Section 9/C of the Companies Act were unconstitutional in violation of the Fundamental Law and their annulment on the basis of Article XII (1) and Article O of the Fundamental Law. The petitioner alleges infringement of Article XII(1) of the Fundamental Law in that the right to enterprise is unnecessarily and disproportionately restricted by the lack of discretion, the objective nature of the sanction, either as a result of the rules governing the disqualification or as a consequence of the application of the law. The lack of imputability (fault) also constitutes, in the view of the petitioner, an infringement of Article XXVIII (1) of the Fundamental Law, namely the right to a fair trial, since the court is not required to determine the causal link (imputability) between the conduct of the persons threatened with disqualification and the occurrence of the involuntary de-registration of the company.

II

[19] 1. The provisions of the Fundamental Law invoked in the petitions read as follows:

"Article B (1) Hungary shall be an independent and democratic State governed by the rule of law."

"Article O Everyone shall be responsible for himself or herself, and shall be obliged to contribute to the performance of State and community tasks according to his or her abilities and possibilities."

"Article I (3) The rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of that fundamental right."

"Article XII (1) Everyone shall have the right to choose his or her work, and employment freely and to engage in entrepreneurial activities. Everyone shall be obliged to contribute to the enrichment of the community through his or her work, in accordance with his or her abilities and potential."

"Article XXIV (1) Everyone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities. Authorities shall be obliged to state the reasons for their decisions, as provided for by an Act."

“Article XXVIII (1) Everyone shall have the right to have any indictment brought against him or her, or his or her rights and obligations in any court action, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act.”

[20] 2. The provision of the Companies Act challenged by the petitions reads as follows:

“Section 9/C If the company is removed from the commercial register in involuntary de-registration proceedings, the Court of Registration shall, subject to the exceptions provided for in this Act, disqualify any person who, at the time of the initiation of the involuntary de-registration proceedings or in the preceding year, was a executive officer, a member with unlimited liability, or a member with majority influence in a limited liability company . A person who is disqualified may not acquire a majority influence in a company, become a member with unlimited liability in a company, become a member of a sole proprietorship or become a executive officer of a company for a period of five years after the company has been de-registered. The rule laid down in this Section shall apply mutatis mutandis where the company is de-registered following liquidation proceedings but where the liquidation proceedings were preceded by involuntary de-registration proceedings.”

III

[21] The Constitutional Court considered, first of all, whether the petitions complied with the statutory criteria.

[22] 1. In the context of the judicial initiative, Section 52 (4) of the Constitutional Court Act provides that the petitioner must prove that the conditions for the Constitutional Court proceedings are fulfilled. s a consequence, if the judge who initiates the proceedings does not state that the challenged rule should be applied in the case or does not show the connection between the rule alleged to be unconstitutional and the specific case in such a manner that the Constitutional Court can clearly establish the connection from the content of the petition, no Constitutional Court proceedings may be conducted.

[23] Section 25 (1) of the Constitutional Court Act “provides the possibility for the judge to challenge the applicable rule in order to prevent the court from being forced to render its decision by applying an unconstitutional rule. Accordingly, any substantive provision of law on which the decision on the merits of the individual case before the court depends may be the subject of a judicial initiative, but procedural rules may also be challenged which, although not directly forming the basis of the court's decision to close the case, if applied, have a substantial effect on the procedural position of the parties” {Decision 3192/2014 (VII. 15.) AB, Reasoning [14] to [18]}.

[24] In the present case, the judge requested an enquiry into the constitutionality of the rules on the sanction of disqualification applicable in the involuntary de-registration proceedings under the Companies Act, which constitutes a substantive rule of law. The Constitutional Court held that the petition fulfilled the conditions provided for in Section 25 and Section 52 of the Constitutional Court Act {*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]}. The judicial initiative states that the challenged rule is applicable to the proceedings, that the

proceedings have been stayed and that the petition seeks a finding of unconstitutionality by non-compliance with the Fundamental Law, including the sanction of the annulment.

[25] 2. With regard to the constitutional complaint, the Constitutional Court found as follows.

[26] The petitioner is a person concerned in an individual case in respect of the order challenged by the petitioner, given that the subject-matter of the order challenged was the petitioner's disqualification. The petitioner has exhausted his rights to seek legal redress and has submitted his petition within the time limit laid down in the Constitutional Court Act.

[27] With regard to the complaint pursuant to Section 26 (1) of the Constitutional Court Act, the petitioner alleged a violation of his right guaranteed by Article XII (1) and Article XXVIII (1) of the Fundamental Law in connection with the legal provision applied in his case, and his petition in this context complies with the provisions of Section 52 (1b) of the Constitutional Court Act. The petitioner also invoked Article O of the Fundamental Law, but did not submit any separate arguments on the merits in this regard, and the Constitutional Court therefore did not consider this element of the petition. The issue raised by the petitioner also satisfies the criterion laid down in Section 29 of the Constitutional Court Act.

[28] In the constitutional complaint pursuant to Section 27 of the Constitutional Court Act, the petitioner alleged a violation of his right guaranteed by Article XII (1) of the Fundamental Law in relation to the Curia decision challenged by the petition, and in this respect the petition complies with the additional formal requirements of Section 52 (1b) of the Constitutional Act and with Article 29 of the Fundamental Law. The petitioner also invoked Article O of the Fundamental Law, but did not provide any separate substantive reasoning in this context, and the Constitutional Court did not assess this element of the petition.

[29] 3. The Constitutional Court, in view of their interdependence, joined the cases on the basis of Section 58 (2) of the Constitutional Court Act and Section 34 of the Rules of Procedure and adjudged them in one procedure.

IV

[30] 1. First, the Constitutional Court considered the regulatory context of the disqualification of executive officers, its evolution and changes.

[31] 1.1 The cases and legal consequences of the disqualification of executive officers were originally contained in the Acts governing companies.

[32] Section 29 of Act VI of 1988 on Business Associations (hereinafter referred to as the "1988 Act on Business Associations") established grounds for criminal disqualification of executive officers. Under that provision, a person who has been sentenced to a custodial sentence which has the force of res judicata for an offence may not be a executive officer of a company unless he has been relieved of relieved of the detrimental effects arising from a criminal record. A further ground for exclusion was a disqualification from engaging in an occupation: In such a case, the person concerned could not be a executive officer of the company carrying out the activity specified in the conviction during the period of the conviction. The legislator thus

inherently formulated a prohibitory rule for the most serious offences from the point of view of public policy, thereby protecting the interests of creditors and members of the company.

[33] Section 25 of Act CII of 1993 amending the Act on the Rules of Taxation, which amended the Act effective as of 1 January 1994, introduced a ground for exclusion whereby, if the executive officer had held that office for at least one year in the two years preceding the liquidation of the company and the company was dissolved in the course of the liquidation proceedings without having paid its public debts, he could not be a executive officer in another company for two years after the dissolution of the company.

[34] 1.2 A special form of disqualification from engaging in any occupation applicable to executive officers of companies was first introduced by the 1994 amendment to Act IV of 1978 on the Criminal Code (hereinafter referred to as the "former Criminal Code") (Section 30 of Act IX of 1994 amending the Criminal Code, in force from 15 May 1994). Section 315 (2) of the former Criminal Code only qualified as an occupation for the purposes of the chapter on economic offences if the offender was, inter alia, a executive officer of a business association. The legislator thus made it possible to apply the disqualification from engaging in an economic offence as a secondary penalty to this category of persons. The general application of the disqualification from engaging in any occupation, that is, beyond economic offences, resulted from the 1997 amendment to the former Criminal Code, which placed this definition relating to executive officers of companies within the rules on the disqualification from engaging in any occupation as an ancillary penalty [Act LXXIII of 1997 amending Act IV of 1978 on the Criminal Code, in force as of 15 September 1997, Section 56 (2) former Criminal Code].

[35] Under Act C of 2012 on the Criminal Code, the regulation was changed to the extent that it replaced disqualification from engaging in an occupation and its cases for executive officers of business associations, non-governmental organisations, business companies, etc., as a main penalty instead of an ancillary penalty, thus becoming a penalty that can be applied independently.

[36] 1.3 Act CXLIV of 1997 on Business Associations (hereinafter referred to as the "former Act on Business Associations"), which entered into force on 16 June 1998, was adopted in parallel with the criminal law rules. The former Act on Business Associations retained the (criminal law) grounds for disqualification (namely the commission of a criminal offence and disqualification from engaging in any occupation) originally provided for in the 1988 Act on Business Associations, and maintained the disqualification rule introduced in 1994, with a partial restructuring of the conditions for directors of companies in liquidation. The former Act on Business Associations extended the period of disqualification from 2 to 3 years and introduced a new rule making disqualification from holding a position as a executive officer conditional on the company's insolvency rather than on the company's failure to pay its public charges. The legislator justified the time limitation on becoming a company officer on the grounds of the increased personal liability of the officers and the protection of creditors, despite recognising that the bankruptcy (liquidation) of a company is not necessarily imputable to the executive officer. The legislator considered that the reason for introducing the sanction was the fact that some of the company's creditors would remain unsatisfied as a result of the

liquidation. The reason for increasing the disqualification period to 3 years was also motivated by the need to protect creditors.

[37] The former Act on Business Associations introduced the economic law counterpart of the ancillary penalty of disqualification used in criminal law as a new ground for exclusion. Accordingly, the executive officer of a company subject to an ex officio de-registration procedure could not be a executive officer for 2 years after the de-registration if he had held such an office in the company dissolved by the de-registration in the year preceding the de-registration. The legislator did not specifically justify the introduction of the new sanction, but the explanatory memorandum to the Act suggests that it was also introduced for reasons of public interest and the protection of creditors, on the same basis as in the case of disqualification from office due to liquidation.

[38] Act IV of 2006 on Business Associations (hereinafter referred to as the "Act on Business Organisations"), which entered into force on 1 July 2006, reproduced the provisions on disqualification from the old Act in essentially unchanged form [Section 23 (3) of the Act on Business Organisations]. Accordingly, if a business association is de-registered in the course of dissolution proceedings, no person may be a executive officer who has been a executive officer for two years in the calendar year preceding the de-registration. By amending the Act on Business Organisations in 2009, the legislator increased the period of disqualification to three years.

[39] The involuntary de-registration proceedings was introduced into the Companies Act by Act XLIX of 1991 on Bankruptcy and Liquidation Proceedings, Act IV of 2006 on Business Associations, Act V of 2006 on Public Company Information, Company Registration and Winding-up Proceedings and Act CXCVII of 2011 on the Amendment of Certain Related Acts (hereinafter referred to as the "First Companies Amendment Act"), and at the same time, it also amended, with effect from 1 March 2012, the provisions disqualification of the 2006 Act on Business Associations: the Act increased the duration of disqualification to five years [Section 23 (3)] and extended the application of the disqualification to members with a sole or majority shareholding, members of a general partnership and members of a limited partnership [Section 5 (10)], under the conditions laid down for the executive officer.

[40] 1.4 With the entry into force of Act V of 2013 on the Civil Code (hereinafter referred to as the "Civil Code") on 15 March 2014, the Act on Business Organisations was repealed. The rules on the disqualification of a executive officer have been overhauled: In part, the Civil Code [Section 3:22 (6), Section 3:90 (3)] and in part, or primarily, the Companies Act contains the relevant provisions. The rules on disqualification were introduced in Section 9/A to Section 9/E of the Companies Act by Act CCLII of 2013 on the Amendment of Certain Acts in Connection with the Entry into Force of the New Civil Code, which entered into force on 1 June 2014 (hereinafter referred to as the "Second Companies Amendment Act"). The Second Companies Amendment Act also laid down exceptions to the disqualification in the rules of the involuntary de-registration proceedings: more specifically, in Section 118 (1) and (6) of the Companies Act.

[41] This amendment also implied that the personal scope of the rules on disqualification was no longer determined by the statutory provisions applicable to business associations, but by Section 2 of the Companies Act.

[42] 2. Under current Hungarian law, two forms of disqualification of a executive officer exist alongside each other: in criminal law, as a specifically mentioned case of disqualification from engaging in any occupation, which is a criminal sanction. The other form is disqualification from engaging in any occupation as applied in company law, which is a punitive sanction against a person for specific acts outside the scope of criminal law.

[43] 2.1 The duration of a disqualification under criminal law may be between 1 and 10 years, or it may be permanent, unlike the duration of a disqualification under company law, which is always 5 years. The duration of the criminal law disqualification is a matter falling within the discretion of the court.

[44] In the case of criminal disqualifications, relief may be granted under certain conditions: If the disqualification was of definitive effect, the convicted person may apply for relief after 10 years, provided that he has proved his competence or merits.

[45] The criminal disqualification is documented in the criminal records, and the relevant data concerning the disqualification are also included in the Official Certificate of Criminal Records (*see* Section 71 of Act XLVII of 2009 on the Criminal Records System, the Registry of Convictions Handed Down against Hungarian Nationals by Courts of the Member States of the European Union, and the Recording of Criminal and Law Enforcement Biometric Data).

[46] The corporate law consequence of the criminal disqualification is defined in Section 3:22 of the Civil Code [Section 3:22 (6) of the Civil Code], that is, a person who has been disqualified by a court from engaging in any occupation shall not be a executive officer. In substance, this is in principle an automatic ground for disqualification, since the legal consequence of a criminal disqualification is that the convicted person may not be a manager of a company during the period of the disqualification. This applies not only to future positions, but also to those already held. Pursuant to Section 22/A of the Companies Act, should the Court of Registration contact the criminal records office to verify the grounds for disqualification, the Court of Registration will, in the event of a ground for disqualification (in this case, disqualification from holding a executive officer position), conduct a legal supervisory procedure on the basis of the notification by the criminal records office, and as a result, it is possible to restore legality.

[47] 2.2 In addition, the disqualification of a executive officer is possible in the framework of company registration proceedings in the cases and according to the procedure specified in the Companies Act.

[48] In the case of disqualification on the basis of a "comparison" (Section 9/E of the Companies Act), in addition to the grounds for disqualification already mentioned, a executive officer may be disqualified from holding office for the reasons set out in Section 9/B and Section 9/C of the Companies Act. Section 9/C links the disqualification for the involuntary de-registration of a company, subject to the exceptions provided for in Section 118 of the Companies Act, to the

fact that a claim has been filed against the company in the course of the involuntary de-registration proceedings.

[49] Of the cases of disqualification described, the petitions challenged only the constitutionality of the disqualification provisions in Section 9/C of the Companies Act.

[50] 3. In the light of the substance of the petitions and of Section 9/C of the Companies Act, the Constitutional Court went on to consider the elements of the involuntary de-registration proceedings that were relevant to the case.

[51] 3.1 The constitutionality of certain rules of the involuntary de-registration proceedings was reviewed by the Constitutional Court in its Decision 35/2015 (XII. 16.) AB (hereinafter referred to as the "2015 Court Decision"), where the Constitutional Court held that "[the] function of involuntary de-registration is to enable the striking-off from the register, and thus the removal, of a company declared dissolved in a general or special procedure of supervision of legality to be carried out in a special procedure. The involuntary de-registration proceedings are essentially of a »sanctioning nature«, in this respect they are similar to the former involuntary winding-up proceedings, in that the Court of Registration may institute proceedings against the company for the application of the legal sanction of dissolution of the company in the event of failure to comply with certain statutory obligations. [...] This was further reinforced by the fact that the First Companies Amendment Act also ordered the application of the rules of involuntary de-registration (or liquidation) for the declaration of the dissolution of what are known as shell companies (companies with unknown registered offices): thus, the dissolution (de-registration) of shell companies (in addition to the de-registration of unincorporated, defunct, inoperative companies) became an essential function of this procedure. The nature of the involuntary de-registration proceedings is adapted to its function. In order to avoid the need for a new court procedure (*see* simplified liquidation), which is both lengthier and more expensive, to remove an insolvent, bogus, inoperative firm from the market (deletion from the register), a special and at the same time speedier and simpler (non-litigious) procedure is used. [...] In involuntary de-registration proceedings, the legal remedy applicable to the company is also adapted to the function of the proceedings. In other words, if a company is inoperative, cannot be restored to lawful operation, cannot be contacted, etc., it is declared dissolved by the court, typically when other measures have failed. If the conditions for the opening of liquidation proceedings are not fulfilled, the company is then stricken off the register by the Court of Registration in involuntary de-registration proceedings. The involuntary de-registration proceedings therefore (may) lead to the application of the most severe sanction that can be imposed on the company: The company is stricken off the register." {the 2015 Court Decision, Reasoning [35] and [36], as well as [38]}.

[52] In essence, involuntary de-registration proceedings are a special type of company procedure, the subject matter of which is the closure and de-registration of a company following a judicial declaration that certain statutory conditions have been met. In a certain sense, involuntary de-registration serves an administrative purpose: It is a means of maintaining the Register of Companies.

[53] In accordance with its function, the company being stricken off the Register of Companies, involuntary de-registration is a specialised and, compared to other (company law) procedures, quicker and simpler non-litigious procedure. It is the task of the Court of Registration to identify the assets of the company concerned and to locate its members and officers (unless the dissolution of a company with an unknown registered office was the basis for the involuntary de-registration, *see* Section 117/A of the Companies Act). All these data are identified on the basis of information obtained from authentic registers, a notice published in the Official Gazette of Companies or the information provided by the member or executive officer available during the proceedings.

[54] 3.2 Pursuant to Sections 116 to 118 of the Companies Act (the rules of involuntary de-registration proceedings), the court acting as a court of registration has two basic options as a result of the discovery of assets: It may either strike the company off the register in the course of the involuntary de-registration proceedings or initiate liquidation proceedings. The cases giving rise to these two options are the following:

(a) If a claim has not been notified and the company does not have or is not expected to have any assets to cover the costs of the liquidation proceedings [Section 118 (1) of the Companies Act]

(b) If a claim has not been notified and the company has recoverable assets [Section 118 (6) of the Companies Act]

(c) If a claim has been notified against the company, but the company has no recoverable assets (and this is not due to a transaction for the purpose of concealing assets) [Section 118 (2) of the Companies Act].

[55] In these cases, the Court of Registration will remove the company from the Register of Companies in the context of involuntary de-registration proceedings.

[56] However, the Court of Registration shall initiate liquidation proceedings in addition to terminating the involuntary de-registration proceedings if

(a) a claim has been notified against the company and the company has assets which can be expected to cover the costs of the liquidation proceedings [Section 118 (3) a) of the Companies Act], or

(b) a claim has been notified against the company and its assets are presumed to be non-existent or significantly reduced as a result of a transaction to conceal the assets [Section 118 (3) (b) of the Companies Act].

[57] Depending on the company's assets and the creditors' claims, the involuntary de-registration proceedings may therefore end with the termination of the involuntary de-registration proceedings and the initiation of liquidation proceedings, or with the de-registration of the company in the involuntary de-registration proceedings.

[58] 4. In the light of Section 9/C of the Companies Act and the exceptions referred to therein (Section 118 of the Companies Act), the Constitutional Court has held the following.

[59] 4.1 Section 9/C of the Companies Act contains the substantive rules of law governing the disqualification applied in involuntary de-registration proceedings, with reference to the exceptions to the disqualification referred to in Section 118 of the Companies Act. In other words, all executive officers whose company is stricken off the Register of Companies for any of the above-mentioned reasons, if they do not fall within the exceptions set out in Section 118 of the Companies Act, are subject to the disqualification pursuant to Section 9/C of the Companies Act.

[60] The rules on the disqualification under company law have been gradually tightened with each amendment. However, the Second Companies Amendment Act has introduced exceptions to the application of the disqualification, relaxing the previous stringency of the rules.

[61] As a result of the search for assets, as explained above, the following options are open to the court in involuntary de-registration proceedings.

[62] In one of these cases, the Court of Registration may, in the context of involuntary de-registration proceedings, strike the company off the register if no claim has been notified and the company has no assets which can be recovered or are not expected to cover the costs of the liquidation proceedings [Section 118 (1) of the Companies Act] or if no claim has been notified and the company has assets which can be recovered [Section 118 (6) of the Companies Act].

[63] In these cases, the disqualification will be disapplied by the Court of Registration, taking into account the fact that no claim has been notified. This is provided for in Section 118 (1) and (6) of the Companies Act.

[64] In the other category of cases, the company will also be dissolved under the involuntary de-registration proceedings if a claim has been notified against the company but the company has no assets to be recovered (and this is not due to a transaction to conceal assets). In such cases, however, the Court of Registration must decide on the disqualification [Section 118 (2) of the Companies Act].

[65] The Court of Registration shall initiate liquidation proceedings in addition to the termination of involuntary de-registration proceedings if a claim has been notified against the company and the company has recoverable assets which are expected to cover the costs of the liquidation proceedings [Section 118 (3) (a) of the Companies Act]; or if a claim has been notified against the company and its assets are presumed to be non-existent or significantly reduced due to a transaction to conceal assets [Section 118 (3) (b) of the Companies Act]. In this case, the disqualification "shall apply mutatis mutandis" pursuant to Section 9/C of the Companies Act As liquidation proceedings are commenced in such a case, they must be conducted in accordance with Chapter III of Act XLIX of 1991 on Bankruptcy and Liquidation Proceedings (hereinafter referred to as the "Bankruptcy Act"). As a result, the court decides on the dissolution of the debtor by order (Section 60 of the Bankruptcy Act), after which the company is officially deregistered and disqualification is ordered pursuant to Section 62 (2a) of the Bankruptcy Act.

[66] Under the current legislation, therefore, the disqualification on account of involuntary de-registration is limited to cases where a claim has been notified against the company, whether or not it has any assets available, regardless of whether or not these assets were created by a transaction serving the purpose of concealing the assets.

[67] 4.2 In its assessment of the constitutionality of the contested legislation concerning the disqualification of the executive officer, the Constitutional Court took as its point of departure the legal position of the executive officer in the operation of the legal person.

[68] The specificity of a legal person is that it cannot act on its own, that is to say, it is necessary that other persons should act in its name and on its behalf. Certain decisions concerning the legal person can be taken by the founders or members, typically the most important decisions concerning the legal person (e.g. dissolution or transformation). The day-to-day operation of the legal person also requires the "designation" (election, appointment) of a decision-maker through whom the legal person can express itself externally (participate in legal relations, that is, in assuming rights and obligations) and whose decisions and statements on behalf of and in the name of the legal person must be attributed to the legal person. To this end, every legal person must have a person in charge of the management of the company (Section 3:2, Section 3:21 and Section 3:29 of the Civil Code). The executive officer is therefore under an obligation to act in the interest of the legal person "as if he were the legal person" [Section 3:21 (2) of the Civil Code]. As a consequence, the executive officer has a civil law relationship not with the members or founders, but with the legal person, which is also expressed by his or her liability (Section 3:24 of the Civil Code).

[69] The executive officer exercises a decisive majority in the management of the company in making business decisions, which include the assumption of business risks. From this point of view, it is of significance that he must act in the interest of the company, since the inherent risk in business and decisions does not in itself establish the liability of the executive officer for breach of his duty to the company.

[70] The activity of the executive officer extends to taking business and other decisions in the interest of the legal person (in this case, the company) which are not within the competence of the decision-making body (for an illustrative list, *see* the chapter of the Civil Code on associations, see Section 3:80 of the Civil Code), that is, it goes beyond the internal management relations of the legal person, who typically performs this activity on an employment or agency basis. The fact that the executive officer may be recalled at any time without stating the reasons for his or her recall underlines his or her enhanced position of trust (Section 3:25 of the Civil Code).

[71] A legal person is created in accordance with the freedom of formation granted to its members or founders. Section 2 of the Companies Act defines legal entities established for the purpose of carrying on a commercial economic activity as a company: This purpose is relevant to the activities of both the founders / members and the executive officers.

[72] 4.3 The executive officer does not directly undertake the business himself or herself in the course of his or her decision-making activity in this context, but does so on behalf of the legal person. However, on the basis of the relevant provisions of the Companies Act and the Civil

Code, since his or her decisions are imputable to the company; in view of the nature of the decisions taken in the interests of the company and of the legal relationship between the executive officer and the company; and in view of the executive officer's direct liability for the company's outstanding debts: The executive officer's activity constitutes an entrepreneurial activity in the fundamental rights sense, and is therefore covered by Article XII of the Fundamental Law.

[73] Under Decision 23/2016 (XII. 12.) AB, "[t]he Constitutional Court interprets the right to enterprise (Article XII of the Fundamental Law) as a fundamental right, which entails that everyone has the right to engage in business activity, that is, to conduct business, as guaranteed by the Fundamental Law. [...] The right to enterprise implies, but as a constitutional requirement it necessarily does imply, that the State shall not prevent or render the right to become an entrepreneur impossible" {*see* Decision 54/1993 (X. 13.) AB, ABH 1993, 340, 341-342; reaffirmed by Decision 3062/2012 (VII. 26.) AB, Reasoning [154]}" {Decision 23/2016 (XII. 12.) AB, Reasoning [165]}.

[74] Decision 26/2017 (X. 17.) AB elaborated on this as follows: "[t]he right to enterprise and the right to the free choice of occupation, as recognised by Article XII (1) of the Fundamental Law, provides the opportunity to pursue business and profit-making activities under specific professional, occupational, economic and other conditions. The right to the free choice of employment and occupation and the right to freedom of enterprise are afforded protection similar to that conferred by civil liberties against interference and restrictions by the State. The essential content of the right enshrined in Article XII (1) of the Fundamental Law is infringed in particular if the right to the free choice of occupation or to become an entrepreneur is completely withdrawn for an indefinite period of time by a measure of public authority {Decision 3076/2017 (IV. 28.) AB, Reasoning [56]}. In its Decision 3243/2014 (X. 3.) AB, the Constitutional Court ruled in principle in relation to the fundamental right guaranteed by Article XII (1) of the Fundamental Law as follows: »[t]he Constitutional Court has already held in its Decision 21/1994 (IV. 16.) AB that the right to work, similarly to the right to enterprise, does not confer a subjective right to engage in a specific occupation. (ABH 1994, 117, 120) Decision 327/B/1992 AB pointed out that "the fundamental right contained in Article 70/B (1) of the former Constitution, which by its very nature is only granted to natural persons, includes the freedom to choose and exercise any work, profession or occupation. [...] However, the fundamental right to the free choice of employment and occupation does not guarantee a subjective right to pursue a particular occupation or to engage in a particular activity." (ABH 1995, 604, 609Expressed differently, no individual "has an absolute right to pursue a particular occupation or an occupation in the form of his or her choice" (Decision 328/B/2003 AB, ABH 2005, 1434, 1441). Following the entry into force of the Fundamental Law, the Constitutional Court reaffirmed its establishes practice in Decision 3380/2012 (XII. 30.) AB and Decision 3134/2013 (VII. 2.) AB as well [ABH 2012, 783, 789.; and Decision 3134/2013 (VII. 2.) AB, ABH 2013, 1918, 1922, as appropriate]« (Reasoning [42]). There is therefore no impediment to a restriction of the right under Article XII(1), provided that the restriction complies with the requirement under Article I (3) of the Fundamental Law" (Reasoning [15]).

[75] The right to enterprise as recognised by Article XII of the Fundamental Law extends in essence to entrepreneurial activity, which is not, however, to be understood exclusively as a form of self-employment. It is also possible to carry on an enterprise in the form of a partnership, as recognised by law: The right to enterprise accordingly also protects those who carry on this activity in partnership with others. The forms of partnership require that the decisions necessary for the operation of the business take a specific legal form, primarily in order to protect other legal entities that interact with the partnership, but this also means that the freedom of enterprise is conferred on the partnership forms of business subject to these legal arrangements. Correspondingly, the right to enterprise protects both the freedom to set up and run a sole proprietorship and the freedom to set up and run a partnership, bearing in mind that the creation (dissolution and transformation) of a business is only one aspect of the activity of a partnership, while the continuation of the business is the day-to-day activity of the partnership already established. In this context, freedom of enterprise protects both the external and the internal aspects of the enterprise in the case of a partnership, given that, externally, this right is conferred on the partnership as a legal entity, whereas, internally, it is conferred on the founders, the members and the executive officers of the partnership.

[76] 4.4 The constitutionality of the restriction is to be reviewed under Article I (3) of the Fundamental Law. With regard to the constitutionality of the disqualification as a legal consequence against a person, as regulated in Section 9/C of the Companies Act, the Constitutional Court must therefore consider whether the restriction is necessary for a constitutionally justifiable purpose and whether the restriction of fundamental rights, which is deemed necessary and is proportionate to the objective pursued.

[77] Disqualification under company law, pursuant to Section 9/C of the Companies Act, as a legal consequence, precludes an executive officer from acquiring a majority influence in any company, from becoming a member of a company with unlimited liability, a member of a sole proprietorship, and from becoming an executive officer of any company within five years of the disqualification. On this basis, disqualification under company law significantly limits the person's participation in economic life and entrepreneurial opportunities.

[78] The legislator's rationale underlying introducing disqualification was to protect the public interest and the interests of creditors against executive officers who abuse their office. The legislator identified this objective in the case of a disqualification imposed in involuntary de-registration proceedings in that it was primarily intended to penalise "bogus" companies or the managers of companies whose legitimate activities had not been restored and which had led to the company's dissolution. Furthermore, the legislator has assumed that cancellations resulting from compulsory winding-up proceedings (or their predecessors) are typically imputable to the executive officer and that, therefore, his or her disqualification, as with the striking off of the company from the Register of Companies, serves the public interest, the protection of creditors and the maintenance of confidence in the economy.

[79] In the Constitutional Court's view, the right to enterprise may be restricted in the light of Article M and Article XIII of the Fundamental Law, having regard to the public interest, business confidence and the protection of creditors as a single objective. The operation of a company may typically have an impact on other (even numerous) actors in economic life, and therefore

their illegal operation may have far-reaching effects on economic life, depending on the "size" of the company, the number of its employees, the extent of its economic relations, etc. In view of the role of executive officers in the company, one possible way of achieving this single objective is to impose a temporary ban, of a preventive nature, on the economic activities of executive officers whose activities have undermined public interest and confidence in the integrity of economic life, and against whom the less stringent means of creditor protection do not provide sufficient protection.

[80] The above description of the grounds for involuntary de-registration shows that it does not only concern shell companies (with unknown registered office); thus, disqualification is not only foreseen for the executive officers of such companies under the current legislation, but applies to a much wider range of persons. This does not exclude that, in cases where the reasons for involuntary de-registration do not relate to the company's becoming a shell company, which are not typically referred to in the legislative justifications, the protection of the public interest, the interests of creditors or confidence in the economy may justify the application of a disqualification of the company's executive officer in addition to the sanction of striking off the company in the course of involuntary de-registration proceedings. However, given that disqualification is automatically linked to involuntary de-registration proceedings under Section 9/C of the Companies Act, all cases leading to involuntary de-registration proceedings (that is, even those leading to involuntary de-registration proceedings not specifically mentioned in Section 116 of the Companies Act) must meet the constitutionally acceptable objective. However, the legislator also has the option of not linking the disqualification of executive officers to the involuntary de-registration proceedings, but of establishing separately from such proceedings the cases which would result in such a serious breach of the aforementioned objectives that it is justified to envisage severe sanctions of disqualification for executive officers who have contributed to their occurrence.

[81] 5. The petitions challenged in particular the constitutionality of the rule on the disqualification of those holding an executive position in the year preceding the commencement of the involuntary de-registration proceedings, which, as was claimed in the petitions, was not based on fault. In this context, the Constitutional Court makes the following observations.

[82] 5.1 The group of persons liable to be disqualified on the grounds of involuntary de-registration is, pursuant to Section 9/C of the Companies Act, composed of the executive officers who held such office at the time of the initiation of the proceedings for involuntary de-registration and in the year preceding the initiation of such proceedings. In other words, in this case, disqualification only applies in view of the fact that the company in question has been dissolved in the context of involuntary de-registration proceedings and that the executive officer was an executive officer of the dissolved company at the time of the opening of such proceedings or at any time during the preceding year. The exceptions to disqualification described above are also objective: (Simply put,) the court will disapply the disqualification if the involuntary de-registration proceedings have not revealed any unsatisfied debts of the company.

[83] The basic difference between the two categories of executive officers liable to be disqualified is that, while the person who was an executive officer at the time of the commencement of the involuntary de-registration proceedings is currently managing the company, in the case of a former executive officer, his or her involvement in the management of the company ceased at some time prior to the commencement of the proceedings. A material difference therefore exists between the two categories of persons as regards their involvement in the management of the company. However, in the Constitutional Court's view, the legislator applies the same legal presumption in respect of persons holding an executive position at the time of the opening of the involuntary de-registration proceedings and in respect of persons holding an executive position during the preceding year: There is no substantive difference between the two categories of persons as regards the legal presumption underlying the disqualification.

[84] 5.2 Under the impugned legislation, liability is based on the holding of an executive position within a given period and on the fact that the company's debts are unsatisfied: To these the legislator attaches an irrebuttable legal presumption of fault (imputability). In other words, if the company has outstanding debts and the executive officer has held such office in the company at the time of the institution of involuntary de-registration proceedings or at any time during the preceding year, for however long a period of time: The executive officer is subject to disqualification, regardless of whether this situation is imputable to him or her, without further consideration.

[85] As has been held in the 2015 Court Decision:, the objective / subjective nature of the sanction is not determined by whether the legislator recognises exceptions to the application of the sanction. Indeed, if disqualification occurs automatically at the end of the proceedings if certain statutory conditions are fulfilled, the sanction is objective. Disqualification is applied automatically at the end of involuntary de-registration proceedings, without any consideration of the liability of the executive officer and, contrary to the legislator's intention, *see* the First Companies Amendment Act, the right to legal redress does not in itself give the court the opportunity to assess the executive officer's fault (imputability), as the appropriate procedural rules are absent from the Companies Act.

[86] Since a company reaches the initiation of involuntary de-registration proceedings as the culmination of a process, the legislator may, in this respect, specify the period of time prior to the initiation of involuntary de-registration proceedings during which the activities of the executive officers may be presumed to have contributed to the company's de-registration. However, in the light of the objective of the disqualification, namely to protect the public interest and confidence in economic life, the disqualification of the executive officers whose activities are liable to infringe the constitutional purpose behind the disqualification may be regarded as a restriction proportionate to the objective pursued. In the light of the constitutional objective of disqualification, it is appropriate that such a sanction should be applied only to persons who have given rise to the legal supervision procedure leading to the involuntary de-registration by their conduct or omission and that a causal link between their actions, conduct or omission and the unlawful situation can be established.

[87] In its Decision 60/2009 (V. 28.) AB, the Constitutional Court addressed the criteria for the constitutionality of strict liability rules (objectively applied) in relation to the requirement of legal certainty in the context of road traffic rules. In that decision, the Constitutional Court held that the legal provision at issue did not infringe the requirement of legal certainty. In its assessment of the provision, it took into account that it concerned situations "directly liable to cause serious damage", in view of which "there is an overriding public interest in the observance of traffic rules by all road users and in strict and consistent compliance with them by the State". The function of strict liability in such cases is to ensure that "neither the person responsible nor the liability can be allowed to »vanish«." Therefore, the Constitutional Court found that the vehicle keeper was justifiably subject to increased liability because the legislator had invoked the legal presumption that the person keeping the vehicle was driving the vehicle when the offence was committed. The increased liability of the vehicle keeper was, however, relaxed by the fact that the presumption could be rebutted. The Constitutional Court considered the consequence of strict liability, in that it makes the application of the sanction more effective by encouraging law-abiding behaviour through the inevitability of liability, to be a constitutionally acceptable objective. Another condition for the constitutionality of the legislation was that strict liability must be "based on a fair and clear criterion (presumption of liability) and that the presumption must be rebuttable within the limits of the law". [Decision 60/2009 (V. 28.) AB, ABH, 501, 521-522]. Finally, from a constitutional point of view, it is also significant that in the decision of the Constitutional Court described here, the legal consequence of the legal provision at issue was a fine against property and not a sanction against a person. In the present decision, the Constitutional Court also applies these aspects in its assessment of the conformity of Section 9/C of the Companies Act, which establishes strict liability, with Article B (1) of the Fundamental Law.

[88] Pursuant to Section 9/C of the Companies Act, the statutory presumption leads to the application of a serious legal consequence against a person disproportionate to the act, in respect of which the legislator failed to provide the possibility to override the statutory presumption. As a consequence, legislation which, in the case of executive officers liable to be disqualified, generally applies a legal presumption against which the legislature has not provided the person concerned with a possibility of exculpation, having regard also to the extent and duration of the disqualification, results in a restriction which is excessive in relation to the objective pursued. With reference also to what was held in Decision 60/2009 (V. 28.) AB, this infringes the principle of legal certainty which is part of the principle of the rule of law enshrined in Article B (1) of the Fundamental Law. Furthermore, in view of the relationship of the disqualification under company law to freedom of enterprise and the right to the free choice of occupation, the legislator's regulation of the disqualification as an objective, uniform and automatically applicable sanction for both categories of executive officers liable to be disqualified results in a breach of Article XII (1) of the Fundamental Law. It leads to a disproportionate restriction on fundamental rights that the possibility for the executive officer at risk of disqualification to exclude his personal involvement in the creation of the grounds for the involuntary de-registration (to rebut the legal presumption on the merits) is not available, nor is it ensured that the court applies the sanction of disqualification in a manner

proportionate to the conduct of the executive officer, which would adequately ensure the achievement of the constitutional objective behind the disqualification.

[89] 6. The petitions also challenged Section 9/C of the Companies Act on the ground that it infringes the right to a fair trial. In this context, the Constitutional Court points out, first of all, that Section 9/C is essentially a rule of substantive law and not of procedural law. Nevertheless, given that one of the conditions for the application of the sanction is the conduct of involuntary de-registration proceedings against the company (which is governed by Chapter VIII of the Companies Act) and that exceptions to the disqualification are also included in the procedural rules governing the involuntary de-registration proceedings in the Companies Act, the Constitutional Court has also referred to the procedural rules on disqualification.

[90] 6.1 With regard to the review of the constitutionality of the rule on the notification only by means of the Official Gazette of the decision of the Court of Registration in involuntary de-registration proceedings, which had imposed a disqualification, the 2015 Court Decision held the following: "[i]n the present case, the Constitutional Court held that the disqualification of the executive officer of a company is not compatible with the provisions of the law described here, in particular the provisions of the Second Companies Amendment Act, which does not provide for an exception to the application of the disqualification of the executive officer, is a severe sanction for the person concerned is similar in content to the disqualification from engaging in an occupation known in criminal law. Since disqualification is a serious substantive legal consequence against a person, that fact has an impact on the procedural rules governing the application of the disqualification" (the 2015 Court Decision, Reasoning [53]). In was concluded in the 2015 Court Decision that the constitutionality of certain procedural rules of the disqualification decision (that is, the procedural position of the person disqualified) can be assessed in the light of the right to a fair trial [Article XXVIII (1) of the Fundamental Law]. On the basis of the above, it was held in the 2015 Court Decision that it was in violation of the Fundamental Law that the disqualification was communicated in the same manner as the de-registration of the company in the involuntary de-registration proceedings (by notice of publication), on the basis of the wording prior to the entry into force of the Second Companies Amendment Act.

[91] 6.2 In addition, the Constitutional Court has addressed the constitutionality of the procedural rules of the disqualification proposed to be included in the competition rules in a previous decision on the basis of an *ex ante* review.

[92] Pursuant to the provision of the law, which has not yet been promulgated, and was the subject of Decision 19/2009 (II. 25.) AB, if a final and enforceable decision of the competition authority or a final and enforceable court decision in the context of a review of a decision of the competition authority had found that the company had breached the law and the company had been fined for that, the person who had been the company's executive officer during the period of the breach would not have been allowed to be the company's executive officer for two years. The disqualification was imposed by the Hungarian Competition Authority and the decision could be challenged in court. Exceptions to the disqualification were laid down by the legislator: The executive officer concerned could plead that he had not participated directly in the decision which had led to the company's involvement in the breach of law or, if he had,

that he had objected to it. The order was subject to appeal, which was heard by the court in a non-litigious procedure.

[93] In Decision 19/2009 (II. 25.) AB, the Constitutional Court declared the contested provision unconstitutional on the ground that it infringed the right to a fair trial. The Constitutional Court's decision was based on the premise that the disqualification results in a restriction of Article 70/B of the Constitution, while at the same time it assessed that the purpose of the procedure of the competition authority is to protect the public interest, the fairness and freedom of competition in the market.

[94] However, the Constitutional Court's review was not concerned with the constitutionality of the sanction of disqualification, but with the constitutionality of the procedural rules governing the application of the sanction.

[95] In this connection, the decision explained that the concept of the right to a fair trial is a "complex requirement" and that the provisions must be assessed in their context. Thus, in the case of proceedings involving the application of a legal sanction based on individual liability, the nature of the sanction has an impact on the procedural requirements. In relation to the provisions at issue, which relate to the disqualification under competition law, the Constitutional Court has held that "[t]he applied sanction, with regard to its consequence, weight and character, is similar to the ancillary penalty of disqualification from engaging in a certain occupation applied in substantive criminal law and to the legal sanctions applied in the disciplinary and ethical procedures, implying the provisional loss of the rights connected to exercising an occupation. Therefore, with regard to the direct effect of the legal sanction on the persons involved, the procedure of establishing the sanction should be subject to the requirement of a fair trial, as a principle determining the quality of the procedure. This is, however, not the case in the regulation under review" [Decision 19/2009 (II. 25.) AB, ABH 2009, 146, 153-155].

[96] Decision 19/2009 (II. 25.) AB, based on the criminal law nature of the disqualification sanction, attributed importance to the following regulatory elements in the course of the review of constitutionality. Significance was attributed to the fact that the disqualification is applied at the end of the competition proceedings brought by the Hungarian Competition Authority against the company. That procedure does not at all concern the clarification of the liability of the executive officers nor does the Hungarian Competition Authority conduct any evidentiary procedure in that regard.

[97] The sanction is uniform and automatically applicable: It is premised on the legal presumption that the executive officer is automatically liable for a serious competition law infringement and that all executive officers are subject to the same treatment. The Hungarian Competition Authority has no discretion to assess the extent of individual fault.

[98] The Constitutional Court also emphasised that there is a right of legal redress against a decision of the Hungarian Competition Authority in non-litigious proceedings under special rules. At the remedy stage, the legislator has allowed for the possibility of exculpation for the person concerned, but the specificities of the Hungarian Competition Authority's procedure (namely, that it does not extend to the assessment of the liability of the executive officer) and

the limitations of the non-litigious procedure limit the possibility of proof here as well. As a consequence, even if the possibility of exculpation is given at the court stage, if the person concerned cannot make use of it, the clarification of his personal liability is not provided in the main proceedings and is limited in the court proceedings.

[99] 6.3 In essence, the disqualification provided for in Section 9/C of the Companies Act means the application of a sanction not closely related to the involuntary de-registration proceedings as a procedure for the application of a sanction against a company, but against certain persons involved in the company, within the framework of the involuntary de-registration proceedings. "This sanction is not closely linked to the »maintenance« of the Register of Companies (removal from the register of non-operational companies), but provides for the application of a sanction against the persons who are most likely to have an influence on the operation of the company, assuming their objective responsibility, and concerning their personal legal situation. However, it may be observed that the application of the disqualification does not, in principle, affect the function of the involuntary de-registration procedure: The company may be de-registered under the simplified procedure irrespective of whether the application of the disqualification is decided under the simplified or the ordinary procedure" (the 2015 Court Decision, Reasoning [39]).

[100] In the context of involuntary de-registration proceedings, the involvement of the executive officer in the involuntary de-registration of the company (in creating the conditions for the opening of involuntary de-registration proceedings) is not the subject of the inquiry. In involuntary de-registration proceedings, or any proceedings preceding them, the court typically considers the legality of the operation of the company, but not the involvement of the executive officer. The executive officer is not subject to the proceedings preceding the declaration of disqualification and has no procedural rights accordingly, so he or she is not in a position to prove in the proceedings that he or she was not involved in the process leading to the involuntary de-registration. The application of the sanction is automatic in a simplified procedure.

[101] "One of the main objectives of the involuntary de-registration proceedings, namely to ensure that the »removal« of defunct companies from the register is carried out as quickly as possible, justifies the fact that the involuntary de-registration proceedings are, in certain respects, based on simplified procedural rules. However, the simplification of procedural rules is limited and constrained by the constitutional requirement of the right to a fair trial. That is to say, the simplification of procedural rules is compatible with the Fundamental Law only to the extent strictly necessary and proportionate to the attainment of that objective" (the 2015 Court Decision, Reasoning [70]).

[102] In these proceedings, in contrast to the legislation subject of Decision 19/2009 (II. 25.) AB, the executive officer has no possibility to challenge the court's order of disqualification on the merits by contesting the order of disqualification, since the legal remedy procedure does not guarantee the exclusion of his or her fault (imputability): He or she can only challenge the order on the grounds that the disqualification does not meet the objective legal conditions.

[103] In view of the gravity of the sanction, the absence of appropriate procedural rules results in a violation of the right to a fair trial, contrary to Section 9/C of the Companies Act. The mere circumstance that the legislator allows for a simplified and accelerated procedure for the removal of companies already stricken from the Register of Companies, in view of the public interest involved, does not in itself constitute an adequate constitutional ground for the disqualification of the executive officers in the same procedure without the guarantee of procedural rights commensurate with the gravity of the legal sanction.

[104] 7. In reaching its decision in the operative part, the Constitutional Court considered the following. In relation to the disqualification provided for in Section 9/C of the Companies Act, there is a partial violation of the Fundamental Law [in relation to Article B (1) and Article XII of the Fundamental Law] and a partial lack of essential content which can be derived from the Fundamental Law, that is, a failure to act within the meaning of Section 46 of the Act [in relation to Article XXVIII of the Fundamental Law].

[105] The Constitutional Court annulled the contested provision in its entirety, having regard to Article 24 (4) of the Fundamental Law, since the constitutional issue raised by the petitioners does not arise solely in relation to one of the categories of persons liable to be disqualified, but also in relation to the entire regulatory method of Section 9/C.

[106] The unconstitutionality by non-conformity with the Fundamental Law found by the Constitutional Court is of a two-fold character. The Constitutional Court found, in part, an unconstitutionality in violation of the fundamental Law in the legislation in force and, in part, an unconstitutionality by omission in contravention of the Fundamental Law. However, the Constitutional Court did not adopt a separate operative part of the finding of omission, since the unconstitutionality at variance with the Fundamental Law established in the context of Section 9/C of the Companies Act cannot be remedied by the creation of missing procedural rules alone, but only by amending the substantive rules of disqualification. The objective nature of the disqualification, which completely excludes discretion and is uniformly and automatically applicable, particularly in cases where the executive officer is demonstrably not responsible for triggering the involuntary de-registration, results in a situation which is so grossly unfair, amounting to a restriction of fundamental rights and a breach of the principle of legal certainty that it requires the legislature to carry out a comprehensive reorganisation of the rules governing the disqualification of executive officers. In view of the above, the Constitutional Court has ruled only on annulment in the operative part. However, the constitutionality of the legislation can be ensured by the legislator by taking into account all the aspects set out in this Decision.

[107] As a general rule [*see* Section 45 (1) of the Constitutional Court Act], the Constitutional Court shall order the annulment of a statute held to be unconstitutional *ex nunc*, but the Constitutional Court may derogate from this rule pursuant to Section 45 (4) of the Constitutional Court Act. In the present case, the Constitutional Court considered whether the temporary preservation of the seriously unfair and unconstitutional situation described in the petitions or the harm to the public interest, the economic interest and the protection of creditors, which the institution of the disqualification is intended to protect, would constitute a greater threat to legal certainty. The Constitutional Court concluded that legislation was

necessary in any event in order to make the institution of disqualification constitutional, but in order to ensure that the situation in breach of the Fundamental Law could not persist for an unduly long period of time, the Constitutional Court, allowing sufficient time for the constitutional rules to be established, annulled Section 9/C of the Companies Act. In this context, the Constitutional Court also took into account that the legal consequence of the *pro futuro* annulment is that the legal consequence of the decision, that is, the prohibition of application, cannot be declared for the cases on which the petitions are based; therefore, it is not possible to remedy any possible violation of rights in the underlying cases on the basis of this Decision. Therefore, the Constitutional Court notes that the legislature is not precluded from opening the avenue for review of the decision to persons subject to the disqualification when the constitutional rules to be adopted are being drafted, that is, when the scope of the rules is being established.

[108] In the light of the efforts towards mutual recognition of disqualification in the case of the disqualification rules already established in the various European countries, it may be particularly appropriate to regulate this serious sanction under company law, taking into account the institutional solutions existing in Europe, both in terms of substantive and procedural law.

[109] In view of these considerations, the Constitutional Court annulled Section 9/C of the Companies Act effective as of 31 December 2018 on the basis of Article B (1), Article XII (1) and Article XXVIII (1) of the Fundamental Law.

[110] The Constitutional Court, in view of the unconstitutionality in violation of the Fundamental law of those provisions, declined to address the element of the petition relating to Article O of the Fundamental Law.

[111] 8. In Case No Ktf.V.40.297/2015 pending before the judge of Pécs Regional Court of Appeals, the Constitutional Court dismissed the petition seeking a prohibition of application, since the Constitutional Court had found that the infringement of the Fundamental Law had future effect and since the constitutional issue could only be remedied by legislation.

V

[112] The constitutional complaint against the Order of the Curia No Gfv.VII.30.047/2016/3 is unfounded as follows.

[113] 1. As explained above, Section 9/C of the Companies Act established strict liability. It follows from that provision that the court has no discretion and lacks the procedural guarantees necessary for the assessment and determination of imputability in applying the sanction. Accordingly, it is irrelevant for the application of the disqualification whether the 'member relieved from his or her shareholding' or the executive officer acted with due diligence in concluding a transaction with a person who does not jeopardise the integrity of the economic life, since the court is not entitled to consider this under Section 9/C of the Companies Act. However, as the Constitutional Court has held, such a method of regulation is contrary to the Fundamental Law, just as it would be questionable if the legislator were to make the executive officer who resigns from office liable for the future conduct of the executive

officer(s) who succeed him in the company within one year, which cannot be foreseen, excluded or influenced in any way by him or her.

[114] 2. Having found that the rule applied in the present case was contrary to the Fundamental Law, the Constitutional Court, however, for the reasons explained above, pronounced it as having future effect, and therefore the Constitutional Court could not rule on the prohibition of application of the legal provision in force until the date of annulment in an individual case, since this would grant an individual exemption from the application of a norm in force for the time being.

[115] In view of the above, the Constitutional Court dismissed the constitutional complaint raised against the Order of the Curia Gfv.VII.30.047/2016/3 in respect of all the elements of the petition.

VI

[116] This Decision shall be published in the Hungarian Official Gazette pursuant to the first sentence of Section 44 (1) of the Constitutional Court Act.

Budapest, 2 October 2018

Dr. Tamás Sulyok sgd., Chief Justice of the Constitutional Court

Dr. István Balsai sgd., Justice of the Constitutional Court

Dr. Ágnes Czine sgd., Justice of the Constitutional Court

Dr. Tamás Sulyok sgd., Chief Justice of the Constitutional Court, on behalf of *dr. Egon Dienes-Oehm* Justice-Rapporteur of the Constitutional Court, prevented from signing

Dr. Attila Horváth sgd., Justice of the Constitutional Court

Dr. Ildikó Hörcher-Marosi sgd., Justice of the Constitutional Court

Dr. Imre Juhász sgd., Justice of the Constitutional Court

Dr. Béla Pokol sgd., Justice of the Constitutional Court

Dr. László Salamon sgd., Justice of the Constitutional Court

Dr. Balázs Schanda sgd., Justice of the Constitutional Court

Dr. István Stumpf sgd., Justice of the Constitutional Court

Dr. Marcel Szabó sgd., Justice of the Constitutional Court

Dr. Péter Szalay sgd., Justice of the Constitutional Court

Dr. Mária Szívós sgd., Justice of the Constitutional Court

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

Concurring reasoning by *Dr. Mária Szívós* Justice of the Constitutional Court

[117] Pursuant to Section 66 (3) of the Constitutional Court Act, I append the following concurring reasoning to the Decision.

[118] The Decision annuls, with future effect as of 31 December 2018, the contested provision of the Companies Act, which I myself voted for.

[119] The most important elements of the judicial initiative and of the constitutional complaint are the findings that, first, the Court of Registration has no discretion in applying the disqualification and, second, the executive officers (or certain members) subject to the disqualification have no possibility of exculpation, the law does not provide them with the opportunity to prove that they had no part in the activity giving rise to the company's de-registration; the application of the sanction against them is objective and does not take account of fault (imputability).

[120] In my view, disqualification under company law may have several demonstrable objectives, such as creditor protection, since there are many irrecoverable debts in the economy, precisely because of the increasing number of shell companies trying to evade their payment obligations in various ways. However, those who set up a company or start a business should be aware of the requirements imposed on them by the relevant legislation, whether it be the provisions of the Companies Act or other legislation, and therefore, in this particular case, they should be aware of the consequences of their conduct. Of course, even the most careful and prudent company can be taken by surprise, and this is particularly true if the company is sold; in such a case, it is obviously impossible to know in advance how the new owner will continue to operate the company.

[121] It is precisely in view of such cases that it is necessary to regulate the possibility of exculpation and ensure a rebuttable presumption of disqualification. However, in the present case, it would have been sufficient to call on the legislator to do so by setting an appropriate time limit. Accordingly, the application of the legal consequence under Section 46 (1) of the Constitutional Court Act would have been an appropriate vehicle for the Constitutional Court to point the legislature in the direction of more nuanced rules allowing for exculpation.

Budapest, 2 October 2018

Dr. Mária Szívós sgd.,
Justice of the Constitutional Court