

Decision 3002/2020 (II. 4.) AB

on the dismissal of a constitutional complaint

In the matter of a constitutional complaint, the Panel of the Constitutional Court adopted the following

decision:

1. The Constitutional Court hereby dismisses the constitutional complaint seeking a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of Section 5 (5) of Government Decree 213/1996 (XII. 23.) Korm on Tour Operator and Travel Agency Activities.
2. The Constitutional Court further rejects the constitutional complaint seeking a finding of unconstitutionality in contravention of the Fundamental Law and annulment of Judgement No Kfv.III.37.192/2017/9 of the Curia.

Reasoning

I

[1] 1. The petitioner as a business association, through its legal representative (Dr. Péter Szabó-Nagy, attorney-at-law, at Szabó-Nagy Attorneys-at-Law), filed a constitutional complaint with the Constitutional Court on the basis of Section 26 (1) and Section 27 of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"), in which the petitioner sought a finding of unconstitutionality in violation of the Fundamental Law and annulment of Section 5 (4) and (5) of Government Decree 213/1996 (XII. 23.) Korm on Tour Operator and Travel Agency Activities (hereinafter referred to as the "Government Decree"), Judgement No Kfv.III.37 .192/2017/9 of the Curia, Judgement No 7.K.32.052/2016/9 of Budapest Capital Administrative and labour Court and Resolution No MKEH-KEH-IFO/01214-006/2016 of the Hungarian Trade Licensing Office.

[2] On 18 January 2016, the Commercial Authority Tourism Department of the Hungarian Trade Licensing Office (hereinafter referred to as the "Authority") notified the petitioner of the conduct of an official inspection because the petitioner had failed to comply with its obligation to provide data, as it had not provided evidence of the lawful employment of the person responsible for the activities of the travel operator. Subsequently, by Resolution No MKEH-KEH-IFO/01214-006/2016, the Authority removed the petitioner from the official register of undertakings operating as tour operators and travel agents, stating that it could resume the activity in question as soon as it had proved its eligibility to carry out the activity, after having submitted the declaration of the activity.

[3] The petitioner brought an action for review of this decision, which was dismissed by Budapest-Capital Administrative and Labour Court (hereinafter referred to as the "court") by Judgement No 7.K.32.052/2016/9. In the grounds of its judgement, the court stated that Section 11 (1) (a) of the Government Decree provides for the removal from the register without discretionary power in the event that the client does not comply with a legal condition; therefore, the decision of the authority in the case was in compliance with the applicable legislation. The court, in response to the petitioner's request in the legal proceedings, stated that the reason in the petitioner's sphere of interest could not result in the legislation being contrary to the Fundamental Law, and in the grounds of its judgement it referred to the judicial practice that the grounds for dismissing the request to initiate proceedings before the Constitutional Court would constitute a decision on the issue of constitutionality, which does not fall within the competence of the court seised of the matter (KGD2010. 184).

[4] The Curia, acting on the petitioner's request for review, dismissed the request by Judgement No Kfv.III.37.192/2017/9. In the statement of grounds for its judgement, it stated that it could not address the merits of the petitioner's constitutional concerns in its proceedings, but at the same time considered whether the court had lawfully dismissed the petitioner's application to initiate proceedings before the Constitutional Court. In this context, it explained in its statement of grounds that it is sufficient for the court to "merely indicate that it did not find it justified in submitting a petition to the Constitutional Court". If the judge were obliged, reads the Curia's reasoning, to justify why the law he applies does not infringe the constitutional premises invoked by the party, or even if he were forced to demonstrate in some way that the rule is constitutional, the judge would be acting directly or indirectly within the powers of the Constitutional Court as laid down in the Constitution, and would be depriving the Constitutional Court of its competence. In the statement of grounds for its judgement, the Curia also stated that "the conditions for entering into a particular form of business or for carrying on a particular form of business may be regulated by the State, and may even be tightened up where appropriate. There is 'a legitimate interest' in laying down the conditions for the activity of a tour operator, which must be reviewed periodically". In addition, the Curia considered the legality of the decision and the procedure of the court of first instance in the case. In this context, the Curia ruled that the court had correctly chosen the applicable law, that is, the relevant provisions of the Government Decree, and had applied them correctly.

[5] 2. The petitioner subsequently filed a constitutional complaint. In the petitioner's view, the provisions of the Government Decree referred to in the petition violate Article M (1) to (2), Article I (3), Article XII (1) and (2), Article B (1), Article C (1), Article 15 (2) of the Fundamental Law, Article 15 (1), Article 31 (1) and Article 47 of the European Charter of Fundamental Rights, as well as Article 6 (1) and Article 13 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter referred to as the "Human Rights Convention" or the "ECHR").

[6] The petitioner alleged a breach of Article M (1) to (2) of the Fundamental Law in that the contested provisions of the Government Decree exclude "hundreds of small domestic enterprises" from the competitive market and unreasonably and unprofessionally hinder their creation, since low turnover enterprises are excluded from engaging in this economic activity

by virtue of the requirements. The petitioner also submitted that it only organises one or a few tours a year, the revenue from which does not cover the cost of complying with the conditions, and that it is not necessary, in its view, to employ a person for twenty hours for that purpose.

[7] Alleging a violation of Article I (3) of the Fundamental Law, the petition argued that the Fundamental Law "only allows restrictions on fundamental rights by an Act of Parliament"; in this context, it also argued that it was contrary to Section 3, Section 4 and Section 5 (3) of Act CXXX of 2010 on Legislation (hereinafter referred to as the "Act on Legislation") for the Government Decree to contain restrictions that should have been laid down by an Act.

[8] By reference to Article XII (1) and (2) of the Fundamental Law, the petitioner also claims that the contested provisions of the Government Decree unjustifiably and unreasonably restrict the right of a person with the appropriate professional qualifications to carry out his activities on a part-time basis, even in the case of several tour operators.

[9] The petitioner submits that the contested provisions of the Government Decree are contrary to Article B (1) of the Fundamental Law because the Government issued the legislation without authorisation. The impugned provision is also contrary to the principle of the rule of law declared in the Fundamental Law because it is "unreasonable", "unprofessional" and "partially unenforceable". The legislator has, in the petitioner's view, interfered without justification with the internal organisation of work in undertakings by prescribing the time frame for the employment of a worker in a given work area. The introduction of the restrictive provisions also 'overruled' the petitioner's acquired rights, since in previous years the petitioner had carried on tour operator activities in accordance with the law. The principle of the rule of law declared in the Fundamental Law [Article B (1)] is also infringed, in the petitioner's view, by the fact that the Government Decree is in breach of the provisions of Section 5 (4) and (5) of the Act on Legislation and Section 6/F (2) (a) of Act CLXIV of 2005 on Trade (hereinafter referred to as the "Act on Trade"). The above-mentioned provision of the Act on Trade did not authorise the Government to supplement the statutory provisions, to lay down additional provisions to those statutory provisions or to lay down detailed rules for the contractual relationship. On the same ground, the petitioner also alleges infringement of Article C (1) of the Fundamental Law.

[10] The petitioner also alleges in its complaint under Section 27 of the Constitutional Court Act that the decision of the Authority No MKEH-KEH-IFO/01214-006/2016, the judgement of the court No 7.K.32.052/2016/9 and the judgement of the Curia No Kfv.III.37.192/2017/9 are contrary to the Fundamental Law, essentially claiming that they were adopted by the bodies implementing the law on the basis of a law that is contrary to the Fundamental Law. The petitioner submits that the above decisions infringe Article 6, Article 13, Article 15, Article 31 (1) and Article 47 of the Charter of Fundamental Rights, since the bodies responsible for the application of the law enjoined the petitioner from exercising his activity without providing any reasons. In that context, the petitioner also contended that the court had failed to state in its decision the reasons for dismissing the petitioner's application seeking the institution of a constitutional court procedure. The petitioner considers that the failure to state reasons in this context infringes Article XXVIII (1) of the Fundamental Law and Article 6 (1) of the Human rights Convention.

II

[11] 1. The relevant provisions of the Fundamental Law read as follows:

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

"Article C (1) The functioning of the Hungarian State shall be based on the principle of the separation of powers."

"Article M (1) The economy of Hungary shall be based on work which creates value, and on freedom of enterprise.

(2) Hungary shall ensure the conditions for fair economic competition. Hungary shall act against any abuse of a dominant position, and shall protect the rights of consumers."

"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 exercise 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.

(2) Hungary shall strive to create the conditions that ensure that everyone who is able and willing to work has the opportunity to do so."

"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."

[12] 2. The relevant provisions of the Government Decree read as follows:

"Section 5 (4) The person responsible for the activity may hold the position of person responsible for the activity only with one travel operator.

(5) The travel operator shall employ the person responsible for the activity in such a way that he or she performs the tasks related to the activity of tour operator or travel agent, as defined in his or her job description or other employment relationship, for at least twenty hours per week."

III

[13] 1. The Constitutional Court, on the basis of the provisions of Section 56 (2) of the Constitutional Court Act, assessed, first of all, whether the constitutional complaint submitted

complied with the requirements for the constitutional complaint laid down in the Constitutional Court Act. The Constitutional Court found the following in this regard.

[14] The petitioner can be considered to be both entitled and concerned, since it submitted the petition in connection with the case brought by it within the time limit set out in Section 30 (1) of the Constitutional Court Act.

[15] 1.1 The Constitutional Court first of all considered the element of the complaint alleging that the judicial decisions were contrary to the Fundamental Law. The complaint is admissible if it complies with the formal and substantive requirements prescribed by law, in particular with the conditions laid down in Sections 26 to 27 and Sections 29 to 31 of the Constitutional Court Act, and with the requirements of the provisions of the Constitutional Court Act; furthermore, pursuant to Section 52 (1), the petition must contain an explicit request. Section 52 (1b) lists the requirements for a constitutional complaint to be explicit. Pursuant to Section 52 (1b) (e) of the Constitutional Court Act, the petition must contain a statement of reasons as to why the contested judicial decision is contrary to the provisions of the Fundamental Law as specified in the relevant petition.

[16] In the present case, the petition filed under Section 27 of the Constitutional Court Act alleges that the courts seised of the case did not state in their decisions the reasons why they had not referred the matter to the Constitutional Court. However, the petitioner failed to explain in this part of its constitutional complaint why it considers that the judicial decisions challenged in a constitutional complaint under Section 27 of the Constitutional Court Act are contrary to the indicated provisions of the Fundamental Law. In the present case, the Constitutional Court also emphasises that, in the absence of a statement of reasons, the application does not comply with the requirement of being explicit as laid down in Section 52 (1b) of the Constitutional Court Act, and it is not possible to adjudicate on the petition. The petition should have expressly stated why the challenged judicial decision violates the indicated provision of the Fundamental Law {Decision 34/2014 (XI. 14.) AB, Reasoning [212]}.

[17] In the context of the violation of the right to a fair trial, the Constitutional Court notes that the obligation to state reasons, which is part of the right to a fair trial under Article XXVIII (1) of the Fundamental Law, stipulates as a minimum requirement that the court must consider 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. However, on the basis of the arguments put forward by the petitioner, no doubt arises as to the infringement of the obligation to state reasons.

[18] The power of the judge to initiate a specific norm control procedure, based on Article 24(2)(b) of the Fundamental Law and Section 25(1) of the Constitutional Court Act, is connected with the first clause of Article 26 (1) of the Fundamental Law. The purpose of this authorisation is to enable the judge to decide upon the rights and obligations brought before him on the basis of constitutional law. The judicial power is therefore not a legal protection of the litigants or the protection of their fundamental rights, but it is a right and / or obligation of the judge as enshrined in the Fundamental Law. The Constitutional Court, in interpreting the power to

initiate proceedings declared in the Constitutional Court Act and granted to the judge protected by the Fundamental Law, stated that "the essence of the legal institution, and its specificity in comparison to abstract *ex post* review procedures, is that the judge, in deciding the case, renders his decision in accordance with the Fundamental Law, that is, subject to the law governing the constitution" {Decision 3113/2017 (V. 22.) AB, Reasoning [4]}. Thus, although a party may seek the institution of constitutional court proceedings in the course of litigation, this may only be undertaken if the judge is convinced that the constitutionality of the law applicable in the litigation is called into question. In the light of these considerations, it may be concluded that the observations of the petitioner on the merits of the case have been considered by the courts hearing the case and their assessment has been reported {Order 3179/2016 (IX. 26.) AB, Reasoning [15]; Order 3064/2017 (III. 31.) AB, Reasoning [12]}. Both the court and the Curia have provided sufficient reasons for their position on the petitioner's constitutional concerns (*cf.* page 4 of the court's judgement No 7.K.32.052/2016/9 and points [28] to [39] of the Curia's judgement No Kfv.III.37.192/2017/9).

[19] On the basis of all the preceding considerations, the constitutional complaint submitted on the basis of Section 27 of the Constitutional Court Act fails to comply with Section 52 (1b) (b) and (e) of the Constitutional Court Act.

[20] 1.2 In the following, the Constitutional Court assessed the element of the complaint alleging that the contested provisions of the Government Decree are in breach of the Fundamental Law.

[21] In his constitutional complaint submitted pursuant to Section 26 (1) of the Constitutional Court Act, the petitioner alleged, *inter alia*, a violation of Article I (1) to (3), Article B (1), Article C (1), Article M (1) and (2) and Article XII (2) of the Fundamental Law.

[22] In line with the Constitutional Court's established practice in relation to Article I of the Fundamental Law, "the relevant provisions of the Fundamental Law define the obligations of the State to protect and guarantee fundamental rights, and therefore there is no room for a constitutional complaint directly in relation to those provisions." {Order 3231/2014 (IX. 22.) AB, Reasoning [8]; Decision 3024/2015 (II. 9.) AB, Reasoning [32]}.

[23] The Constitutional Court has maintained its previously established practice in the context of the complaint filed in connection with Article B (1) of the Fundamental Law: legal certainty is not a fundamental right, and a constitutional complaint may be based on its violation only in exceptional cases, namely in the case of retroactive legislation and lack of preparation time {Order 3268/2012 (X. 4.) AB, Reasoning [14] to [17]; Order 3322/2012 (XI. 12.) AB, Reasoning [10]; Order 3323/2012 (XI. 12.) AB, Reasoning [9]; Order 3324/2012 (XI. 12.) AB, Reasoning [9]; Order 3325/2012 (XI. 12.) AB, Reasoning [11]}. The petitioner did not rest his complaint on this exceptional scope, but on legal certainty in general.

[24] Article C (1) of the Fundamental Law lays down the constitutional principle of the separation of powers, in relation to which the Constitutional Court has already held that, as there is no right guaranteed by the Fundamental Law, a constitutional complaint cannot be based on a violation of that right {Decision 3384/2018 (XII. 14.) AB, Reasoning [21]}.

[25] The Constitutional Court has also determined, in connection with Article XII (2) of the Fundamental Law, that this provision does not confer a fundamental right either, “but primarily provides for a State objective, a community value or a principle of national economic organisation and, accordingly, in line with the established practice of the Constitutional Court, a constitutional complaint cannot be based on Article XII (2) of the Fundamental Law” {Order 3146/2013 (VII. 16.) AB, Reasoning [38]; Order 3015/2015 (I. 27.) AB, Reasoning [11]; Decision 3076/2017 (IV. 28.) AB, Reasoning [14]}.

[26] In accordance with the consistent practice of the Constitutional Court, Article M (1) and (2) of the Fundamental Law cannot be considered as a right of the petitioners guaranteed by the Fundamental Law, and therefore, no constitutional complaint may be based on them {see, for example, Order 3108/2016 (VI. 3.) AB, Reasoning [23]}.

[27] The Constitutional Court could not conduct an inquiry into the merits of the above provisions of the Fundamental Law, as the petition does not meet the requirement of Section 26 (1) (a) of the Constitutional Court Act, pursuant to which a constitutional complaint may be filed in the case where the petitioner’s “rights enshrined in the Fundamental Law were violated”.

[28] 1.3 The Constitutional Court shall, pursuant to Article 24 (2) (f) of the Fundamental Law (review of the conflict with an international treaty), review legislation on the initiative of the petitioners or in the course of any of its procedures of its own motion. The procedure may be initiated by a quarter of the Members of Parliament, the Government, the President of the Curia, the Prosecutor General and the Commissioner for Fundamental Rights. A judge shall, in addition to ordering a stay in court proceedings, initiate the procedure of the Constitutional Court if, in the course of the adjudication of an individual case pending before him, a statute is to be applied which he finds to be in breach of an international treaty [Section 32 (2) of the Constitutional Court Act]. Since, on the basis of the above, the petition for a finding that a statute is in breach of an international treaty and for its annulment is not from a legitimate source, the Constitutional Court has not considered the merits of the petition in this respect [Section 55 (4) (b) of the Constitutional Court Act].

[29] 1.4 The petitioner alleged a violation of Article XII (1) and (2) of the Fundamental Law in connection with Section 5 (4) of the Government Decree, primarily because the contested provisions of the Government Decree unjustifiably and unreasonably restrict the right of a person with appropriate professional qualifications to perform his or her activities on a part-time basis, even with several tour operators. The Constitutional Court emphasises that the alleged breach of the Fundamental Law in relation to Article XII (1) and (2) of the Fundamental Law in this context cannot arise in relation to the petitioner, but in relation to the “person responsible for the activity” (that is, the employee working for the tour operator) as a (fundamental) right guaranteed by the Fundamental Law which has been infringed. On the basis of the arguments put forward by the petitioner in this connection, in view of the fact that Section 5 (4) of the Government Decree does not contain a provision relating to the petitioner, the alleged infringement of the Fundamental Law by this provision of the Government Decree cannot be reviewed on the merits.

[30] 1.5 The petitioner also relied, in the context of the alleged infringement of his right to enterprise, on the fact that Section 5 (5) of the Government Decree unreasonably and unprofessionally restricts his right to engage in the activity of tour operator in the future. He also stated in his arguments that the income from his travel agency activity was not sufficient to meet the requirement of the contested provision of the Government Decree (full-time employment of one person). The petitioner put forward his arguments in relation to Article XII (1) to (2) of the Fundamental Law and Article M (1) to (2) together. The Constitutional Court assessed the arguments in terms of their content and, with regard to the infringement of Article XII (1) of the Fundamental Law, in the light of Section 29 of the Constitutional Court Act. The question of the restrictive nature of the regulation, the necessity and proportionality of the restriction of fundamental rights, the legal context in which an entrepreneur engaged in travel agency and tour operator is obliged to employ a "person responsible for the activity", including the time frame of employment, is a constitutional law issue of fundamental importance.

[31] On the basis of the foregoing, the Constitutional Court ruled on the merits of the complaint in accordance with Section 31 (6) of the Rules of Procedure, without a separate admissibility procedure, from the point of view of the right to enterprise.

IV

[32] The petition is deemed unfounded.

[33] 1. The petitioner submits that the application of the contested provisions of the Government Decree prevents it from carrying on the activity of tour operator, since the condition laid down in the Decree effectively precludes it from entering the market as a small and medium-sized enterprise with a lower turnover or from carrying on an entrepreneurial activity in addition to other gainful economic activities. The Constitutional Court therefore reviewed the constitutional content of the right to enterprise, the constitutional framework of its restriction, considered the relevant regulatory context and then compared the contested legislation with the content of the fundamental right.

[34] 1.1 The Constitutional Court has already protected the right to enterprise in its early practice. In its Decision 21/1994 (V. 16.) AB it concluded that "[t]here is no hierarchical relationship between the right to work, the right to choose freely one's work and occupation in terms of subjective rights, on the one hand, and the right to enterprise, on the other"; therefore, "[w]ork, occupation or enterprise as fundamental subjective rights do not differ from one another" (ABH 1994, 117, 121). This practice was reaffirmed by the Constitutional Court after the entry into force of the Fundamental Law in Decision 3380/2012 (XII. 30.) AB and Decision 3134/2013 (VII. 2.) AB {ABH 2012, 783, 789; and Decision 3134/2013 (VII. 2.) AB, Reasoning [10] to [12], summarized in Decision 3002/2019 (I. 7.) AB, Reasoning [27]}.

[35] Preserving the framework of this doctrine, the Constitutional Court has defined the scope of protection of the right to enterprise as follows: "The right to conduct a business, as

recognised by Article XII (1) of the Fundamental Law, and the right to the free choice of occupation, provide the opportunity to pursue business activities for profit under specific professional, occupational, economic and other conditions" {Decision 3076/2017 (IV. 28.) AB, Reasoning [56]}. The Constitutional Court in its Decision 3243/2014 (X. 3.) AB stated in principle in relation to the fundamental right guaranteed by Article XII (1) of the Fundamental Law that "The Constitutional Court has already stated 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)" (Reasoning [42]).

[36] "The right to enterprise means, but it does not necessarily mean, as a constitutional requirement, that the State should not prevent or render it impossible for a person to become an entrepreneur" {Decision 54/1993 (X. 13.) AB, ABH 1993, 340, 341-342, last reaffirmed in Decision 17/2018 (X. 10.) AB, Reasoning [112]}. The Constitutional Court, in defining the constitutional content of the fundamental right to enterprise, has also pointed out that "[t]he right to enterprise cannot be ascribed a meaning which implies that the legal environment applicable to existing businesses and undertakings is unchangeable" {Decision 282/B/2007 AB, ABH 2007, 2168; most recently reaffirmed in Decision 17/2018 (X. 10.) AB, Reasoning [112]}.

[37] The Constitutional Court has applied and developed a common benchmark for the assessment of the right to engage in an occupation and of possible restrictions on the right to enterprise. However, the test developed is differentiated, since, in the practice of the Constitutional Court, the scope of protection of the right to enterprise extends to the choice of a particular economic (gainful) activity on the one hand, and to the pursuit of an activity already started on the other.

[38] "The right to enterprise and the right to the free choice of occupation, as recognised by Article XII (1) of the Fundamental Law, provide 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 enjoy protection similar to that of civil liberties against interference and restrictions by the State. The essence of the right enshrined in Article XII (1) of the Fundamental Law is infringed in particular where a measure of public authority completely deprives the right to the free choice of occupation or to become self-employed for an indefinite period." {Decision 3076/2017 (IV. 28.) AB, Reasoning [56]}.

[39] Decision 20/2013 (VII. 19.) AB held, in the context of the restriction of the right to enterprise, that "[a] restriction must strike a balance between the freedom of the individual and other constitutional and social interests and values such as the environment, health, competition, safety, etc.". Otherwise, the right of free choice would be extinguished" (Reasoning [25]). "The right to choose an occupation is complete if it includes the possibility of exercising it. The free exercise of an occupation, including both its commencement and its continued exercise, is possible within the limits laid down by law. It is clear, however, that this protection cannot be unlimited and that constitutional limits must be set as to its extent, subject to other fundamental rights and values. In considering whether it can be limited, it is necessary to state that the exercise of the fundamental right to the free choice of occupation may be subject to material, that is, objective or subjective criteria. A material criterion is deemed

to exist if its fulfilment is completely independent of the personal characteristics and circumstances of the individual. A restriction is subjective if the conditions can be fulfilled individually. In the latter case, the possibility is in principle open to all on equal terms [...] and the legislator has a wider margin of appreciation than in the case of objective criteria." {Decision 20/2013 (VII. 19.) AB, Reasoning [30] and [31]}. "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." {Decision 16/2018 (X. 8.) AB Reasoning [74]}

[40] Decision 3208/2013 (XI. 18.) AB of the Constitutional Court construed the permissibility of this restriction as follows:

"A fundamental right is restricted by any general legal regulation, which normally can only be an Act of Parliament within the meaning of Article I (3) of the Fundamental Law, and by any individual public administrative act, judicial decision or other State action based on that Act of Parliament, which interferes with the scope of protection of the fundamental right. The scope of protection is the totality of the all conduct and legal situations protected, permitted or guaranteed, by the fundamental right. A norm interfering with any conduct or legal situation within the scope of protection of a fundamental right requires a justification by fundamental rights. Interference in the protected scope (statutory definition) of a fundamental right does not necessarily entail the unconstitutionality of the regulation, but merely the justification for a review of the constitutionality of the regulation. The constitutionality of the regulation under review depends on the outcome of this scrutiny; not all restrictions on fundamental rights are unconstitutional..

The Constitutional Court [...] shall appraise the restriction of fundamental rights by the standard of a necessary and proportionate (or only proportionate) restriction. [Decision 6/1998 (III. 11.) AB, ABH 1998, 98-99; Decision 18/2000 (VI. 6.) AB, ABH 2000, 122-123, and 130]

This standard rests on a specific basis of positive law expressed in the Fundamental Law: Article I (3) of the Fundamental Law lays down the conditions for the restriction of fundamental rights. Article I (3) of the Fundamental Law provides that 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." (Reasoning [81] to [83])

[41] In conclusion, it may be concluded that the scope of protection of the right to enterprise as recognised in Article XII (1) of the Fundamental Law extends not only to the entry of the entrepreneur into the market but also to the continuation of the business, in the legal context in which it is carried on. The right to enterprise is not a fundamental right that cannot be restricted, but the assessment of the legal restriction is different in the case of subjective (that is, requirements that can be met at the will of the entrepreneur) and objective (that is, requirements that are independent of the person of the entrepreneur) requirements. In the case of the former, the legislator has greater margin of appreciation as regards the restriction. The latter, objective legal restrictions, where the entrepreneur is essentially excluded from the

activity and cannot continue the entrepreneurial activity once started, are subject to a more stringent assessment from a constitutional point of view.

[42] 1.2 Subsequently, the Constitutional Court reviewed the body of rules governing the pursuit of the tour operator activity.

[43] The concepts of tour operator activity and travel agency activity are defined in Act CLXIV of 2005 on Trade (hereinafter referred to as the "Act on Trade") as follows. Pursuant to Section 2 (25) of the Act on Trade, travel agency activity shall mean "a commercial activity directed toward travellers where the tour operator combines and sells or offers for sale, on a commercial scale, packages, either directly or through another trader, containing the carriage of passengers, accommodation and other tourist services (such as in particular meals, guided tours, entertainment and cultural programmes), and transmits the traveller's data to another trader in accordance with the Government Decree on Travel Services Contracts, in particular on Contracts Relating to Travel Packages and Linked Travel Arrangements". Under Section 2 (26) of the Act on Trade, travel agency activity shall mean "business activities, on a commercial scale, where the travel agent offers travel services to the traveller arranged by a tour operator, including the conclusion of contracts in the name and on behalf of a tour operator".

[44] The general provisions for the performance of tourist service activities of a commercial nature are set out in Sections 6/B to 6/F of the Act on Trade. Section 6/F of the Act on Trade lays down four conditions for the pursuit of the tour operator activities and the travel agency activities, that is, four limitations on the right to enterprise, the first of which is the existence of a person responsible for the activity in the company wishing to carry on that activity. The term "person responsible for the activity" is defined in Section 6/F (2) (a) of the Act on Trade, which provides that "[t]he activities of tour operators and travel agencies may be performed by a company that has at least one person among its employees engaged under contract of employment or some other form of employment relationship, or in the case of private entrepreneurs the private entrepreneur himself, or a person in his employ under contract for an unfixed duration who participates in tour operator and travel agency services has the vocational training and the time of professional experience prescribed in the Government Decree on the Activities of Travel Agencies and Tour Operators, and has the requisite language skills [...]".

[45] The legislator has empowered the Government in Section 12 (1) (g) of the Act on Trade to adopt "the procedure and the conditions for notification of the activities of tour operators and travel agencies, the requirements relating to the activities of tour operators and travel agencies, furthermore, the content of the register of tour operators and travel agencies, other than personal data, and the detailed procedural rules relating to operating the register; furthermore, the sanctions for any infringement of the provisions of the relevant legislation or of the resolutions adopted by the competent authorities, and the detailed rules on mandatory insurance cover". The Government has fulfilled this obligation by adopting Government Decree 472/2017 (XII. 28.) Korm on Travel Services Contracts, in Particular on Contracts Relating to Travel Packages and Linked Travel Arrangements (hereinafter referred to as the "Government Decree on Travel Services Contracts").

[46] Section 5 (4) and (5) of the Government Decree lay down the detailed rules for the employment of a "person responsible for the activity" of tour operators and travel agents: A "person responsible for the activity" may only perform a responsible position with a travel operator, and Subsection (5) provides that such a person must be employed at least twenty hours a week specifically to perform a task related to the activity of the tour operator or the travel agent.

[47] Section 5 (5) of the Government Decree at issue does not contain any specific provision as to the form of employment of the person responsible for the activity, but only as to the time frame of employment (twenty hours per week). The choice of the form of employment is a matter for the contracting parties (the business association carrying on the tour operator activity and the person responsible for the activity): that task may be carried out under an employment contract or under another type of legal relationship intended to provide employment.

[48] The employment of the person responsible for the activity within the time frame laid down by law is therefore, on the basis of the foregoing, a condition for the commencement and continuation of the travel agency activity. The person carrying on the activity in question must ensure that the first condition is fulfilled at all times during his activity. The legal consequence of failure to comply with this condition is laid down in Section 11 (1) (a) of the Government Decree: A travel operator who fails to comply with the conditions for operation is stricken from the register, that is, he or she may not continue to engage in this activity. This competence is exercised by the Government Office of the Capital City Budapest as a commercial authority on the basis of the authorisation provided for in Section 3 (2) (a) of Government Decree 365/2016 (XI. 29.) Korm on the Designation of the Government Office of the Capital City Budapest as an Authority in Certain Industrial and Commercial Matters and on the Territorial Metrology and Technical Safety Authorities. The Government Office acts in the procedures for the notification and registration of travel businesses, and also performs inspection tasks in relation to the travel businesses included in the register.

[49] In the event of failure to comply with the conditions, the Government Office may, pursuant to Section 11 (1) (a) of the Government Decree, strike the travel operator from its register, but pursuant to Subsection (2) of the same provision, this is not linked to a prohibition on activity for one year by individual decision. The latter sanction is linked only to the grounds for deletion set out in Section 11 (1) (b) to (i). Pursuant to Section 11 (7) of the Government Decree, in the event of striking off the register, the entrepreneur may not continue to operate a tour operator's activities until he or she has notified the Government Office of his or her intention to resume such activities, that is, the deficient obligation may be rectified at any time, and failure to comply with it does not entail a ban for a specified period. Furthermore, under Section 11/A (1) of the Government Decree, fines may be imposed only for infringements of the law where the de-registration has not taken place.

[50] On the basis of an overview of the pertaining legislation, it can be concluded that the travel agency service provided by the petitioner before being stricken from the register constitutes an entrepreneurial activity and is therefore covered by the scope of protection of the fundamental right to enterprise under Article XII (1) of the Fundamental Law.

[51] 1.3 In the present case, Section 5 (5) of the Government Decree under challenge by the petition, by laying down detailed rules for the employment of the person responsible for the activity and by providing for cancellation in the event of failure to comply with the conditions, imposes a barrier to market entry and to the continuation of the business. In the present case, therefore, it was necessary to consider, on the basis of the constitutional complaint, whether the conditions of the legislative environment constitutionally restricted the right to remain in business without infringing Article XII (1) of the Fundamental Law.

[52] On the basis of the established practice of the Constitutional Court, the current requirement, that is, the employment of a competent person who satisfies the conditions in a specific form, is a *conditio sine qua non* for the exercise of the right to enterprise (the tour operator activity and the travel agency activity). It is therefore a condition which does not impose an objective constraint, that is, a constraint which is independent of the person of the entrepreneur and therefore unenforceable, on those wishing to engage in the tour operator activity.

[53] 1.3.1 The Constitutional Court considered whether the contested provision of the Government Decree restricts the right to enterprise to the extent necessary and proportionate to the objective pursued. In the light of the above, the Constitutional Court applied the necessity and proportionality test in the framework outlined above, first assessing the necessity of the restriction of the fundamental right.

[54] Interference by the regulator (the State) in the field of commercial administration may generally shape the economic environment; it may impose requirements on traders and aim at greater protection of consumers' interests.

[55] In the present case, the latter is the basis for the restriction of the fundamental right. The contested provisions of the Government Decree are intended to ensure that, in the case of specialised commercial activities (travel agency and tour operator activities), in order to protect passengers, the undertaking concerned has, during appropriate working hours, a professionally competent person available who, by reason of his or her training and expertise, can be expected to perform the activity with a high level of care. This is particularly important in a sector where the organisation and management of travel may give rise to a multitude of issues concerning the safety of passengers and their property. The regulation will guarantee consumer interests by extending passenger protection and ensuring transparency.

[56] Under Article M (2) of the Fundamental Law, "Hungary [...] shall protect the rights of consumers". In the context of the interpretation of this provision, the Panel has pointed out in its work to date that "[t]he second sentence of Article M (2) generally implies an obligation on the State to establish and maintain a system of institutions to protect consumers' interests, to combat abuses of dominant positions, and to enact legislation to safeguard consumers' rights, taking into account the constitutional values enshrined in the Fundamental Law." {Decision 8/2014 (III. 20.) AB, Reasoning [61]}. On this basis, the State, as regulator, may impose on a commercial operator, for the purpose of consumer protection (public interest), provisions and conditions necessary for its proper functioning, ensuring its professionalism and competence.

[57] In the present case, the right to carry on a business is justified by the consumer protection aspects and interests which can be inferred from Article M (2) of the Fundamental Law. The increased protection of the safety of travellers (as a consumer protection aspect), which concerns both their persons and their property, underlies the need for State interference. In the present case, the State's protection under Article M (2) of the Fundamental Law, which seeks to guarantee the safety of passengers, is two-fold, as a result of the regulatory system: The regulation, by means of the Government Decree, lays down rules applicable to the companies operating the service and the persons employed by them, while the Government Decree on travel services contracts lays down specific rules on the contracts necessary for the use of the service. The existence of a person responsible for the activity, in accordance with Article M (2) of the Fundamental Law, guarantees the interests of consumers in the provision of travel services by ensuring professionalism and a preventive approach.

[58] 1.3.2 The Constitutional Court was then required to ascertain whether the restriction contained in the provision challenged in the petition, that is, the degree of State interference required, was proportionate to the objective pursued, namely the guarantee of greater personal and material safety for consumers.

[59] In its assessment of the proportionality of the restriction, the Constitutional Court also took into account the penalties imposed on the travel operator in the event of failure to comply with the obligation at issue. The requirements applicable to the travel operator and the person responsible for the activity are laid down in the Act on Trade and the Government Decree. Section 6/F (2) (a) to (d) of the Act on Trade and Section 5 of the Government Decree contain the conditions for the exercise of the travel operator activity. In addition, the Act on Trade and the Government Decree also provide for the possibility of being stricken off by the court and, in the last resort, disqualified from the activity if the conditions are not met.

[60] As regards the proportionality test, it should also be recalled that the rule challenged by the petitioner, namely the requirement that all undertakings engaged in tour operator activities must employ a qualified person for twenty hours a week, constitutes a limitation of activity. However, it is a purely subjective limitation, since it is possible for any undertaking to achieve that. The employment of the person responsible for the activity for a statutory period (twenty hours per week) ensures that a competent person is permanently present in the undertaking, not only on an ad hoc basis, but also in terms of the duration of the period. This form of regulation partly ensures that the person responsible for the activity is able to see the entire process of the tour operator's activity (outbound travel arrangements, accommodation and return home). However, the minimum of twenty hours per week does not imply a full-time employment obligation. Nevertheless, the form of employment may be freely agreed between the entrepreneur and the person responsible for the activity. It should also be pointed out that the mandatory requirements concerning the qualifications of the person responsible for the activity, as set out in the previous point, could be rendered meaningless without specifying the time frame for employment, since it would be pointless to have a competent employee formally employed under a contract if that employee were only nominally involved in the work of the undertaking and not in the actual performance of his activity. It should also be noted that the responsibility for the lawful operation of the business is shared between the entrepreneur and

the person responsible for the activity: The safety of passengers using the service is the joint responsibility of the entrepreneur and the person with the professional qualifications.

[61] Lastly, under the legislation, failure to comply with the requirements relating to the person responsible for the activity is punishable by de-registration under the Government Decree. As already indicated in the present decision, the sanction of de-registration is not the same as disqualification. After the de-registration and the rectification of the deficiencies which gave rise thereto, no impediment prevents the entrepreneur from continuing his or her activities as a tour operator.

[62] 2. It follows from the foregoing considerations that the legal provisions at issue do not constitute an obstacle to the continuation of the business, while the proportionate restrictions facilitate its professional and safe operation. The provisions of the Act on Trade and the Government Decree relating to the person carrying out the activity can be enforced if a competent employee is available for a certain period of time (twenty hours per week). Having identified the nature of the restriction, the assessment of the extent of the restriction is based on the technical criteria set out by the Constitutional Court, and it could not be established that Section 5 (5) of the Government Decree challenged in the petition constituted an unnecessary and disproportionate restriction on the right to enterprise under Article XII (1) of the Fundamental Law. The Constitutional Court therefore dismissed the petition alleging infringement of the fundamental right.

Budapest, 21 January 2020

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