

Decision 3194/2014 (VII. 15.) AB

On the dismissal of constitutional complaints

In the matter of constitutional complaints seeking a finding of unconstitutionality by conflict with the Fundamental Law of legal provisions, with concurring reasonings by Justices *Dr. Imre Juhász, Dr. Béla Pokol, Dr. László Salamon* and *Dr. István Stumpf* concurring, as well as dissenting opinions by Justices *Dr. András Bragyova, Dr. Miklós Lévay* and *Dr. Kiss László*, the Constitutional Court, sitting as the full court, adopted the following

decision:

The Constitutional Court hereby dismisses the constitutional complaints seeking a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of Section 12 (1) (l) of Act CXCVI of 2011 on National Assets and Section 2 of Act CXXXIV of 2012 on the Restriction of Smoking by Minors and the Retail Sale of Tobacco Products.

Reasoning

I

[1] 1. The Constitutional Court received 16 petitions whereby the petitioners were seeking a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of Section 12 (1) (l) of Act CXCVI of 2011 on National Wealth (hereinafter referred to as the "National Assets Act") and Section 2 of Act CXXXIV of 2012 on the Restriction of Smoking by Minors and the Retail Sale of Tobacco Products (hereinafter referred to as the "Act on Tobacconist's Shops"). The petitioners sought the procedure of the Constitutional Court within the scope of a constitutional complaint contained in Section 26 (2) of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act").

[2] The petitioners alleged an infringement of Article XIII (right to property) and Article XII (1) of the Fundamental Law (right to enterprise) and with respect to both provisions of the Fundamental Law, the petitioners also considered the impugned statutory provisions to be contrary to Article I (3) of the Fundamental Law provisions.

[3] The contested statutory provisions entered into force on 1 July 2013. The impugned provision of the National Assets Act classified the retail sale of tobacco products as one of the exclusive economic activities of the State. The first clause of Section 2 (1) of the Act on Tobacconist's Shops made such retail activity an activity transferred into the competence of the State, whereas Section 2 (2) provides that where the exercise of the State's exclusive right to retail tobacco is granted by the State by means of a concession contract, then the retail sale of tobacco products may be exercised only on the basis of the right granted by the provisions of the concession contract (right to retail sale of tobacco products) and a retail licence for tobacco products. The petitioners objected to the fact that, as of 1 July 2013, under the contested statutory provisions, only those with whom the "monopolistic State" entered into a concession contract may lawfully engage in tobacco retail activities. The petitioners saw the infringement suffered by them as not being able to carry on, with the contested legal provisions taking effect as of 1 July 2013, the retail activity which they had previously carried out in order to obtain regular profits, in good faith and on the basis of an official permit. The petitioners argue that the legal provisions sought to be annulled will lead to a loss of sales revenue from the sale of tobacco products in the future. The petitioners argued that the State had not compensated for their lost revenue and that their exclusion from the tobacco retail business would reduce their turnover and profits and consequently reduce the market value and goodwill of their business as a whole.

[4] 2. The petitioners substantiated the unconstitutionality by non-conformity with the Fundamental Law of the legal provisions sought to be annulled on the following grounds. In their view, the contested statutory provisions raise the case of an infringement of the fundamental right to property [Article XIII of the Fundamental right], for several reasons.

[5] 2.1 In their view, authorizations under permits of official character to carry out an activity fall within the scope of protection under Article XIII of the Fundamental Law. The economic activity actually carried out on the basis of the official permit, on the one hand, provides an opportunity to apply the ownership guarantee and, on the other hand, places economic value on the official permit. In their view, the Constitutional Court considers the right to carry out an activity on the basis of an official permit to be property if the holder of the permit carries out the activity for the purpose of obtaining regular income. In this connection, the petitioners referred to the fact that, in accordance with the relevant case-law of the German Constitutional Court, an established and operating business (*engerichteter und ausgeübter Gewerbebetrieb*) also enjoys property protection. In support of their argument, the petitioners also relied on the case law of the European Court of Human Rights, in particular the judgement in *Tre Traktörer Aktiebolag v. Sweden*, in which, in their view, the withdrawal of the applicant's licence to serve alcoholic beverages led to a finding of a breach of the

Convention. In the grounds of the judgement, the court found that the revocation of the licence reduced the goodwill, customer base and value of the applicant (as a restaurant).

[6] 2.2 As contended by the petitioners, the challenged statutory provisions deprived them of property rights by a normative act without adequate compensation. An official permit is a right with an asset value on the basis of which a lucrative economic activity was carried out, however, the withdrawal of the such right with an asset value (revocation of the official permit by an Act) was not compensated by the State.

[7] 2.3 As put forth by the petitioners, in the case under review there was expropriation pursuant to Article XIII (2) of the Fundamental Law because the State deprived the property of the petitioners by force of law without providing immediate full and unconditional compensation. The value of the petitioners' property has decreased significantly and without compensation as a result of the entry into force of the disputed statutory provisions; therefore, in their opinion a violation of property rights could be established even if the State's interference did not qualify as expropriation.

[8] 2.4 The petitioners also claimed that they had not received compensation for their previous investments in the activity or for the assets used for that purpose, which they could no longer use or sell in the future. The failure to pay compensation, in their view, made the State's interference with the petitioners' property disproportionate.

[9] 2.5 Finally, the petitioners also argued that they had been deprived of their legitimate expectation, their future profit, by the State, and that this was the cause of the greatest damage incurred by the petitioners.

[10] 3. The petitioners also alleged a violation of the right to enterprise [Article XII (1) of the Fundamental Law]. It was explained that if the operating business engaged in the retail sale of tobacco products is not considered as property, the pursuit of the retail business of tobacco products means the exercise of the right to enterprise, which the statutory provisions to be annulled provide only for the State. However, a "monopolistic State" is free to decide whether to permit this activity to another entrepreneur. The petitioners, relying on Article 38 (1) and (2) of the Fundamental Law, explained that, in their view, a cardinal law, such as the National Assets Act, as a cardinal law enacted on the basis of the authorisation granted in Article 38 (1) of the Fundamental Law, cannot arbitrarily refer to certain economic activities as the exclusive economic activities of the State. In their view, the unlimited extension of the exclusive economic activity of the State is incompatible with Article M) (1) of the Fundamental Law.

[11] 3.1 The petitioners have argued that the contested legal provisions infringe the essential content of the fundamental right to both property and enterprise, constitute

an unnecessary and disproportionate restriction on such rights and are therefore contrary to Article I (3) of the Fundamental Law. In their view, even if the regulatory objective referred to by the legislator, the reduction of smoking among minors, were acceptable as a constitutional interest to be protected, the introduction of the state monopoly, the means chosen by the legislator to achieve this, unnecessarily and disproportionately restricts these fundamental rights. As contended by the petitioners, Section 16/A (3) of Act CLV of 1997 on Consumer Protection (hereinafter referred to as the "Consumer Protection Act") has been prohibiting the sale and/or service of tobacco products to persons under the age of 18 since the entry into force on 1 September 2008. In the event of a breach of that prohibition, the Consumer protection Act allowed the consumer protection authority to prohibit the trade in tobacco products for a maximum of one year from the date on which the infringement was established or, in the event of a repeated breach of the prohibition, order the temporary closure of the business involved in the infringement for a maximum period of 30 days, and impose a consumer protection fine of between HUF 15,000 and HUF 500,000 [Section 47 (1) (h) and (i) and Section 47/C of the Consumer Protection Act]. As put forth by the petitioners, the regulation of the Consumer Protection Act described in the petition ensured that minors should not have legal access to tobacco products; thus, there was no reason to introduce a State monopoly; since 1 July 2013, there has been nothing more effective in protecting the health of minors than before. In support of the above, the petitioners invoked the negative impact of the cross-selling opportunities provided for in Section 3, point 8, of the Act on Tobacconist's Shops on the health of minors, and that there are a number of products and services that may be harmful to the health of minors, but these have not been monopolised by the State.

[12] In view of the close substantive connection between their subject matters, the Constitutional Court joined the cases and adjudicated them in a single proceeding pursuant to Section 58 (2) of the Constitutional Court Act.

II

[13] 1. The provisions of the Fundamental Law invoked the petition are as follows:

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

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

necessary and proportionate to the objective pursued and with full respect for the essential content of such 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 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 38 (1) The property of the State and of local governments shall be national assets. The management and protection of national assets shall aim at serving the public interest, meeting common needs and preserving natural resources, as well as at taking into account the needs of future generations. The requirements for preserving and protecting national assets and for the responsible management of national assets shall be laid down in a cardinal Act.

(2) The scope of the exclusive property and of the exclusive economic activities of the State, as well as the limitations and conditions of the disposal of national assets of outstanding importance for the national economy, shall be determined in a cardinal Act with regard to the objectives referred to in paragraph (1).

[14] 2. The provision of the National Assets Act challenged with the petitions are as follows:

“Section 12 (1) The exclusive economic activities of the State shall comprise the following:

(l) the retail trade in tobacco products.”

[15] 3. The provision of the Act on Tobacconist's Shops contested with the petitions are as follows:

“Section 2 (1) The retail trade in tobacco products in Hungary shall constitute an activity exclusively delegated into the competence of the State, and carrying out such activity of which may be ceded by the State for a specified period by way of the conclusion of a concession contract entered into in accordance with the provisions of

Act XVI of 1991 on Concessions (hereinafter referred to as the "Concessions Act") and the provisions of this Act.

(2) Where the State cedes the exercise of the right provided for in Subsection (1) by means of a concession contract, the retail sale of tobacco products may be carried out only on the basis of the right provided for in the provisions of the concession contract (hereinafter referred to as the "right to retail sale of tobacco products") and in possession of a retail license for tobacco products (hereinafter referred to as the "licence")."

III

[16] Pursuant to Section 56 (1) of the Constitutional Court Act, the Constitutional Court first decides on the admissibility of the constitutional complaint, during which the judicial panel proceeding in the matter reviews whether the petition meets the legal, that is, formal and substantive, conditions for the admissibility of the constitutional complaint. In the present case, the Constitutional Court found during the admission procedure that the constitutional complaints met the above-mentioned conditions and were therefore admitted by the Constitutional Court.

IV

[17] The constitutional complaints are unfounded.

[18] 1. The Constitutional Court first examined the infringement of the right to property contained in Article XIII (1) of the Fundamental Law alleged by the complainants. Within the meaning of Article XIII (1), everyone shall have the right to property and inheritance. Property shall entail social responsibility. Based on Article XIII (2) of the Fundamental Law, 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. In its Decision 26/2013 (X. 4.) AB (Reasoning [161]), the Constitutional Court summarised its practice regarding the fundamental right to property as follows: "In its Decision 64/1993 (XII. 22.) AB, the Constitutional Court stated that the scope and manner of constitutional property protection do not necessarily follow the concepts of civil law and cannot be identified with the protection of abstract civil law property. The content of the right to property, protected as a fundamental right, shall be interpreted at all times together with the applicable limitations of public law and the (constitutional) limitations under private law. The extent of the constitutional protection of property is always specific; it depends

upon the subject matter, the object and the function of the property, as well as upon the nature of the restriction as well. Viewed from the other side: The constitutional permissibility of interference by the public authorities into property varies pursuant to these considerations. {ABH 1993, 373, 380. Most recently cited in Order 3219/2012 (IX. 17.) AB, Reasoning [6]}. The same Constitutional Court Decision established the following: »Due to the specificities of the fundamental right protection of property, the focus of the assessment of the constitutionality of State interference, the actual space of the Constitutional Court's assessment, became the assessment of the proportionality of the objective and means, the public interest and the restriction of property. [...] The social and economic role of property, in particular the integration of individual regulatory measures into specific economic policy tasks, makes it much more difficult to establish necessity or inevitability than in the case of other fundamental rights, where a general comparison is more possible (ABH 1993, 381).«” With regard to Article XIII of the Fundamental Law, the Constitutional Court continued to maintain its previous practice, under which the fundamental right to property protects the property already acquired and, in exceptional cases, future entitlements of property. {As for the previous judicial practice of the Court, see Decision 64/1993 (XII. 22.) AB, ABH 1993, 373.; Decision 10/2001 (IV. 12.) AB, ABH 2001, 123., as well as Decision 819/B/2006 AB, ABH 2007, 2038, 2041.; and as for the reaffirmance of the above practice, see Decision 3115/2013. (VI. 4.) AB, Reasoning [34]}.

[19] 2. The petitioners considered that the impugned statutory provisions were contrary to the Fundamental Law due to the violation of the fundamental right to property for several reasons. At the same time, the petitioners, on the basis of partly identical arguments, referred to the unconstitutional restriction of the fundamental right and its deprivation. In this context, the Constitutional Court points out that the impugned legal provisions cannot simultaneously implement an unconstitutional restriction as against the fundamental Law of the fundamental right to property and its deprivation. The Constitutional Court first reviewed the petitioners' arguments alleging a restriction in conflict with the Fundamental Law.

[20] As put forth by the petitioners, the activity of retailing tobacco products for several years in order to earn a regular income holding an official permit is an economic activity protected under Article XIII of the Fundamental Law as qualifying as proprietary protection. In their view, the contested legal provisions excluded the retail sale of tobacco products from the scope of Act CLXIV of 2005 on Trade and transferred it to the exclusive economic activity of the State, thereby depriving the complainants of the right to continue their business activities under an official permit by force of law, which, in their view, led to a restriction contrary to the Fundamental Law of their fundamental right to property. In line with the position taken by the Constitutional Court, the economic activity performed by the complainants is not protected by Article XIII of the

Fundamental Law. The mere fact that the complainants have been engaged in the retail trade in tobacco products for a long period of time, on the basis of an operating licence of indefinite duration, on the premises and in the scope of the business line specified therein, from which they derived regular income, does not mean that said economic activity could be considered as acquired property or a constitutionally protected future entitlement of property and as such would be protected by Article XIII of the Fundamental Law.

[21] The complainants also saw a restriction in conflict with the Fundamental Law on property in the fact that, in their view, by the contested legal provisions, the legislature had revoked, without compensation, the official permits previously issued to them to engage in the activity of retail sale of tobacco products, which, in their view, represented a property right under constitutional property protection. In this context, the Constitutional Court held the following. Prior to the entry into force of the contested provision of the Act on Tobacconist's Shops on 1 July 2013, the pursuit of the activity of retail sale of tobacco products was conditional on the entrepreneur and/or business applying for an operating licence from the notary for the business premises in which the entrepreneur intended to carry out that activity. The operating licence was issued by the notary in the name of the holder indicated in the application, for the retail unit and business line(s) indicated therein for an indefinite period of time. If the activity to be carried on in the retail unit required an additional official permit in addition to the operating licence, the holder was required to have such permit as well. The complainants had been engaged in the retail trade in tobacco products for several years prior to the entry into force of the contested legal provisions, in possession of the said operating licence, in the retail unit and business line indicated therein. Pursuant to the contested provisions of the Act on Tobacconist's Shops, as of 1 July 2013, the tobacco retail activity may be carried out in possession of a right to retail sale of tobacco products and a retail licence for tobacco products granted in a concession contract. The person who was awarded the concession as a result of the concession tender and the holder of the concession contract shall apply to the competent authority responsible for excise matters, the customs authority, for a new type of official permit specifically authorising the activity of retail trade in tobacco products. Under the amended legislation described above, the complainants, may continue to carry out retail sale in the business lines covered by their operating licence and official permit in their retail units that have been granted an operating licence in addition to tobacco retail activities. In the case of shops exclusively engaged in the retail trade of tobacco products (e.g. tobacco specialist shops), as of 1 July 2013, it is only possible to carry out tobacco retail activities in a national tobacco shop in accordance with the conditions of the changed legal regulation, that is, with the right to retail sale of tobacco products and holding a permit to such effect in a national tobacconist's shop. The retail licence for tobacco products was introduced by the Act on Tobacconist's

Shops as an official permit issued by the customs authorities specifically authorising the retail sale of tobacco products; prior to 1 July 2013, that is, prior to the entry into force of the Act on Tobacconist's Shops, there existed no such special permit (the operating licence issued for the business or the excise licence was not such a licence). In the light of the foregoing, it must be held that the contested statutory provisions do not expressly provide for the revocation of the complainants' operating licences or other official permits, and that the complainants may continue to engage in tobacco retailing activities following 1 July 2013 as well, provided that they comply with the conditions contained in the changed legislation.

[22] The petitioners also argued that the official permit allowing for the retail sale of tobacco products was a right with an asset value withdrawn from them by the legislator by a "normative act" without compensation. As explained above, the complainants did not have a special official permit issued by the State to carry out this activity, specifically providing for the retail sale of tobacco products, which was introduced by the contested provision of the Act on Tobacconist's Shops on 1 July 2013 (a retail licence for tobacco products). Furthermore, the contested legal provisions did not provide for the revocation of previously issued official permits (operating licences or excise licences). Operating licenses for an indefinite period in the name and for the business premises of the complainants, for a specific line of business/activity, as well as excise licenses were a statutory condition for the pursuit of the activity of retail sale of tobacco products and could not be considered as a right with an asset value under constitutional property protection. The above-mentioned licences constitute name-confirmed and non-transferable official licenses, which could be revoked by the issuing authority under specific statutory conditions.

[23] The complainants also considered the restriction contrary to the Fundamental Law of the fundamental right to property that the contested legal provisions interfered with the complainants' property in such a way that the value of their property decreased significantly and without compensation. In their view, the State should also have paid compensation for assets which had previously been considered a necessary investment but which could not be recovered or sold at a value appropriate to it by the company concerned (following the "revocation" of official licenses). The Constitutional Court also reaffirms with this Decision that the fundamental right to property enshrined in Article XIII of the Fundamental Law does not guarantee a retained market value of investments and assets acquired by businesses or entrepreneurs necessary for the performance of entrepreneurial activity and made at the beginning of such activity.

[24] 3. The Constitutional Court also reviewed whether the impugned statutory provisions implemented the deprivation of the fundamental right to property (expropriation) on the grounds raised by the complainants. The complainants considered the cessation of their business activities under official permits prior to the

entry into force of the Act on Tobacconist's Shops, the revocation of official permits (as rights with asset value), the reduction in the value of their business as a result of the contested provisions and the loss of their revenue (projected profits) gained tobacco retail activities to be expropriation (deprivation of property) provided for in Article XIII (2) of the Fundamental Law. The Constitutional Court takes the view that the property acquired in the case under review and the constitutionally protected future entitlements of property were not taken away or expropriated; thus, there is no obligation of the State to compensate under Article XIII (2) of the Fundamental Law. As stated above by the Constitutional Court, the retail activity of tobacco products as an economic activity carried out by the complainants in possession of an official permit before the entry into force of the Act on Tobacconist's Shops does not fall within the scope of protection of the fundamental right to property enshrined in Article XIII (1) of the Fundamental Law. The Constitutional Court also found that the impugned statutory provisions did not eliminate *ex lege* the possibility for the complainants to continue their tobacco retail activities as carried out in the past; the Act on Tobacconist's Shops also gives them the opportunity to submit a concession tender and, in the event of a successful application, to obtain a right to retail sale of tobacco products and a retail licence for tobacco products. This is also true for complainants who, prior to the entry into force of the Act on Tobacconist's Shops, carried out tobacco retail activities in a shop that had only an official permit for this product range (e.g. a tobacco specialist shop). The contested provisions do not deprive the complainants of their ownership of the necessary investments previously made and of the assets acquired for business purposes, nor, as explained above, such provisions deprive the complainants of a right with a asset value. The Constitutional Court considers that the hope for future profit of the entrepreneurial activity and the expected profit therefrom cannot be considered as a future entitlement of property recognised and protected by the constitutional property law.

[25] In view of the above, the Constitutional Court dismissed the constitutional complaint alleging violation of Article XIII of the Fundamental Law.

[26] 4. The Constitutional Court also examined constitutional complaints alleging violation of the constitutional principle enshrined in Article M) (1) of the Fundamental Law and the fundamental right to enterprise enshrined in Article XII (1) of the Fundamental Law. As contended by the petitioners, if the operating company engaged in the retail trade of tobacco products before the entry into force of the Act on Tobacconist's Shops is not considered property by the Constitutional Court, it should be considered as the exercise of a fundamental right to enterprise. In this context, the complainants objected to the fact that the State had arbitrarily transferred to its exclusive economic activity the pursuit of the retail trade in tobacco products, which, in their view, infringed freedom of enterprise declared in Article M) of the Fundamental

Law. In their view, the contested provisions infringe the essential content of the right to freedom of enterprise, and the State monopoly on the retail sale of tobacco products constitutes an unnecessary and disproportionate restriction of that fundamental right. The complainants argue that, even assuming that curbing the smoking of minors is acceptable to a constitutional interest that may justify a restriction on the fundamental right to enterprise, the introduction of a State monopoly, the instrument chosen by the legislator, would render the restriction of the fundamental right unnecessary and disproportionate. As put forth by the petitioners, the fact that the retail trade in tobacco products may, as a general rule, be carried out in a national tobacco shop, is presumed to meet the requirement of necessity and proportionality prescribed in Article I (3) of the Fundamental Law; however, the protection of minors is in no way served by the introduction of a State monopoly, according to the complainants. The petitioners also pointed out that the retail sale of all products (e.g. alcoholic beverages or sexual products) that could be considered harmful to the health of minors for a number of reasons could clearly not be made a State monopoly by the State, which, in their view, also supports the State's choice of an inappropriate instrument for the restriction of fundamental rights.

[27] Pursuant to Article 38 (2) of the Fundamental Law, the scope of the exclusive economic activity of the State is determined by a cardinal Act with regard to the purposes of Article 38 (1). Article 38 (1) of the Fundamental Law states that the management and protection of national assets shall aim at serving the public interest, meeting common needs and preserving natural resources, as well as at taking into account the needs of future generations. In the position of the Constitutional Court, the contested provision of the National Assets Act, which classified the retail activity of tobacco products as the exclusive economic activities of the State, cannot be considered as an arbitrary procedure on the part of the legislator. According to the position of the Constitutional Court, the legislator is free to decide which activities it classifies as the exclusive economic activities of the State in a cardinal Act, that is, the National Assets Act, created on the basis of the constitutional authorisation granted in Article 38 (2) of the Fundamental Law, in accordance with the provisions of the Fundamental Law, in particular the objectives set out in Article 38 (1) of the Fundamental Law. In the case under review, the protection of the general public health aspects and the health of young individuals constitute an overriding public interest, which corresponds to the aim at "serving the public interest" in Article 38 (1) of the Fundamental Law, as an objective recognised by the Fundamental Law. Since the contested provision of the National Assets Act serves a purpose recognised and protected by the Fundamental Law, the procedure of the legislature objected to by the complainants (classification of the tobacco retail activities as the exclusive economic activity of the State) cannot be considered arbitrary. Article M (1) placed in the part of the Fundamental Law titled Foundation set forth in principle that economy of Hungary

is based on value-creating work and freedom of enterprise. In line with the governing practice of the Constitutional Court, the constitutional principle enshrined in Article M) (1) of the Fundamental Law strengthens and supports the fundamental right to enterprise provided for in Article XII (1). The Constitutional Court considers that the fact that the legislator included the retail activity of tobacco products in the scope of the exclusive economic activity of the State in order to achieve the objective set forth in Article 38 (1) of the Fundamental Law does not violate the said constitutional principle.

[28] With regard to the complainants' claim alleging infringement of the fundamental right to enterprise enshrined in Article XII (1) of the Fundamental Law, the Constitutional Court ruled as follows. In the present case, neither the complainants nor anyone else is precluded from carrying out value-creating work in the form of an undertaking, nor from engaging in a tobacco retail business classified as an exclusive economic activity of the State as permitted under a concession contract in compliance with the provisions of the Act on Tobacconist's Shops. In line with the relevant practice of the Constitutional Court the fundamental right to enterprise means that anyone shall have the right, granted in the Fundamental Law, to run an enterprise, that is, to be engaged in a business activity. However, the right to enterprise shall mean providing an opportunity to enter into a system of economic conditions created by the State for the enterprises, in other words, granting the possibility of becoming an entrepreneur that may be, in certain cases, bound by or limited to conditions motivated on professional grounds. The right to enterprise is not an absolute right and it may be subject to restrictions: No one has a subjective right to exercise an entrepreneurial activity connected to a specific occupation, nor to exercise it in a particular legal form of enterprise. The right to enterprise only means, but this much is set as a constitutional requirement, that the State should not prevent from or make impossible becoming an entrepreneur {Decision 54/1993 (X. 13.) AB, ABH 1993, 340, 341–342.; reinforced in Decision 32/2012 (VII. 4.) AB, Reasoning [155]}. The Constitutional Court also pointed out in the determination of the constitutional content of the fundamental right to enterprise that "the right to enterprise should not be considered to bear a meaning pursuant to which the legal environment applicable to functioning enterprises could not be changed" {Decision 282/B/2007 AB, ABH 2007, 2168.; reaffirmed in Decision 32/2012 (VII. 4.) AB, Reasoning [161]}. In the case law of the Constitutional Court, the fundamental right to occupation, enterprise receives the same protection from State interference and restriction that is afforded to freedoms. However, the constitutionality of these restrictions is evaluated by different standards depending upon whether it is the practice or the free choice of the occupation which is restricted by the State and, with respect to the latter, the judgement differs depending on whether the State limits the choice of occupation by subjective or by objective criteria. What endangers the right to occupation, enterprise the most is precluding a person

from engaging in that activity, i.e. he is not permitted to choose it. The prescription of subjective requirements is also a restriction on the freedom of choice. But the fulfilment of such requirements is available to every person in principle (if not, it is an objective restriction). For this reason, the legislature's leeway is somewhat greater than in the case of objective restrictions. Finally, restrictions on the exercise of the profession are largely justified from a professional and expedient point of view, causing a fundamental rights problem in borderline cases. {Decision 21/1994 (IV. 16.) AB, ABH 1994, 117, 121., reaffirmed in Decision 3134/2013 (VII. 2.) AB, Reasoning [13]}

[29] The Constitutional Court shared the complainants' view that their long-term tobacco retail activity before the entry into force of the Act on Tobacconist's Shops constituted a business activity and as such falls within the scope of protection of the fundamental right to enterprise under Article XII (1) of the Fundamental Law. The Constitutional Court also shared the view of the complainants that in the present case the said fundamental right could be restricted on the basis of the constitutional provisions contained in Article I (3) of the Fundamental Law. The Constitutional Court maintains that the impugned legal provisions do not deprive the essential content of the fundamental right to enterprise: They do not preclude the complainants from carrying out the value-creating work within the framework of entrepreneurial activity of their choice. The above finding is also true of the tobacco retail activity carried out by the complainants before the entry into force of the contested legal provisions as a (specific) business activity. The Constitutional Court found the violation of the essential content of the fundamental right to an enterprise where the legislator completely deprived certain market participants of the right to freely choose an occupation and to exercise the given enterprise for an indefinite period of time. {Decision 71/2009 (IV. 30.) AB, ABH 2009, 699, 709., reaffirmed in Decision 32/2012 (VII. 4.) AB, Reasoning [40]} This is not the case here. The contested statutory provisions have not completely deprived the complainants, for an indefinite time, of the possibility of performing a business activity (the retail trade of tobacco products); and they raised subjective limitations on exercising the activity that could be fulfilled either by the petitioners or by an enterprise, which has not carried out such an activity before. Neither the complainants, nor anyone else are deprived of the possibility of exercising this business activity, in accordance with the statutory provisions of the Act on tobacconist's shops, after a successful competition.

[30] However, the Constitutional Court also found that the impugned legal provisions, compared to the previously effective regulation, placed new subjective restrictions on the pursuit of the tobacco retail activity as a business activity where the acquisition of the right to retail sale of tobacco products and, on that basis, the new type of retail license for tobacco products have been made a legal condition for that business activity. Pursuant to Section 2 (2) of the Act on Tobacconist's Shops, after the entry into

force of the Act, tobacco retail activities may be carried out only on the basis of the right provided by the concession contract concluded on the basis of a successful concession tender (right to retail sale of tobacco products) and in possession of a retail licence for tobacco products. Following the entry into force of the Act on Tobacconist's Shops on 1 July 2013, the complainants were no longer able to carry out the said retail activity under the legal provisions previously in force, they had the option to continue to do so, at their discretion, if they complied with the new legal conditions imposed by the contested legal provisions. Although the contested legal provisions did not, *ex lege*, revoke the complainants' official licenses, but on this basis, the complainants were no longer allowed to engage in tobacco retail activities after 1 July 2013; if they decided to continue the said retail activity, they had to obtain the permit referred to in Section 2 (2) and Section 13 (2) of the Act on Tobacconist's Shops. The impugned legal provisions thus changed the legal conditions for carrying out the retail activity of tobacco products to the detriment of the complainants, as they raised new subjective barriers to the pursuit of the business activity. In the case under review, the Constitutional Court had to decide whether the legal provisions introduced by the impugned legal provisions restricting the exercise of the fundamental right to enterprise to the detriment of the complainants complied with the constitutional provisions of Article I (3) of the Fundamental Law setting forth conditions for the constitutional restriction of fundamental rights. Under Article I (3) of the Fundamental Law, a fundamental right may only be restricted in order to allow the exercise of another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary, proportionately to the objective pursued, and respecting the essential content of such fundamental right. The preamble to the Act on Tobacconist's Shops clearly indicates the reasons determined by the legislator for the restriction of the tobacco retail activity as it appears in the Act, that is, the introduction of stricter provisions compared to the those under the previous regulation. The aim of the legislator was to curb the smoking of under-age individuals and, for this purpose, it limited the broad retail availability and appearance of tobacco products as previously provided by the regulations in force. Within the meaning of Article XX (1) of the Fundamental Law, everyone shall have the right to physical and mental health. Pursuant to Article XV (5) of the Fundamental Law, by means of separate measures, Hungary shall protect families, children, women, the elderly and those living with disabilities Article XVI (1) lays down that every child shall have the right to the protection and care necessary for his or her proper physical, mental and moral development. In the course of performing the objective obligation of institutional protection securing the enforcement/performance of the fundamental rights and the constitutional obligation mentioned above, the State shall secure that the harms affecting physical and mental health of children, and of under-age persons, would be as little as possible. Tobacco products are market goods whose health effects are well known. Reducing smoking

among young people and thereby improving the public health status of society in the medium and long term is not only a key public health objective in the regulation of the Act on Tobacconist's Shops, but also a constitutional (public) interest for the protection of the above-mentioned fundamental rights. The legislator may freely assess, within the limits of the Fundamental Law, the scope of the preventive statutory regulation it intends to develop to minimise the risks, in the framework of the protection of the fundamental rights and the performance of the obligation of institutional protection serving the above, for the purpose of protecting the health of children and of under-age persons. To choose from the potential regulatory methods shall be the duty and the responsibility of the legislator; in the case under review, the legislator could have introduced a more differentiated regulation, better enforcing the different individual aspects of the affected parties and being more equitable. The Constitutional Court could only examine the constitutional question, within the limits of the petition -, whether the regulation selected by the legislator (and through this, the state interference) was necessary and proportionate for achieving the given aim. The Constitutional Court could not review, in the absence of competence, the practicality, effectiveness and equity of the selected regulation. Determining whether the prohibitions and sanctions imposed in the Consumer Protection Act, as invoked by the complainants, provided sufficient protection (an appropriate safety net), effectively ensured that young people's smoking was curbed and, thus, their health was protected, as explained above, constitutes a discretionary decision under the responsibility of the legislature. The Constitutional Court has already stated in point 4 of the Reasoning that there is a pressing public interest in the State monopoly of the retail activity of tobacco products, justified by health reasons, such as curbing juvenile smoking and thus improving society's public health in the medium and long term. The Constitutional Court takes the view that the fundamental rights enshrined in Article XX (1) and Article XVI (1) of the Fundamental Law; moreover, the fulfilment of the constitutional obligation imposed on the State in Article XV (5) of the Fundamental Law provides a sufficiently weighty constitutional reason for the restriction of the fundamental right to enterprise; consequently, necessity, as a precondition of the constitutionality of restricting a fundamental right as laid down in Article I (3) of the Fundamental Law, is deemed to exist in the case under review.

[31] Reviewing the constitutional condition of proportionality contained in Article I (3) of the Fundamental Law, as held by the Constitutional Court, the impugned legal provisions can be considered not only a necessary but also a proportionate restriction. The transfer of the tobacco retail activity to a State monopoly and, through this, the restriction of the complainants' right to exercise this activity within the framework of an undertaking serve the protection of fundamental constitutional rights and the fulfilment of the obligation of institutional protection imposed on the State. The State's objective obligation of institutional protection to protect those fundamental rights, and

the existence of a constitutionally justifiable public interest, having regard in particular to the special nature of tobacco products (which poses a serious risk to the health of society as a whole, but especially of young individuals and children) and the fact that the monopolised tobacco retailing activity has been authorised by the State under a concession contract for entrepreneurs, cannot be considered as a disproportionate restriction on the fundamental right to enterprise. In reviewing the proportionality of the restriction, the Constitutional Court also took into account the fact that the complainants were engaged in the retail sale of goods that were shown to pose an increased health risk and that the treatment of the diseases it caused imposes a significant budgetary burden on the State. In addition, the retail activity of tobacco products was regulated as a licensed activity under the scope of the Act on Trade, that is, it was placed under State restriction; the introduction of a State monopoly (which is not unprecedented in European states) means a tightening of the restriction, but this is supported by the public interest and the protection of the constitutional fundamental rights indicated above with sufficient constitutional weight. The Constitutional Court also took into account the fact that the legislator, within the limits of the Fundamental Law, enjoys relatively wide discretion about what to consider as a threat to the society and to what extent, and the result of this assessment shall only be regarded to be in conflict with the Fundamental Law, if it is unsuitable to provide a foundation for the subsequent legislation, due to being wrongful. The Constitutional Court takes the view that in the case under review, this cannot be established; the legislation challenged by the complainants responds to a real social emergency, recognisably serves public interest purposes and ensures the enforcement of fundamental rights which must also be protected against the fundamental rights of enterprise. The statutory provisions challenged by the complainants are capable of restricting access to tobacco products, which is widely guaranteed by the previous legislation, and thereby ensuring the protection of the constitutional public interest and the enforcement of the fundamental rights already mentioned above.

[32] In view of the above, the Constitutional Court also dismissed the complaints alleging violation of the principle enshrined in Article M) (1) of the Fundamental Law, the fundamental right enshrined in Article XII (1) and the constitutional provision contained in Article I (3).

Budapest, 7 July 2014

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