

## **Decision 3124/2015 (VII. 9.) AB of the Constitutional Court of Hungary**

### **On the finding of unconstitutionality by non-compliance with the Fundamental Law and annulment of the order of Budapest-Capital Administrative and Labour Court No 34.Kpk.46411/2013/10**

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

decision:

The Constitutional Court finds that the order of Budapest-Capital Administrative and Labour Court No 34.Kpk.46411/2013/10 regarding the late payment penalty is contrary to the Fundamental Law, and therefore annuls the said order.

Reasoning

I

[1] The petitioner as a business organisation lodged a constitutional complaint through its legal representative.

[2] Based on Section 27 of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"), the petitioner sought a finding by the Constitutional Court unconstitutionality by non-conformity with the Fundamental Law and annulment of the order of Budapest-Capital Administrative and Labour Court No 34.Kpk.46411/2013/10.

[3] On the authority of the facts underlying this procedure, the Hungarian Competition Authority (hereinafter referred to as the "Competition Authority") imposed a fine of HUF 1.2 billion against the petitioner in a procedure in competition matters for violation of Section 11 of Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition (hereinafter referred to as the "Unfair Trading Practices Act"). The petitioner challenged the Competition Authority's decision before the court and paid the fine within the time limit for payment. The court of first instance upheld the petitioner's action, set aside the decision of the Competition Authority and ordered the Authority to initiate a new procedure. The court of second instance upheld the judgement of the court of first instance, partly on different grounds provided in its statement of reasons. On 26 October 2011, pursuant to Section 83 (5) of the Unfair Trading Practices Act, the Competition Authority remitted to the petitioner the amount

of the fine plus interest calculated in accordance with the statutory provision, that is, more than HUF 321 million.

[4] The final judgement was challenged by the petitioner and the Competition Authority by way of a request for review. The Curia set aside the final judgement and reversed the judgement at first instance by dismissing the petitioner's action. Subsequently, on 10 September 2013, the petitioner paid the fine again. By an order of 24 September 2013, the Competition Authority initiated enforcement proceedings for the payment of interest on the previously repaid fine and for the payment of late payment penalty (approximately HUF 266 million) for the period from the day following the date of the remit (27 October 2011) until 10 September 2013. The petitioner challenged the order before the court in a non-administrative non-contested procedure, and the court rejected its application. According to the statement of reasons given for the court order, the Competition Authority could lawfully order enforcement in accordance with the provisions of Section 89 (2) of the Unfair Trading Practices Act to recover the amount of undue interest amount in the context of the enforcement of the basic decision (Vj-130/2006. 239.). The Court held that the order for enforcement of the late payment penalty was also lawful, since the Curia judgement had *ex tunc* effect and the Competition Authority's decision had been lawful from the outset. The court held that, in the light of this, "the original state must be restored", that is, a state of affairs must be created as if the obligation to pay the fine had been continuously in force. Thus, for the period during which the amount of the fine was not in the possession of the Competition Authority, the petitioner was liable to pay a late payment penalty pursuant to Section 132 (1) (a) of Act CXL of 2004 on the General Rules of Public Administration Proceedings and Services (hereinafter referred to as the "General Public Administration Proceedings Act"). The court stated, citing a commentary, that the obligation to pay the penalty is independent of the fault (attributability) of the obligor, forms an objective legal consequence of the default and constitutes "the consideration for the use of foreign money (*aliena pecunia*)".

[5] According to the supplemented constitutional complaint, the court order violates the petitioner's right to a fair trial under Article XXVIII (1) of the Fundamental Law, because the court did not fulfil its obligation to state reasons: "the court seized of the matter essentially justified its decision with tautological reasoning and did not assess the arguments supporting the petitioner's application for legal remedy." In relation to the late payment penalty obligation, the petitioner argued that, on the basis of the final judgement, it had lawfully retained the amount of the fine and had not been obliged to pay the fine until the judgement of the Curia. An interpretation to the contrary infringes his right to a fair trial and his right to legal remedy [Article XXVIII (7) of the Fundamental Law]. The right to legal remedy was not effective: the petitioner had to pay a late payment penalty during the review procedure without this being expressly provided for by law. As regards the recovery of late payment penalty, the petitioner considered that the right to a fair trial and the right to legal remedy had been infringed in that the enforcement order had in essence itself created the formal legal basis on the basis of which the interest was recovered. The legal basis for the payment of interest could therefore not be effectively challenged by the petitioner, and the enforcement order was subject to only one non-litigious remedy. This also meant, according to the petitioner, that he could not effectively defend his property. In the absence of an appropriate legal provision, the Competition

Authority deprived the petitioner of its property in enforcement proceedings by an arbitrary and expansive interpretation of the existing legal provisions. The petitioner's right to property under Article XIII (1) of the Fundamental Law was therefore also infringed. Finally, the petitioner also invoked a violation of legal certainty [Article B (1) of the Fundamental Law], because the Competition Authority and the court had based the petitioner's obligation to pay interest (back) on Section 83(5) of the Unfair Trading Practices Act, whereas no such obligation to pay (that is, in the opposite direction) arises from the provision in question. By their arbitrary interpretation of Section 83(5) of the Unfair Trading Practices Act, they caused the petitioner a violation of fundamental rights which is also contrary to the principle of legal certainty.

[6] The petitioner also argued that the violation of the Fundamental Law by the court's order also stems from the violation of the Fundamental Law of the basic decision (that is, the Competition Authority decision which was reinstated by the Curia judgement). The petitioner has also lodged a constitutional complaint against this decision of the Curia. The Constitutional Court partially dismissed and partially rejected this complaint by its Decision 30/2014 (IX. 30.) AB.

[7] The petitioner also indicated a violation of certain fundamental rights enshrined in the European Convention on Human Rights (Article 6 and Article 1 of the First Additional Protocol), but did not submit a separate request or a statement of reasons in this connection.

## II

[8] The provisions of the Fundamental Law cited in the petition read as follows:

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

"Article XIII (1) Everyone shall have the right to property and inheritance. Property shall entail social responsibility..

(2) Property may only be expropriated exceptionally, in the public interest and in those cases and ways provided for by an Act, subject to full, unconditional and immediate compensation."

"Article XXVIII 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.

[...]

(7) Everyone shall have the right to seek legal remedy against any court, authority or other administrative decision which violates his or her rights or legitimate interests."

## III

[9] The Panel of the Constitutional Court seized of the matter admitted the constitutional complaint on 4 November 2014. The Panel held that the constitutional complaint had been filed within the statutory time limit and that the complaint satisfied the requirements for an explicit request under Section 52 (1a) of the Constitutional Court Act. No further appeal was available against the contested order. The petitioner was a party to the main proceedings before the Competition Authority and the order of the Competition Authority is an order to

initiate enforcement of the late payment penalty and the unduly paid interest relating to the fine imposed on the petitioner, for which the petitioner was ordered to pay. The petitioner acted as the applicant in the public administrative non-litigious procedure. The petitioner is therefore to be considered as entitled and concerned. The petitioner alleged a violation of his rights guaranteed by the Fundamental Law [Article XIII; Article XXVIII (1) and (7)]. The order issued in the public administrative non-litigious procedure constitutes a judicial decision on the merits within the meaning of Section 27 of the Constitutional Court Act, despite the fact that the issue of liability in competition law was decided in the decision of the Competition Authority and in the judgements reviewing its legality, and public administrative enforcement is also part of the underlying official proceedings {Decision 13/2015 (V. 14.) AB, Reasoning [63]}. However, the substantive nature of the decision in the application of Section 27 of the Constitutional Court Act must be assessed in the context of the system of the Constitutional Court Act, not in the rules governing the underlying proceedings. In this respect, the Constitutional Court took into account the fact that in the order the court assessed the lawfulness of the initiation of public administrative enforcement, which is to be considered as the merits of the enforcement stage. The Constitutional Court also took into account the fact that the decision of the Competition Authority also provided for the enforcement of a claim (namely the repayment of interest paid by the Competition Authority) which was not expressly provided for in the basic decision; therefore, the enforcement measure essentially constitutes a decision on the merits of the interest repayment.

[10] In its complaint, the petitioner raised an issue of infringement of the Fundamental Law which substantially affected the court's decision in the following contexts: whether it is compatible with the Fundamental Law if the public administrative body uses the enforcement procedure to recover the interest previously paid by it in the absence of an express statutory provision; and whether it is compatible with the indicated provisions of the Fundamental Law that the petitioner, having always acted lawfully in the given situation, could not avoid the late payment penalty obligation as a result of the decision of the Curia.

[11] The Competition Authority inspected the documents of the Constitutional Court proceedings and submitted its observations in writing to the Constitutional Court.

#### IV

[12] The constitutional complaint is partly well-founded.

[13] The Constitutional Court had to review the contested order in two respects. Firstly, as regards the late payment penalty and, secondly, as regards the enforcement of the interest paid. In some aspects (such as the fulfilment of the obligation to state reasons by the court), the constitutional assessment of the issues could be assessed in a joint manner, but in other aspects, a separate assessment was required.

[14] 1. The petitioner challenged the enforcement order primarily on the grounds that the decision imposing liability under competition law was contrary to the Fundamental Law. However, since the Constitutional Court found the petitioner's constitutional complaint against the Curia judgement to be unfounded in its Decision 30/2014 (IX. 30.) AB, the conformity of

the order subject to these proceedings with the Fundamental Law can no longer be doubted on the basis of this context.

[15] 2. The petitioner also complained about the inadequacy of the statement of reasons of the contested court order, which violates his right to a fair trial under Article XXVIII (1) of the Fundamental Law. In this regard, the petitioner referred to Decision 7/2013 (III. 1.) AB, in accordance with which courts are obliged to state the reasons for their decisions in accordance with procedural requirements. In this context, the Constitutional Court has established the minimum requirement that the court must assess the observations of the parties to the proceedings on the merits of the case in sufficient depth and report on its assessment in its decision. (Reasoning [34])

[16] According to the petitioner, the order did not provide an account of the factual and legal grounds for the decision, as it only contained an interpretation of the "consideration for the use of foreign money" which could not be derived from the specific legal provision. As regards the payment of interest, the court merely accepted the Competition Authority's position and made no attempt to consider the points raised by the petitioner.

[17] The Constitutional Court reiterates its previous position that the above-mentioned expectations of the courts' duty to state reasons do not mean that every observation or argument put forward by a party must be rebutted by the judge individually and in detail. The judge may also fulfil his duty to state reasons by disclosing the factual and legal context in its entirety on the basis of the objections raised by the party {Decision 7/2013 (III. 1.) AB, Reasoning [31]}. It is not part of the obligation to state reasons whether or not this reasoning and logical connection is in accordance with the petitioner's understanding or whether the petitioner considers it to be correct or incorrect.

[18] In the present case, the Constitutional Court concluded, on the basis of its review of the specific order and the petitioners' objections in the case, that the court had assessed the situation *ex tunc*, based on the *ex tunc* scope of the curia judgement, and concluded that the Competition Authority's decision was not unlawful. The court thus discarded the chronological approach taken by the petitioner, on which it had based its own reasoning. The different starting point led the court and the petitioner to different conclusions, which does not, however, raise a constitutionally insufficient statement of reasons for the order.

[19] The constitutional complaint cannot therefore be upheld for failure to comply with the obligation to state reasons.

[20] 3. The Constitutional Court then provided an overview of the legal provisions applied in the order. In this context, it found that there is clear and explicit statutory provision regulating the situations in question (obligation to pay late payment penalty from the repayment of the fine after the final judgement until the repayment of the fine after the final judgement, enforcement of the interest paid in enforcement proceedings), does not exist in either the Unfair Trading Practices Act nor in the General Public Administrative Procedure Act. By interpreting the relevant provisions, the court arrived at the legal content on the basis of which it found the Competition Authority's order to be lawful.

[21] One of these relevant rules is Section 89 (2) of the Unfair Trading Practices Act which provides that "The investigator, or the competent competition council in respect of the competent competition council's decisions, shall *ex officio* adopt an order without delay so as to initiate enforcement of its decision adopted in competition monitoring proceedings, if in the case referred to in Section 77 (6) (d), or, in the case defined in Subsection (1) hereof, it finds relying on the information at its disposal that the obligation ordered in the enforceable decision was not fully discharged within the time limit for performance or if performed in non-conformity with the prescribed requirements. The enforcement procedure shall be opened upon delivery of the ruling ordering enforcement to the judgement obligor." The second is the provision of the Unfair Trading Practices Act on the payment of interest [Section 83 (5) thereof], which, as it stood at the time of the repayment, provided that "[i]f the decision of the competent Competition Council violated any legal provision, and as a consequence thereof, the party has the right to reclaim the fine, interest shall be paid on the amount to be repaid at twice the base rate of the central bank at the time.". Finally, the court also applied the provision of the General Public Administrative procedure Act on late payment penalty [Section 132 (1) thereof], which provides that "The obligor shall be charged a late payment penalty: (a) for failure to satisfy his pecuniary obligations in due time, except if an Act provides otherwise; [...]".

[22] 4. The Constitutional Court first assessed the contested order in relation to the late payment penalty.

[23] 4.1 Regarding the nature of the late payment penalty, the Constitutional Court stated in its Decision 13/2015 (V. 14.) AB that "The late payment penalty is a legal consequence in public administration proceedings of the failure to pay within the time limit the obligation to pay money prescribed in the public administrative act on which the enforcement is based, or to reimburse the aid or benefit received under an administrative agreement. By its legal nature, a late payment penalty is a legal disadvantage linked to the failure to perform the (principal) payment obligation within the prescribed time limit. In public administration proceedings, the late payment penalty constitutes an objective legal effect, since it does not depend on whether the failure is attributable to person causing the failure. The late payment penalty produces legal effects of a dual nature: On the one hand, it penalises the failure to comply and thus encourages compliance within the time limit specified in the public administrative act. On the other hand, since the person entitled to the amount of the late payment penalty is the person for whose benefit the obligation to pay is imposed by the enforceable act, it also serves as compensation for the person so entitled.

The obligation to pay a late payment penalty arises when the time limit for voluntary compliance has expired without result (that is, from the day after the last day of the time limit for compliance). The obligation to pay the penalty continues until the obligation to pay the principal amount has been fulfilled. In other words, the obligation to pay the penalty is linked to the failure to comply with the time limit for compliance in the public administration proceedings and not to the enforceability (that is, the moment from which the public administrative decision can be enforced by means of coercive measures by the State). The late payment penalty is therefore a sanction by its legal nature." (Reasoning [77] and [78])

In the present case, the Constitutional Court had therefore to take into account the fact that the late payment penalty is not simply the consideration for the use of foreign money, but a sanction. This is reflected in the wording of the commentary to the General Public Administration Proceedings Act [Complex Jogtár (version available on 4 May 2015), commentary to Section 132 of the General Public Administration Proceedings Act], stating that "[a] late payment penalty is a financial sanction which has a dual function: On the one hand, it reinforces the interest of the obligor in voluntary compliance in respecting the prescribed time limit and, on the other hand, it compensates in the nature of liquidated damages the obligee for the disadvantages suffered by him or her as a result of the delay."

[24] For a long time, the general public administration (State administration) proceedings did not recognise a legal disadvantage in the event of non-payment of a monetary obligation, whereas, for example, in the field of tax law, it had been regulated for a longer period of time. The General Public Administration Proceedings Act created an interest in voluntary compliance with the time limit by introducing the sanction for late payment, the measure of a late payment penalty. The General Public Administration Proceedings Act regulates the late payment penalty as a legal disadvantage independent of fault (attributability in the Hungarian civil law sense). It also creates the possibility for reducing or remitting the penalty if the obligor proves, when enforcement is sought, that the failure to perform is not attributable to him and that a cause beyond his control makes it impossible or would impose a disproportionate burden on him to perform on time. In enforcement proceedings, the late payment penalty may also be dispensed with or reduced as a payment advantage or relieved payment, either on its own or in addition to other facility of payment. The remission or reduction of the late payment penalty requires the consent of the obligee [Section 130 (1) and (2) of the General Public Administration Proceedings Act]. The exemption from (remission of) the late payment penalty is therefore not an automatic act: The penalty may be remitted under certain conditions and only subject to a discretionary decision of the authority.

[25] It follows from the above that, on the one hand, the late payment penalty carries out a similar function as interest on late payment (default interest) in civil law relations. However, the late payment penalty is the consequence of a failure to pay a sum of money arising from a public-law relationship, the terms of which are not freely agreed between the parties, who are in a co-extensive relationship, but unilaterally by the legislature, the State, which is also the party entitled to the amount of the penalty. The specific circumstances arising from the hierarchical relationship cannot therefore be disregarded in the construction of the provisions relating to the late payment penalty.

[26] In this context, the Constitutional Court also assessed the fact that under the current legislation in force, the amount of liquidated damages payable for the "use of foreign money" differs depending on who has used the foreign money without authorisation. Pursuant to Section 83 (5) of the Unfair Trading Practices Act (as of and in force since 1 February 2012), if the State is the user of the foreign currency, the party to the public administration proceedings is only entitled to interest on the amount to be refunded equal to the base rate of the central bank at the time. On the other hand, in accordance with the General Public Administration Proceedings Act, if it is the party to the public administration proceedings that keeps the

foreign money, the amount of the late payment penalty for each calendar day is set at one 365th part of twice the base rate of the central bank at the time of charging the amount of the penalty. The legislator has therefore upset the balance of the amount of the liquidated damages payable for the use of foreign money in favour of the State, which can only be justified by the punitive nature of the late payment penalty under public law. The late payment penalty is therefore not simply the 'consideration for the use of foreign currency', as emphasised in the court order, but the penalty imposed by the State for failure to pay the money due under a public law relationship within the time limit. A legal disadvantage which can be remitted or reduced only by a discretionary decision of the body acting in the exercise of public authority, taking into account the law and with the authorisation of the rightsholder/obligee.

[27] The Constitutional Court also attached particular importance to the fact that in the present case the Competition Authority enforced the penalty against the petitioner for "late" payment of the fine imposed in the procedure in competition matters. The Constitutional Court has stated in its Decision 30/2014 (IX. 30.) AB that in antitrust cases the court in fact decides on a criminal charge, even if the procedure in competition matters cannot be considered as a hard core of criminal law. {Reasoning [60] to [62]} The obligation to pay the fine is therefore the result of the application of the law by the public authority and not directly the consequence of the unlawful conduct, the fine being an explicitly (broadly defined) punitive (repressive) sanction. However, in the absence of a public administration decision constituting an obligation to pay, there is no obligation to pay and therefore no failure to pay.

[28] The Constitutional Court has also kept in mind the effect of court judgements on public administration decisions. In this respect, it should be stressed that "[t]he most frequent decision to be taken in the course of judicial review of public administration is the decision of the court affecting rights which establishes the existence of a public administrative act. The purpose of the statement of claims is to change a legal relationship, since it seeks to have the court set aside an public administration decision (or decisions) which, as a consequence of a breach of the law, either creates, amends or terminates a legal relationship (usually a material one) under public administration law. The same is also the case when the court, as an exceptional solution, allows the court to change the decision of the public administrative body in certain types of cases, in accordance with the Code of Civil Procedure." (A közigazgatási perjog – összefoglaló vélemény. Kúria Közigazgatási-Munkaügyi Kollégium Joggyakorlat-elemző Csoport, pp. 35–36, [http://lb.hu/sites/default/files/joggyak/a\\_kozigazgatasi\\_perjog\\_joggyakorlat-elemzo\\_csoport\\_osszefoglalo\\_velemenye.pdf](http://lb.hu/sites/default/files/joggyak/a_kozigazgatasi_perjog_joggyakorlat-elemzo_csoport_osszefoglalo_velemenye.pdf))

[29] On the basis of the facts, it can be concluded that the Competition Authority had no legal basis to retain the amount of the fine until the Curia's decision, since there was no official act binding the petitioner to pay the fine, since the Competition Authority's decision was set aside. In comparison, the petitioner acted lawfully in all the relevant cases at the relevant time, in accordance with the decision of the Competition Authority and the judgements of the courts: It paid the fine within the time limit for payment indicated in the Competition Authority decision, and also after the Curia judgement. After the final judgement, the Competition Authority returned the amount of the fine to the petitioner by bank transfer; therefore, it was not realistic to expect the petitioner to attempt to pay the fine again in order to avoid the late



payment penalty. Nor was the petitioner able to pay the amount disputed in the Curia proceedings to the Competition Authority in any other way (in view of the disputed nature of the fine), because no such means of payment were provided for in the General Public Administration Proceedings Act or the Unfair Trading Practices Act. The petitioner could not have avoided the obligation to pay the late payment penalty even if only the Competition Authority had lodged an request for review and the petitioner itself had not done so. In other words, by bringing the action, the petitioner essentially placed itself in a situation where, despite its lawful conduct, it had to pay a late payment penalty for the period between the refund of the fine and its re-payment.

[30] According to the solution adopted by the court, the curia judgement has *ex tunc* effect. From this approach, the court concluded that the petitioner had incurred an obligation to pay a late payment penalty during a period of time in relation to the original time limit for performance, which was subsequently deemed to be lawful. This interpretation led directly to the conclusion that, in the circumstances of the case, despite the lawfulness of the procedure following the final judgement, there was no way of avoiding the *ex post* obligation to pay the late payment penalty. The delay had occurred with *ex tunc* effect and the obligation to pay the late payment penalty therefore also arose *ex tunc*.

[31] The Constitutional Court, while accepting that the Curia review judgement possesses *ex tunc* effect, that is, the Competition Authority decision must be considered as if it had always been lawful, nevertheless concluded that such *ex tunc* effect cannot be applied indefinitely. In terms of the application of the legal effects, it is not possible to ignore the fact that, as explained above, the penalty payment is a sanction, and an objective sanction for late performance.

[32] The purpose of the payment of a late payment penalty is to induce the obligor to fulfil his or her payment obligation in a timely manner. However, in such situations, the late payment penalty cannot fulfil that purpose, since the penalty was always paid by the petitioner in accordance with the decisions governing the situation, but the petitioner was nevertheless unable to avoid the penalty. The petitioner was in the situation of having retroactively revived its obligation to pay the fine by the setting aside of the court decision quashing the decision of the Competition Authority, and thus became in default as a result of a circumstance that arose later. It is incompatible with the purpose of an incentive to comply if it becomes objectively known after the event that the person concerned is in fact liable to pay a penalty (fine) and has failed to do so.

[33] 4.2 The Constitutional Court subsequently reviewed whether the situation described above violated any of the petitioner's rights guaranteed by the Fundamental Law.

[34] The petitioner relied on the violation of the right to a fair trial.

[35] Article XXVIII (1) of the Fundamental Law includes the right to apply to the courts {Decision 36/2014 (XII. 18.) AB, Reasoning [66]} which does not simply mean that a person can apply to the courts and thus initiate court proceedings if a right or obligation becomes contentious, but that the dispute is adjudicated on the merits by the court and is finally decided on the merits

by an enforceable decision {Decision 30/2014 (IX. 30.) AB, Reasoning [78]; Decision 22/2013 (VII. 19.) AB, Reasoning [16]}.

[36] Moreover, Article XXVIII (1) establishes as a fundamental right for everyone the right to a fair trial by an independent and impartial tribunal of any charges brought against them, including criminal matters in the broad sense, including sanctions for restrictive (anti-competitive) practices. As held in Decision 30/2014 (IX. 30.) AB, "Article XXVIII (1) of the Fundamental Law imposes an obligation on the State to ensure judicial review of the decision of the Competition Authority through a fair procedure in accordance with Article XXVIII. This also implies that the requirements for a "decision on the merits" must also apply in antitrust cases in a corresponding manner (that is, in a more limited manner than in actual criminal proceedings).

In accordance with Article 25 (2) (b) of the Fundamental Law, the courts decide on the legality of public administration decisions. As a result of the link between the right to a fair trial and the judicial review of public administration decisions, the constitutional requirement formulated in Decision 39/1997 (VII. 1.) AB (ABH 1997, 263) and reaffirmed in Decision 7/2013 (III. 1.) AB (Reasoning [24]) must also be properly applied in competition monitoring proceedings. Accordingly, the court must have the opportunity to adjudicate on the merits of the rights and obligations (in the present case, the »penal charge«) brought before it in accordance with the conditions set out in Article XXVIII (1) of the Fundamental Law [formerly: Article 57 (1) of the Constitution]." (Reasoning [62] and [63])

[37] The specificity of competition matters is that the assessment of the anti-competitive act falls within the competence of a public authority for the first time and not of a court, and the condemning decision can be challenged by the business undertaking subject to the proceedings before a court by means of an . Deciding on the charge can thus only be brought before the court at the request of the person fined. In antitrust cases, therefore, bringing a charge to court takes the form of bringing an action, that is, going to court.

[38] It must be stressed that the right to apply to the courts is an effective and real right [similar to the case law of the European Court of Human Rights: *Bellet v. France* (23805/94) 4 December 1995, para 38; *Kreuz v. Poland* (28249/95) 19 June 2001, paras 52-57]. The legislation applied must not have the effect of preventing a party from availing himself of an effective remedy available. (*Miragall Escolano and Others v. Spain* (38366/97, 38688/97, 40777/98, 40843/98, 41015/98, 41400/98, 41446/98, 41484/98, 41487/98 and 41509/98) 25 January 2000, paragraph 36)

[39] The right to apply to the courts is not an unlimited fundamental right, it can be limited according to the necessity and proportionality test set out in Article I (3) of the Fundamental Law.

[40] The Constitutional Court has held that the imposition of an obligation to pay a late payment penalty in cases such as the present case restricts the right to apply to the courts. In fact, the imposition of a late payment penalty, which cannot be warded off in advance nor can it be avoided subsequently, despite lawful conduct, becomes a sanction for bringing proceedings and has the effect of deterring the exercise of the right to apply to the courts,

since such penalty can be avoided only by refraining from bringing proceedings. This is true even if the situation does not necessarily arise, but depends on the decisions of the courts of first and second instance and on the parties who appeal against the judgements of the courts. The right of access to the courts is limited all the more so because the amount of the late payment penalty is, in fact, unpredictable depending on the length of the Curia proceedings. However, the ex-post imposition of the penalty, which is not consistent with the function of a sanction, does not serve to protect other fundamental rights or constitutional values. It therefore constitutes an unnecessary restriction for the purposes of Article I (3) of the Fundamental Law.

[41] The petitioner also complained of a violation of his right to a remedy, namely in relation to the main proceedings. In his petition, it stated the following: "The remedy granted to the petitioner was inefficient and its content was rendered nugatory, since the Petitioner, on the basis of the Order had to pay a late payment penalty of a sanction-like character for the duration of the review proceedings, without any express legal provision requiring to do so."

[42] The review as an extraordinary remedy falls outside the scope of protection of the right to legal remedy (see for example: Decision 3120/2012 (VII. 26.) AB, Reasoning [22]; Order 3239/2014 (IX. 22.) AB, Reasoning [13]; Order 3045/2015 (II. 20.) AB, Reasoning [11]; Order 3067/2015 (IV. 10.) AB, Reasoning [20]). In this respect, therefore, the infringement of the right to legal remedy cannot be raised on any ground. On the other hand, however, since there is no ordinary appeal within public administration against a decision taken in competition monitoring proceedings, the initiation of judicial proceedings is also intended to give effect to the right to a remedy under Article XXVIII (7). The Constitutional Court therefore included the infringement of the right to a judicial remedy in this context.

[43] "The essential content of the right to legal remedy requires the legislator to provide for the possibility of recourse to another body or to a higher forum within the same organisation in respect of the substantive and adjudicative decisions of the public authorities [Decision 5/1992 (I. 30.) AB, ABH 1992, 27, 31; Decision 22/1995 (III. 31.) AB, ABH 1995, 108, 109]." {Decision 9/2013 (III. 6.) AB, Reasoning [28]} In addition, what is relevant for the exercise of the right to legal remedy is what the forum for redress can actually overrule, that is, what is the scope of such overruling. {Decision 2/2013 (I. 23.) AB, Reasoning [37]} "»The Fundamental Law demands that the legal protection afforded by the right of legal remedy be effective, that is to say, that it be effectively exercised and capable of redressing the prejudice inflicted by the decision. The effectiveness of the right of legal remedy may be influenced by a variety of factors, including the scope of the possibility of overruling, the time limit for addressing such legal remedy, or the rules governing the service of the decision complained of and the effective possibility of its being made known." {Decision 22/2013 (VII. 19.) AB, Reasoning [26]} Furthermore, the possibility of redress is an essential and intrinsic element of any remedy, that is, the remedy conceptually and substantively includes the possibility of redressing the prejudice [Decision 23/1998 (VI. 9.) AB, ABH 1998, 182, 186]" (Reasoning [15]).

[44] In the present case, the petitioner actually exercised its right of legal remedy (that is, it brought an action, and even exhausted the remedies available in the judicial procedure during the proceedings), on the basis of which the courts dealt with the decision of the Competition

Authority on the merits, covering the issues of fact and law. In this context, therefore, the right to legal remedy has not been infringed. However, what the Constitutional Court has said in relation to the right to a fair trial is also correct in relation to the right to legal remedy. The right to legal remedy is not an unlimited fundamental right either, because it may be limited under the conditions laid down in Article I (3) of the Fundamental Law. The subsequently incurred obligation to pay a late payment penalty may be regarded as such a restriction, but its necessity in order to safeguard other fundamental rights or constitutional values cannot be justified, either.

[45] The Constitutional Court therefore concluded that the contested court order violated Article XXVIII (1) and (7) of the Fundamental Law with regard to the imposition of the late payment penalty.

[46] 5. The Constitutional Court also included in its assessment the court order in relation to the initiation of the enforcement of the interest previously paid by the Competition Authority.

[47] This interest is also the consideration for the use of foreign money (*aliena pecunia*), the obligation to pay it and the rate of interest for which is determined by a mandatory provision in the Unfair Trading Practices Act. In terms of its function, therefore, it is also liquidated damages which the State must pay if the decision of the Competition Authority imposing the obligation to pay the fine (penalty) is found to be unlawful before a court and the fine must be refunded. The obligation to pay interest is not, and cannot be, linked to the conduct sanctioned by the fine, since the interest is payable by the State if the decision of the authority is found by the court to be unlawful. By its nature, it is a civil law entitlement, a lump sum compensation for the "damage" caused by an unlawful public administration decision.

[48] As in the case of the late payment penalty, there is no explicit legal provision as to whether the interest previously paid is due for the State if the decision of the Competition Authority is later deemed to be lawful as a result of the Curia's decision, and how (that is, in what procedure) the authority can assert or enforce it. The Competition Authority or the court seised of the matter considered the measure of enforcement of the interest to be the enforcement of the basic decision [Section 89 (2) of the Unfair Trading Practices Act]. Pursuant to the above-mentioned provision of the Unfair Trading Practices Act, the Competition Council acting in the case shall initiate enforcement of its decision in the course of the procedure in competition matters *ex officio* if the obligation imposed by the enforceable decision has not been fulfilled within the prescribed time limit, or has been fulfilled only partially or not in the prescribed manner. By contrast, the basic decision concerns the payment of the fine (penalty) and does not cover interest. However, it is not disputed that the enforcement of the interest paid by means of the enforcement procedure was intended to bring about a definitive settlement of the relationship between the Competition Authority and the petitioner, on the assumption, both public administrative and judicial, that the petitioner was not entitled to interest because of the annulment by the court of second instance of the final judgement of the second instance and the dismissal of the action.

[49] The petitioner submitted, first, that the order of the court infringed Article B (1) because the court had attributed to the mandatory provision in Section 83 (5) of the Unfair Trading

Practices Act content which it did not contain in any interpretation. Being well-established in the annals of the Constitutional Court,, a constitutional complaint for violation of the principles of the rule of law and legal certainty can only be based on an exceptional basis, on the prohibition of retroactive legislation and application of law arising from Article B (1) and on the requirement of sufficient preparation time {Decision 3062/2012 (VII. 26.) AB, Reasoning [86]}. The petitioner, however, based on the violation of legal certainty, challenged only the correctness of the interpretation of the law by the Competition Authority and the court, which, in the absence of a violation of a right guaranteed by the Fundamental Law as a condition under Section 27 of the Constitutional Court Act, cannot form the basis of a constitutional complaint.

[50] At the same time, the Constitutional Court also refers to the fact that the Constitutional Court derived the requirement of subordination of public administration to the law from the principle of the rule of law. It stated that "one of the fundamental pillars of requirements of the rule of law is that bodies vested with public powers must carry out their activities within the organisational framework laid down by law, within the rules of operation established by law, within limits which are determined by law in a manner which can be known and is foreseeable by the citizen." {Decision 56/1991 (XI. 8.) AB, ABH 1991, 454, 456; reaffirmed by Decision 13/2013 (VI. 17.) AB, Reasoning [80]; Decision 2/2015 (II. 2.) AB, Reasoning [20]} "The requirement that the public administration be subject to the rule of law is a requirement deriving from the principle of the rule of law. It is the requirement that the public administrative bodies, intervening in social relations in the exercise of public authority, take their decisions within the organisational framework laid down by law, in the rules of procedure regulated by law, within the framework laid down by substantive law." {Decision 38/2012 (XI.14.) AB, Reasoning [72]}

[51] Article B (1), which enshrines the principle of the rule of law, thus requires that the Competition Authority shall perform its functions within the framework of the law, on the basis of a statutory authorisation, and exercise the powers assigned to it in accordance with the purpose of such functions. The courts are empowered to determine whether the public administration is performing its functions within the legal framework and in accordance with such framework [Article 25 (2) (b) of the Fundamental Law], typically in the context of public administrative litigious and non-litigious proceedings initiated at the request of a party to the public administrative proceedings whose rights or legitimate interests have been infringed. It is therefore for the courts to verify that the public administrative bodies are indeed taking their decisions in accordance with substantive law, within the organisational framework and procedural rules laid down by law. In a constitutional complaint procedure, the Constitutional Court can only intervene in this judicial application and interpretation of the law if a right guaranteed by the Fundamental Law is also infringed because the authorities have exceeded the legal framework.

[52] In the present case, the petitioner also claimed a violation of his right to a fair trial and his right to legal remedy in connection with the enforcement of the interest paid in the public administrative enforcement proceedings, stressing that the petitioner could not bring the matter before the court, which fundamentally affected its property. He did not consider the

public administrative non-litigious procedure to be effective legal protection. the petitioner claimed to have been deprived of its property in a case and in a manner (procedure) not provided for by law, and therefore the court order was also contrary to Article XIII of the Fundamental Law.

[53] With regard to the right to property, the Constitutional Court concluded that although formally the Competition Authority, by initiating the enforcement proceedings, had seized a certain amount of money, that is, the property of the petitioner, in substance it was a question of the petitioner disputing the legal basis for the recovery of the interest (whether the interest paid would be returned to the State on some statutory basis) and the method of its enforcement (public administrative enforcement). The question of whether the deprivation/withdrawal was lawful can be answered by interpreting and applying the relevant statutory provisions and, as such, is not directly related to the constitutional property law. It is therefore not within the competence of the Constitutional Court to determine this question, which is for the courts to decide. However, it is for the Constitutional Court to assess whether the right to a fair trial or the right to legal remedy has been infringed in the present case by the provision of non-litigious public administration proceedings.

[54] In the context of the right to a fair trial, the petitioner complained that the court order prevented it from having access to a judicial body and from having an effective remedy. In the petitioner's view, the dispute should have been decided by the court in (civil) litigation, which could have been the route to effective judicial protection of his property.

[55] In this respect, the Constitutional Court started from the premise that since the Competition Authority's basic decision did not provide for an obligation to pay interest, the initiation of enforcement essentially constitutes a decision on the merits as to whether the State is entitled to the interest paid. According to the Competition Authority, the interest was recoverable by the State on the basis of the Unfair Trading Practices Act, whereas the petitioner argued that the interest could not have been reclaimed from it on the basis of the statutory provision referred to. The court adopted the Competition Authority's interpretation. Nor is it for the Constitutional Court to rule on the question of whether this interpretation or application of the law is correct in the context of the right to a fair trial. It must merely decide whether the petitioner was afforded the right to a fair trial in the course of the non-litigious public administration proceedings in which the dispute was decided.

[56] In this context, the Constitutional Court emphasises that for the purposes of applying Article XXVIII (1) of the Fundamental Law, it is not relevant which form of procedure, that is, litigious or non-litigious, the legislator actually regulates, or which procedure the courts actually decide on a case. On the contrary, the legislature or the those implementing the law would be free to determine the scope of this fundamental right arbitrarily, if necessary. However, the scope of protection of a fundamental right cannot depend on the will of the legislator or the those applying the law. The phrase 'in any court action' in Article XXVIII (1) of the Fundamental Law therefore - similar to the Strasbourg case law on Article 6 (1) of the European Convention on Human Rights (*Le Compte, van Leuven and de Meyere v. Belgium* (6878/75; 7238/75), 23 June 1981, paragraph 45 - in fact refers to matters in 'dispute'. The requirements of Article XXVIII (1) must therefore also be met in proceedings which, although

conducted as non-litigious proceedings, are in fact a dispute (litigation or court action) which is decided by the court.

[57] As explained above, the legal dispute that arose between the Competition Authority and the petitioner concerning interest falls within the scope of protection of Article XXVIII (1) of the Fundamental Law.

[58] Considering the circumstances of the case, the Constitutional Court took into account the fact that the petitioner could challenge the Competition Authority's order before a court. In so doing, it had formally established that there was a right to apply to the courts under Article XXVIII (1) of the Fundamental Law. That access to a court also meant that the petitioner had a right of redress against the order of the Competition Authority, that is to say, the right to another forum, which is a requirement of the right to legal remedy under Article XXVIII(7), was guaranteed. On the other hand, the Panel of the Constitutional Court also took into account that the dispute between the Competition Authority and the petitioner concerned the applicable law and its interpretation, and did not concern the facts, since there was no dispute in the non-litigious procedure either as to whether the interest had been paid by the Competition Authority or as to the amount of the interest. In the case at hand, the court had to decide on the basis of the documents and only on a question of law, and there was no need to adduce evidence. In comparison, the redress and recourse to the courts were not formal: the court could assess the merits of the decision of the authority as to the law applicable to the dispute and could interpret and apply it without any constraints. In this respect, the scope of the public administrative non-litigious procedural framework was not stretched by the dispute that arose: The procedural form did not prevent the effective review of the public administration decision and the resolution of the dispute on the merits.

[59] The petitioner did not, however, plead, either in relation to the relevant rules or to the specific procedure, on what other grounds his right to a fair trial was infringed by the fact that his case was the subject of a public administrative non-litigious procedure and not of a lawsuit. He did not indicate which elements of the procedure, in and of themselves, or as a whole, rendered the procedure unfair. In general, the reference to the fact that the decision on interest was taken in a non-litigious procedure instead of a litigious one does not automatically constitute a violation of the right to a fair trial. However, the petitioner has not put forward any other argument beyond that and has not established that his right to a fair trial has been infringed.

[60] Therefore, the Constitutional Court found the constitutional complaint in relation to interest unfounded in relation to Article XIII and Article XXVIII (1) and (7) of the Fundamental Law. While with regard to Article B (1) thereof, the complaint did not satisfy the statutory condition. The constitutional complaint should have been dismissed on the ground that it was unfounded and the constitutional complaint should have been rejected on the ground that it did not meet the statutory requirements.

[61] The court order, however, treats the request for review against the Competition Authority's order as a single unit, dismissing it in one single order. ["The court dismisses the request for review."] For this reason, the Constitutional Court annulled (in its entirety) the court's decision

(which was found to be contrary to the Fundamental Law in the context of the late payment penalty) on the basis of Section 43 (1) of the Constitutional Court Act. Therefore, the Panel did not render a separate decision on the partial dismissal and rejection of the complaint.

Budapest, 29 June 2015

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

Dr. Egon Dienes-Oehm, , sgd.,  
Justice-Rapporteur of the Constitutional  
Court

Dr. Barnabás Lenkovics, sgd.,  
Justice of the Constitutional Court

Dr. Miklós Lévay, sgd.,  
Justice of the Constitutional Court

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