Decision 42/2006 (X. 5.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of petitions seeking posterior review of the unconstitutionality of a statute, the Constitutional Court has – with dissenting opinions by dr. András Bragyova, dr. András Holló and dr. Péter Paczolay, Judges of the Constitutional Court – adopted the following

decision:

1. The Constitutional Court holds that Section 95 paras (1) to (3) and Section 96 para. (2) of Act C of 2003 on Electronic Communications are unconstitutional and, therefore, annuls them as of the date of publication of this Decision.

2. The Constitutional Court terminates the proceedings launched in respect of the petitions seeking establishment of the unconstitutionality and annulment of Section 11 para. (1) item *c)* of Act LXVI of 1999 on the amendment of Act LXXII of 1992 on Telecommunications.

The Constitutional Court publishes this Decision in the Official Gazette.

Reasoning

I

1. Almost two hundred petitioners have requested establishment of the unconstitutionality and annulment of certain provisions of Act LXXII of 1992 on Telecommunications (hereinafter: the AT) as well as of Act LXVI of 1999 on its amendment (hereinafter: the AT Amendment). Most of the petitions contain the same text, and some of them were collected and submitted by an association. The Constitutional Court has consolidated the petitions and judged them in a single procedure.

2. Although in different arrangements and wordings, the petitions contain the following arguments relevant to the assessment of unconstitutionality:

- Section 26 para. (1) item *b)* and paras (2) and (3) of the AT, as well as Section 11 para. (1) item *c)* of the AT Amendment violate the provisions contained in Article 13, Article 18 and Article 70/D of the Constitution, as according to the challenged statutes, the restriction or the deprivation of property rights for the benefit of mobile telecommunications service providers is allowed not out of public interest and not only exceptionally, while the establishment of towers and other buildings for mobile telecommunications violates the interests in the protection of the environment and health, and all these damaging effects concern not only the owners of the real estates where the telecommunications facilities are installed,
- the text in Section 26 para. (3) of the AT as established by Section 7 of the AT Amendment restricts the right of disposal by the owner of the real estate, thus violating the right to enterprise and the freedom of competition (Article 9 of the Constitution), and it also impairs Article 59 para. (1) of the Constitution by changing the usability of private flats, and the physiologic effect of the facilities is contrary to Article 18, Article 54 para. (1) and Article 70/ D para. (1) of the Constitution,
- the new text in Section 26 para. (3) of the AT as introduced by Section 7 of the AT Amendment results in a disproportionate restriction of property rights without a technical necessity, and – in the context of other statutes – it bears the risk of development of an unconstitutional judicial practice,
- although the original text in Section 26 para. (3) of the AT was constitutional, and according to that, the restriction of property rights was proportionate, the amendment introduced in Section 7 of the AT Amendment breaks this proportionality by allowing the installation of new telecommunications equipment without the requirement of technical necessity and, therefore, it disproportionately restricts property rights and violates legal certainty,
- the repealing of Section 28 para. (2) of the AT by Section 11 para. (1) item *c)* of the AT Amendment violates Article 9 para. (1) of the Constitution by breaking the harmony guaranteed by the repealed provisions of the AT in respect of Section 8 para. (1) of Act LXV of 1990 on Local Governments and Article 43 para. (2) of the Constitution.

3. On request by the Constitutional Court, the Minister of Healthcare, the Minister of Agriculture and Rural Development, the Minister of Justice, the Minister of the Environment,

and the Minister of Transport, Telecommunications and Water Management have also delivered their opinions on the questions raised in the petitions.

4. Communications – and in particular telecommunications – have changed significantly since the transformation of the political regime in Hungary in 1989. In 1992, the AT replaced the exclusive infrastructure and service monopoly by a concession system. The economic policy aim of allowing competition was – among others – to improve the telecommunications system (with the participation of foreign investors) and to provide sufficient telephone services for the population. Then the legal system of Hungary had to comply more and more with the regulations of the European Union. Upon the expiry of the exclusive rights granted for the telecommunications service providers, for the purpose of harmonising the telecommunications market with the international market, and for further alignment of the Hungarian regulations with the European Union's rules, the Parliament adopted Act XL of 2001 on Communications (hereinafter: the AC), with its Section 103 para. (1) item *e)* repealing the AT.

In the year 2003, a new Act was adopted in the field of communications. According to the reasoning of the Bill submitted to the Parliament, the reason of proposing the new legislation was the fact that the AC "failed to fully meet the expectations" and, on the other hand, a comprehensive reform had taken place in the European Union in order to develop and maintain effective competition, and the Hungarian legislation had to be harmonised with that. In the Union, five new directives and a resolution were elaborated in respect of the telecommunications system. Thus, Act C of 2003 on Electronic Communications (hereinafter: the AEC) also served the purposes of legal harmonisation. Section 165 para. (1) item *a)* of the AEC repealed the AC. Sections 94 to 96 of the AEC contain the provisions corresponding to the rules of the AT amended by the AT Amendment and challenged by the petitioners.

Only the review of statutes in force belongs to the competence of the Constitutional Court. The constitutionality of a repealed statute may only be examined by the Constitutional Court on the basis of a judicial initiative as per Section 38 of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC) or a constitutional complaint as per Section 48 thereof, when the applicability of the statute is also a question to be judged upon. (Decision 335/B/1990/13 AB, ABH 1990, 261, 262) However, the Constitutional Court performs the constitutional review of statutes in force when the legislation in force does contain any provision similar to the one contained in the repealed statute and challenged in the petition.

(Decision 137/B/1991 AB, ABH 1992, 456, 457; Decision 163/B/1991 AB, ABH 1993, 544, 545)

Therefore, the Constitutional Court has performed the constitutional review having regard to the relevant provisions of the AEC.

II

The following statutory provisions have been taken into account when judging upon the petitions:

1. The relevant provisions of the Constitution are as follows:

"Article 8 (1) The Republic of Hungary recognises inviolable and inalienable fundamental human rights. The respect and protection of these rights is a primary obligation of the State.

(2) In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by Act of Parliament; such Act of Parliament, however, may not restrict the basic meaning and contents of fundamental rights."

"Article 9 (1) The economy of Hungary is a market economy, in which public and private property shall receive equal consideration and protection under the law.

(2) The Republic of Hungary recognises and supports the right to enterprise and the freedom of competition in the economy."

"Article 13 (1) The Republic of Hungary guarantees the right to property.

(2) Expropriation shall only be permitted in exceptional cases, when such action is out of public interest, and only in such cases and in the manner stipulated by Act of Parliament, with provision of full, unconditional and immediate compensation."

2. The relevant provisions of the AT are as follows:

"Section 26 (1) The owner (manager or user) of the real estate must tolerate – upon prior notice – the following:

(a) ingress by the authorised representative of the public telecommunications service provider into the territory of the real estate in order to perform maintenance and troubleshooting work;

(b) establishment by the public telecommunications service provider of a telecommunications device, wire or antenna for the purposes of public telecommunications (hereinafter jointly: "telecommunications device") on/under/over/in the real estate, building or facility, provided

that for technical reasons this is the only feasible solution (to be verified by the authority's declaration).

(2) In the case of paragraph (1) item *a)*, the owner of the real estate shall be entitled to compensation in line with the extent of the restriction. In addition, in the case under item *b)*, the owner may enforce the rights according to Section 108 para. (2) of the Civil Code. In the case of expropriation, the party requesting the expropriation shall obtain the authority's opinion as well.

(3) For the purpose of placing a telecommunications device on the real estate and in the case of telecommunication devices installed on the real estate, the authority may pass a resolution, upon the request of the public service provider, establishing – out of public interest – easement or other right to use, or licensing a right to conduits."

3. The relevant provision of the AT Amendment is as follows:

"Section 11 (1) This Act shall enter into force on the 30th day upon its promulgation and at the same time

...

(c) Section 28 para. (2) of the AT,

...

shall be repealed."

The repealed text in Section 28 para. (2) of the AT was the following:

"Any new building above the surface for the purpose of telecommunications shall only be established with the approval of the local government, or the Metropolitan Government in the case of Budapest. In the course of the above, the criteria of landscape- and cityscape protection shall be taken into account in particular."

4. The relevant provisions of the AEC are as follows:

"Section 9 (1) The National Communications Authority (hereinafter referred to as "Authority") is a government office, as a legal entity with national competence. The Authority is governed by the Government and supervised by the Minister."

"Section 10 The Authority

…

(m) shall perform the regulatory functions related to the notification of electronic communications services, frequency management for civilian purposes, identifier

management, keeping the records prescribed by the law, the elimination of interference, overseeing the market, use of real properties, and authorisation of electronic communications structures and building supervision;"

"Section 83 (1) Unless otherwise prescribed by the law, the installation, occupancy, continuation, remodelling and dismantling of electronic communications structures shall be subject to authorisation. With the exception of antennas, antenna support structures and the accessory objects, these authorisations shall be granted by the Authority.

"Section 94 (1) Urban planning and development, road and public utilities construction and rehabilitation projects, and the implementation and renovation of other buildings and structures shall be executed so as to accommodate the installation of electronic communications facilities as provided for specifically in other legislation.

(2) As a general principle, electronic communications equipment shall be installed on public land or by way of sharing existing electronic communications facilities or in facilities owned by public utility service providers. If this is not possible, the installation may also be implemented using private land.

(3) Electronic communications facilities may be installed on public land owned by the local government if no state-owned public land is available for such purpose, or if the installation on the latter is not possible for technical reasons or subject to prohibitive legal provisions. The local government may refuse consent for the facilities to be installed on public land it controls or to grant permission for use of the land only if granting consent is likely to cause injury to the interest of the municipality or its population of extraordinary proportions, or if granting permission for the use of land is prohibited by a statutory provision.

(4) The developer (builder) of an electronic communications installation shall be required to restore the original state of the environs when the building work is done. The owner of another installation, private property or public land owned by the local government used for the installation of electronic communications facilities may make an agreement with the developer so that the environs be restored to a standard higher than the original state if the owner assumes costs exceeding those necessary for the restoration of the original state."

"Section 95 (1) In the absence of an agreement made between the owner of the real estate and the developer, the authority may impose – out of public interest – a restriction on the owner (manager or user) of the affected real estate in using the real estate so that the developer of the facility have an electronic communications facility established on/under/over/in the real estate.

(2) The owner of the real estate shall be entitled to compensation in line with the extent of the restriction. In addition, the owner may enforce the rights according to Section 108 para. (2) of the Civil Code.

(3) For the purpose of placing an electronic communications facility on the real estate and in the case of electronic communication facilities installed on the real estate, the authority may pass a resolution, upon the request of the public service provider, establishing – out of public interest – easement or other right to use.

(4) Failing its approval, the authority may restrict, out of public interest, the use of a property by its owner (manager or user) in order that a duly authorised representative of the electronic communications service provider may enter, subject to prior notice, the property for checking the electronic communications equipment, and for maintenance and repair purposes."

"Section 96 (1) If an electronic communications equipment that is used by the service provider provides the users living or staying in the immediate vicinity thereof with services under conditions more favourable than the normal service conditions or in excess thereof, the service provider shall not be entitled to a compensation therefore either through the subscriber contracts or in any other way.

(2) The electronic communications facility shall be installed on the real estate in a manner not disturbing the owners of the neighbouring real estates, or disturbing them to the least extent under the given circumstances, and in such case the establishment and the operation of the facility shall not be considered unnecessary restrainment under the Civil Code."

5. The relevant provisions of Act IV of 1959 on the Civil Code (hereinafter: the CC) are as follows:

"Section 108 (1) The owner of a real property is obliged to tolerate agencies authorised by specific other legislation to use the real property for a period of time, obtain servient tenement or restrain ownership rights in other ways to the extent that is necessary for the performance of their professional tasks. In such cases, the owner of the real estate shall be entitled to compensation in line with the extent of the hindrance (restriction).

(2) If the use or other restriction terminates or considerably hinders the proper use of the real estate, the owner may request the purchase or expropriation of the real estate."

"Section 115 (3) An owner may demand the termination of illegal intrusions or influences and, if things have been removed from his possession, to have them returned."

"Section 171 (1) A servitude or another right of use may be imposed upon a real property by the resolution of a state agency acting out of public interest, to the benefit of agencies authorised under specific other legislation. The establishment of the right of use shall entail due compensation.

(2) The cases in which the right of use may be established and the provisions on compensation shall be laid down in a separate statute."

"Section 188 (1) If a possessor is deprived of his possession without legal grounds or is restrained in maintaining such possession (illicit power), he shall be entitled to protection of his possession."

"Section 191 (1) A person who is deprived of his possession or is restrained in its enjoyment shall, within one year, be entitled to file a request with the town clerk for the restoration of the original state of possession or for the discontinuance of restraint.

…

(3) The town clerk shall restore the original state of possession and prohibit the trespasser from continuing in this conduct, unless it is obvious that the person who has requested protection of possession is not entitled to possession or has been obliged to tolerate such restraint. The town clerk may also resolve the issues of profits, damages, and costs."

III

1. The petitions filed by the petitioners with reference to Article 13 of the Constitution – based on partly different reasons – are to be examined in the framework of the new regulations, in respect of Section 95 paras (1) to (3) and Section 96 para. (2) of the AEC.

The petitions are well-founded.

2. With regard to the constitutional protection of the right to property, the following shall be taken into account:

a/ Article 13 para. (1) of the Constitution guarantees the right to property. Article 13 para. (2) only permits the deprivation of the right to property in exceptional cases out of public interest, in cases and in the manner stipulated by Act of Parliament, and only if full, unconditional and immediate compensation is provided.

b/ The Constitutional Court holds the right to property to be a fundamental right. [Decision 7/1991 (II. 28.) AB, ABH 1991, 22, 25] The scope of property protected by the above right contains not only to the right to hold property under civil law but all other related pecuniary rights as well. [17/1992 (III.30) AB, ABH 1992, 104, 108] According to Decision 64/1993 (XII. 22.) AB [ABH 1993, 373, (hereinafter: the CCDec.)] repeatedly taken as the basis in the Constitutional Court's practice later on, the right to property is protected by the Constitution as the material fundament of the individual's autonomy to act (380).

c/ The CCDec. examined the constitutionality of the rule on the statutory right of option with regard to the flats transferred from State ownership to local government ownership, stressing that the Constitutional Court took into account the historical circumstances of the matter as well (377). As explained in the CCDec. in respect of the restriction of property right, the restrictions of a public authority nature are enforced on a wide scale, and due to those restrictions, protection similar to the one prescribed for the case of expropriation is often applied. At the same time, a converse tendency has also been developed: the owner must tolerate more and more restrictions without compensation. In particular, the owners of real estates must face many restrictions. In these cases, the concept of public interest is interpreted in a broad sense: the restriction of the right to property is restricted directly for the benefit of a private person, and the serving of the interests of the community is only indirectly pursued. The CCDec. established the principle applicable to examining the restriction of property rights with due account to all the above.

According to the CCDec., the public interest specified in Article 13 para. (2) is to be followed also when restricting the fundamental right to be protected under Article 13 para. (1) of the Constitution since due to the social and economic roles of property it is much more difficult to verify necessity, as a requirement acknowledged when other fundamental rights are to be restricted (381). In the examination of public interest it is sufficient to clarify whether it is justified to refer to public interest in the statute, and if no other fundamental right is violated in addition to the restriction of the right to property. As stated in the CCDec., in addition to examining public interest, the Constitutional Court should assess whether the restriction of the right to property is in proportion with the public interest used as its basis. The smaller protection compared to other fundamental rights (the examination of only public interest instead of the necessity of restriction) can be counterweighted by the Constitutional Court

setting special conditions, for example requesting compensation even if the case is not considered expropriation (382).

d/ Several years after the reformation of the property structure, the Constitutional Court holds it necessary to enforce more stringent requirements for the purpose of protecting the right to property than the ones formulated in the CCDec. in 1993.

Decision 27/2000 (VII. 6) AB examined in respect of the field affected by the legal regulations in question whether public interest may justify the restriction of the ownership of real estates – i.e. the Constitutional Court did not simply accept reference to a theoretical public interest.

The Constitutional Court's solution of setting stricter requirements is not without precedents. To support its arguments, the reasoning of the decision passed in 2000 as mentioned above made reference to Decision 7/1991 (II. 28.) AB [ABH 1991, 22 (hereinafter: CCDec1)], in which the restriction of partial titles pertaining to property right was based on assessing whether the restriction was absolutely necessary. (ABH 2000, 449, 454, similarly: Decision 1256/H/1996. AB, ABH 1996, 789, 796)

In examining the constitutionality of restricting the property rights related to real estates, CCDec1 was based upon Article 8 para. (2) of the Constitution, assessing whether the essence of the right to property was impaired, and whether the restriction was necessary and proportionate. The Constitutional Court examined the aim of the statutory provision setting the restriction with account to the above criteria. (ABH 1991, 22, 26)

The wording of CCDec1 was different from that of the decision passed in 1993 regarding property transfer to local governments. The principle explained in CCDec1 was followed by Decision 2299/B/1991 AB (ABH 1992, 570, 571) and, with reference to the former one, more recently by Decision 33/2002 (VII. 4.) AB (ABH 2002, 173, 182) and Decision 21/2005 (VI. 2) AB (ABH 2005, 239, 243). However, other decisions made reference to the less stringent position taken in 1993.

e/ Decision 35/2005 (IX. 29.) AB put forward a new and clear position as compared to the decisions relying upon ambiguous theoretical foundations. In that decision, the Constitutional Court established an unconstitutional omission of legislative duty, as the Parliament had failed to comprehensively review on a theoretical basis the regulations on expropriation and to harmonise them with Article 13 of the Constitution. As pointed out in the decision, the meaning of public interest had changed, and due to privatisation, i.e. the transfer

to private persons of activities formerly performed exclusively by the State, the provisions violating the right to property often serve the interests of private persons, and public interest is only indirectly affected through the activities pursued by those persons. (ABH 2005, 379, 385–386)

f/ The following principles have been developed in the new practice concerning the restriction of the right to property:

The right to property is regulated in the Constitution differently from other fundamental rights. Article 13 para. (2) of the Constitution allows – on certain conditions – the complete withdrawal of property rights. Article 13 para. (1) provides for the general clause of granting the right to property, but it does not regulate the restriction of the right to property.

Article 8 para (2) of the Constitution provides for the general rule on restricting fundamental rights. According to the practice of the Constitutional Court, a fundamental right may only be restricted constitutionally when the restriction is contained in an Act of Parliament, and it is necessary and proportionate to its desired objective. [Decision 20/1990 (X. 4.) AB, ABH 1990, 69, 70–71] In line with the detailed principle on assessing the restriction, restricting a fundamental right requires the protection of the enforcement of another fundamental right or liberty, however, the importance of the objective to be achieved must be proportionate to the restriction of the fundamental right concerned." [Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 171]

The constitutional rule on the restriction of fundamental rights and the related practice of the Constitutional Court shall be applied to the restriction of property rights as well. However, the special features of the right to property based on Article 13 of the Constitution shall also be taken into account. One of those features is laid down in Article 13 para. (2) of the Constitution, setting the precondition of public interest for the complete withdrawal of property rights. With regard to that, one of the criteria for examining the constitutionality of restricting the right to property is the necessity based on the enforcement of another fundamental right, constitutional value or objective, or a necessity based on public interest.

In the present circumstances, the concept of public interest may be interpreted in a way to allow the acknowledgement of indirectly serving the interests of the whole community by solving social problems, although private interests are directly in the forefront.

When the right to property is restricted out of public interest, the Constitutional Court holds it insufficient for the statute to generally refer to public interest as a factor making the

restriction necessary, leaving it up to the free discretion of the authority to determine the concrete elements of property to which the restriction is applicable. The statute shall define the public interest in a manner allowing the courts to verify in the concrete case the necessity of the restriction out of public interest.

In this respect again, the other criterion of examination is proportionality based on Article 8 para. (2) of the Constitution. With regard to proportionality, the constitutional rules on the right to property do not impose any specific requirement. Therefore, the general standard is to be applied to the examination of proportionality, i.e. there should be an accord between the importance of the purpose to be achieved and the weight of violating a fundamental right in order to achieve that purpose.

[The principles summarised above are laid down in Decision 25/2006 (VI. 15.) AB, ABK June 2006; Decision 29/2006 (VI. 21.) AB, ABK June 2006; Decision 7/2006 (II. 22.) AB, ABK February 2006; Decision 35/2005 (IX. 29.) AB, ABH 2005, 379, 386–387; Decision 11/1993 (II. 27.) AB, ABH 1993, 109, 110.]

3. The Constitutional Court's practice developed for the protection of the right to property is in line with the provisions under Article 1 of the First Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 (hereinafter: the Convention) and promulgated in Hungary by Act XXXI of 1993, as well as with the principles contained in the decisions of the European Court of Human Rights (hereinafter: the Court).

The relevant rule of the Covenant contains the following:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The Court has interpreted the concept of possessions in a broad sense, including all rights of a proprietary nature (*Georgi c. Roumanie*, Decision of 24 May 2006, nº 58318/00, items 64 and 67; *Weissman c. Roumanie*, Decision of 24 May 2006, nº 63945/00, items 58 and 59). The term "use of property" is interpreted by the Court not according to the provisions of civil law in the specific countries, and the Court holds to belong here all entitlements

connected to the given rule (*The Former King of Greece and others v. Greece*, Decision of 20 November 2000, nº 25701/94, item 60).

Public interest is interpreted by the Court in a broad sense. In a concrete case, the Court noted that in respect of operating airlines, the financial interests of a private air freight carrier pursuing a public-interest activity can hardly be separated from the interests of the country as a whole (*Hatton and others v. The United Kingdom*, Decision of 8 July 2003, nº 36022/97, item 126). In the opinion of the Court, although the individual countries are more prepared to implement the checking of the existence of public interest, the Court shall not accept any reference to public interest when it is clearly unfounded (*The Former King of Greece,* decision as cited, item 87).

According to the established practice of the Court, in the case of restricting the right to property, the same requirements shall be applied as the ones determined by the Convention for the deprivation of property. Accordingly, a restriction may only be accepted when the injury caused is in proportion with the benefit serving public interest (*Athanasiou et autres c. Grèce*, Decision of 9 February 2006, nº 2531/02, items 22 and 23). With regard to proportionality, the Court examines the wide context of the case, and on this basis it has established the violation of the Convention when no appeal against the State's decision was offered during the restriction of the right to property and no procedural rules were elaborated to serve the purpose of an adequate protection of rights (*S. A. Dangeville c. France*, Decision of 16 April 2002, nº 36677/97, item 61).

In the recent practice of the Court, a so-called decision of principle has been developed to be applied when in a certain country the violation of the Convention affects many subjects of law, i.e. there is a problem in the legal system. In the Broniowski case, the Court's decision of principle established not only the violation of the right to property in respect of the given applicant, but it also underlined the deficiencies in the legal system as it had offered no proper procedures for legal protection in the case of violating the right to property. Therefore, the Court called upon the country in question to take the necessary legal and administrative steps (*Broniowski v. Poland*, Decision of 22 June 2004, nº 31443/96, item 189, and the decision closing the case on the basis of a settlement, 28 September 2005, item 34). The same solution was applied by the Court in a recent case where it determined the deficiency of the legal system in respect of not having procedural and other legal institutions designed to prevent the arbitrary and incalculable impairment of the right to property. Therefore, the Court called

upon the country in question to elaborate the legal solution granting proportionality (*Hutten–Czapska v. Poland*, Decision of 19 June 2006, nº 35014/97, items 168 and 251).

4. According to Section 188 item 12 of the AEC, containing explanatory provisions, electronic communications structures shall mean, among others, objects in connection with wireless connections such as antenna support structures (towers) and poles as well.

As stated in general in Section 94 para. (1) of the AEC, the installation of electronic communications facilities is to be allowed. In line with Section 94 para. (2) of the AEC, electronic communications facilities shall be installed on public land, or – if this is not possible – by using private land. According to Article 95 para. (1), in the absence of an agreement on the installation of the electronic communications facilities, the authority may impose a restriction on the owner of the real estate. The AEC does not define the concrete condition of the restriction; it only refers to public interest. As a connected provision, Section 95 para. (2) provides for due compensation against the restriction and refers to the rule of the CC according to which the owner of the real estate may – on certain conditions – request the purchase or expropriation of the real estate. However, not even this additional provision contains any clue about the public interest to necessitate the restriction of the right to property with regard to the concrete real estate.

According to Section 95 para. (3), for the purpose of installing an electronic communications facility on the real estate and in the case of electronic communication facilities already installed on the real estate, the authority may pass a resolution, upon the request of the public service provider, establishing easement or some other right to use. Here again, the AEC does not define the conditions for restricting property rights, but it only refers to public interest. Although Section 95 para. (3) of the AEC does not mention Section 177 of the CC regulating the establishment of easement or some other right to use by the authority's resolution, out of public interest, there is a connection between the two provisions. Neither do the two rules together determine clearly the conditions upon which the authority in charge should establish the restriction of the right to property regarding the real estate concerned. As on the basis of the regulation allowing free discretion, the existence of public interest cannot be verified in respect of the restriction of the right to property regarding the real estate concerned, this regulation is considered unconstitutional in line with the Constitutional Court's practice. [Decision 11/1993 (II. 27.) AB, ABH 1993, 109, 110]

5. Section 95 paras (1) to (3) of the AEC provides for the restriction of the right to property with reference to public interest. When examining public interest, the Constitutional Court has taken account of the important role played by electronic communications in the life of the country. Having regard to the petitions, the Constitutional Court has taken special account of the use of mobile telephones. The significance of mobile telephones is reflected in the data published in 2005 by the Statistical Office of the European Union, according to which in the countries of the Union, there was an average of 79.9 mobile telephone subscriptions per 100 citizens (in general, the more developed countries of the Union showed data above the average) in the year 2003. In Hungary, the penetration of mobile telephones reached a rate of 78.3, while the rate for the regular telephone lines was only 35.6. With due account to the wide-scale demand for the use of mobile telephones, the Constitutional Court has established the general existence of public interest in the installation of electronic communications facilities, such as antenna structures.

Besides a general reference to the public interest related to the installation of electronic communications facilities, the AEC fails to determine the criteria upon which one could verify the existence of the public interest necessitating the restriction related to the real estates concerned. This way of regulation does not comply with Article 13 para. (1) of the Constitution, granting the right to property.

Therefore, the Constitutional Court has established that Section 95 paras (1) to (3) of the AEC are unconstitutional, and the relevant provisions have been annulled.

6. The petitioners refer to the violation of the rights not only of the persons who own the real estates where the communications facilities are installed, but also of those who live in the neighbouring real estates.

According to Section 96 para. (2) of the AEC, the electronic communications facility shall be installed on the real estate in a manner not disturbing the owners or the possessors of the neighbouring real estates, or disturbing them to the least extent under the given circumstances. As provided for in the AEC, in such case no unnecessary restrainment under the Civil Code may be referred to, i.e. the restriction of the right to property is justified. Due to this provision of the AEC, the owners and the possessors of the neighbouring real estates enjoy no protection of property and possession, and they may not request termination of the restraint or enforce any claim for damages.

Based on Article 13 para. (1) of the Constitution, when examining the restriction of the right to property in the present case, too, it should be assessed whether the restriction is out of public interest and whether the regulation in question complies with the requirement of proportionality. The assessment of Section 96 para. (2) is closely related to the restriction contained in Section 95 paras (1) to (3). Therefore, it cannot be established in respect of the owners of the neighbouring real estates either if public interest does exist regarding the concrete real estates in excess to the public interest related in general to the installation of the communications facility. In addition to the above, Section 96 para. (2) justifies the installation of the communications structure if the disturbance is of the least extent possible, thus excluding the application of the CC rules pertaining to the restraint of the right to property and possession. The challenged regulation does not specify the criteria of defining the disturbance of the least extent possible, and consequently it is up to the free discretion of the authority in charge to establish it. Under such circumstances, the restriction of the right to property is considered disproportionate and, therefore, unconstitutional.

The Constitutional Court has consequently established that Section 96 para. (2) of the AEC is unconstitutional, and this provision has been annulled.

7. In addition to the above provisions, the petitioners allege the violation of other provisions of the Constitution by the challenged regulations. However, when the unconstitutionality of challenged statute is established by the Constitutional Court, and the relevant provisions are annulled, no further causes of unconstitutionality shall be examined. [Decision 4/1996 (II. 23.) AB, ABH 1996, 37, 44; Decision 61/1997 (XI. 19.) AB, ABH 1997, 361, 364; Decision 15/2000 (V. 24.) AB, ABH 2000, 420, 423; Decision 16/2000 (V. 24.) AB, ABH 2000, 425, 429]

IV

One of the petitioners challenges the rule according to which – as against the earlier regulations – it is not required to obtain the approval of the local government, or the Metropolitan Government in the case of Budapest, for the construction of any new building above the surface for the purpose of telecommunications.

The regulations in the AEC are different from the ones challenged by the petitioner. According to Section 83 para. (1), the authorisations in respect of antennas, antenna support

structures and accessory objects shall be granted by an authority other than the one in charge of issuing authorisations regarding electronic communications facilities in general. In line with Section 52 paras (3) and (7) of Act LXXVIII of 1997 on the Shaping and Protection of the Built Environment, this authority is the building authority. As required under Section 31 para. (1) item *c)*, during the establishment of buildings, the criteria of protecting the environment and preserving nature shall be guaranteed. Paragraph (5) adds another rule requiring to take account of the aspects of protecting the landscape, the townscape, the scenery, and the local character. This means that by repealing the challenged provision, the regulation missed by the petitioner was incorporated into the AEC, thus making the petition objectless. Therefore, the Constitutional Court – acting pursuant to Section 31 item *a)* of amended and consolidated Decision 3/2001 (XII. 3.) Tü. by the Full Session on the Constitutional Court's Provisional Rules of Procedure and on the Publication Thereof – has terminated the procedure commenced in respect of the petition seeking establishment of the unconstitutionality and annulment of Section 11 para. (1) item *c)* of the AT Amendment

The publication of this Decision in the Official Gazette (*Magyar Közlöny*) is based on Section 41 of the ACC.

Budapest, 3 October 2006.

Dr. Mihály Bihari
President of the Constitutional Court

Dr. Elemér Balogh
Judge of the Constitutional Court

Dr. András Bragyova
Judge of the Constitutional Court

Dr. Árpád Erdei
Judge of the Constitutional Court

Dr. Attila Harmathy
Judge of the Constitutional Court, Rapporteur

Dr. András Holló
Judge of the Constitutional Court

Dr. László Kiss
Judge of the Constitutional Court

Dr. Péter Kovács
Judge of the Constitutional Court

Dr. István Kukorelli
Judge of the Constitutional Court

Dr. Péter Paczolay
Judge of the Constitutional Court

Dissenting opinion by Dr. András Holló, Judge of the Constitutional Court

1. I do not agree with the annulment of Section 95 paras (1) to (3) Act C of 2003 on Electronic Communications. I hold that the Constitutional Court should have established an unconstitutional omission of legislative duty due to the lack of guarantee provisions related to property right.

In the present case, the Constitutional Court has had to assess whether Article 13 para. (1) of the Constitution was impaired by the provisions under Section 95 paras (1) to (3) of the AEC.

- As emphasised in the majority Decision as well, mobile communications services are to be considered public-interest activities.

- The case under debate is about the installation of electronic communications structures. Section 188 item 12 of the AEC clearly define the structures classified as such.
Based on this concept, the challenged regulation is not applicable to the installation of those structures of the service provider that serve an activity other than one of public interest.
Accordingly, the restriction of the right to property serves public interest, and in particular a very specific one. If there is some purpose of public interest regulated in a statute (communications services and the installation of the necessary structures), any further reference to "public interest" as laid down in the set of criteria for intervention by the authority may only be interpreted as the obligation of the authority – the National Communications Authority – to examine in each case whether the restriction imposed on the property rights related to the real estates concerned does, in fact, serve the interests of the public, or whether the purpose of public interest might be achieved without restraining property rights.

- According to Section 94 paras (2) and (3), such structures are to be primarily installed on public land, and in particular on public ground owned by the State. Installation on a piece of land owned by the local government is only allowed when there is no State-owned

land available or there is any technical cause or a statutory prohibition preventing installation on State-owned public land. The local government may only refuse its consent if granting it is likely to cause injury to the interests of the municipality or its population subject to special recognition, or if it is prohibited by a statutory provision.

Private land may only be used for such installation when it would not feasible on public land.

According to Section 95 para. (1), restriction by the authority shall be preceded by an attempt to reach an agreement with the owner – excluding restriction of the right to property.

Therefore, restriction by the authority may only take place when the restriction of the right to private property is the only way to implement the installation.

- According to Section 95 para. (2), the restriction entails an obligation of compensation. Therefore, the regulation meets the requirement of proportionality as well.

On an abstract level, this regulation complies also with the constitutional requirements set for the deprivation of property (exceptionality, public interest, in the case and in the manner specified in Act of Parliament, and with compensation).

Consequently, it cannot be established that the tool of restricting property rights was unconstitutionally used by the legislation.

The problem raised in the majority Decision on the basis of the relevant legal regulations is that the relevant Act of Parliament provides for a wide scale of discretionary power for the communications authority with regard to the restriction of property rights. The authority is free to assess the justification of referring to public interest in the concrete case. This means that the statutory regulation allows the authority to restrict the right to property in a manner which is incalculable and arbitrary.

This constitutional concern does exist in my opinion, too. It takes a resolution by the authority to prescribe an obligation of tolerance for the owner of the real estate, and the conditions of restriction by the authority are prescribed in the Act of Parliament only by reference to public interest in general, without regulating the criteria to be assessed during the procedure by the authority based on which the authority may establish in the concrete case the justification of the reference to public interest. Also in the majority Decision, the unconstitutionality of the challenged rules is established due to the lack of guarantee provisions. According to the practice generally followed by the Constitutional Court, an unconstitutional omission of legislative duty is established if the statutory guarantees necessary for the enforcement of a fundamental right or a statutory provision with a content deductible from the Constitution is missing from the given regulatory concept. [Decision

37/1992 (VI. 10.) AB, ABH 1992, 227, 231; Decision 22/1995 (III. 31.) AB , ABH 1995, 108, 113; Decision 29/1997 (IV. 29.) AB, ABH 1997, 122, 128; Decision 15/1998 (V. 8.) AB, ABH 1998, 132, 138]

Therefore, I hold that the Constitutional Court should have rejected the petitions related to Section 95 paras (1) to (3), and should have established an unconstitutional omission of legislative duty.

2. I also have concerns about the reasoning of the Decision regarding the modification of the standard elaborated by the Constitutional Court for the assessment of the constitutionality of restricting the right to property. Connecting in point III.2 of the reasoning the standards elaborated by the Constitutional Court with regard to the restrictability of the fundamental subjective rights and the right to property might lead to a deterioration of the practice of protecting fundamental rights as followed by the Constitutional Court. It is the essence of the test of fundamental rights that any fundamental right may only be restricted in the interest of protecting or enforcing another fundamental right, constitutional objective or value, and the requirements of necessity and proportionality are only additional criteria. Introducing the vague concept of public interest into the interpretation of Article 8 para. (2) might lead to extending the possible scope of restricting fundamental rights.

In Decision 64/1993 (XII. 22.) AB, the Constitutional Court set out from the interpretation of the provisions under Article 13 of the Constitution, establishing that the test of fundamental rights elaborated on the basis of Article 8 para. (2) was not applicable to restricting property rights. Based on the fact that the Constitution itself, too, allows the deprivation of property under well defined conditions, and that the constitutional requirements on restricting property rights may not be more severe than the conditions of expropriation as regulated in the Constitution, the Constitutional Court has elaborated an individual constitutional standard for restricting property rights.

As not even the Constitutional Court's practice is stable and consequent regarding the assessment of restricting property rights, I agree with the Decision in respect of facilitating further development of the test of restricting property rights, but I hold that this should be performed in a manner other than the one used in the Decision. In my opinion, it would be reasonable to maintain an individual constitutional standard regarding the assessment of restricting the right to property. I hold that in the framework of the property restriction standard elaborated in Decision AB 64/1993 (XII.18.), the Constitutional Court could have established – also by interpreting the requirement of proportionality – a requirement stating

that when the law empowers a public authority to restrain property rights, it shall determine the conditions of the restriction so as to secure that the reference to public interest be actually justified in the each and every case.

Budapest, 3 October 2006.

Dr. András Holló
Judge of the Constitutional Court

I second the above dissenting opinion.

Dr. András Bragyova
Judge of the Constitutional Court

Budapest, 3 October 2006.

Dissenting opinion by Dr. Péter Paczolay, Judge of the Constitutional Court

I do not agree with the establishment of the unconstitutionality and the annulment of Section 95 paras (1) to (3) Act C of 2003 on Electronic Communications (hereinafter: the AEC). In my opinion, it is not contrary to the right to property to allow the use of private ground for the purpose of installing a communications facility upon due compensation proportionate to the extent of the restriction.

Chapter X of the AEC deals with how to secure by third persons certain conditions of the electronic communications services.
Sections 94 to 98 of the AEC regulate the questions of using real estates and the joint use of buildings.

It follows from Section 94 paras (2) and (3) as well as Section 95 para. (1) of the AEC that using private ground is an exceptional option.
Prior to using private land, the authority shall check whether it is possible to install the electronic communications equipment on public land – owned by the State – or by way of

sharing existing electronic communications facilities or in facilities owned by public utility service providers. If neither of the above three possibilities can be used to install the communications structure, it can be installed on public land owned by the local government, provided that granting the necessary consent is not likely to cause injury to the interest of the municipality or its population subject to special recognition, and granting a permission for the use of land is not prohibited by a statutory provision.

Installation by using private land may only happen when – as worded in the relevant Act of Parliament – it is "not possible" to use public land, to share existing electronic communications facilities, to install it in facilities owned by public utility service providers, or to reach an agreement with the owner of the real estate.
Accordingly, prior to requesting the authority to restrict the use of a real estate on private land, the developer shall examine whether it is possible to install the facility without using private land.
In general, the installation of an electronic communications facility on private land requires an agreement between the owner of the real estate and the developer. According to Section 95 para. (1) of the AEC, the developer shall attempt to reach an agreement with the owner of the real estate. In the absence of an agreement, the National Communications Authority may – out of public interest – restrain the use of the real estate in order to allow the installation of an electronic communications facility.

As regulated in Section 95 para. (2) of the AEC, the owner of the real estate shall be entitled to compensation in line with the extent of the restriction. In addition, the owner may enforce the rights under Section 108 para. (2) of the CC, i.e. if the use or other restriction terminates or considerably hinders the proper use of the real estate, the owner may request the purchase or expropriation of the real estate.

According to the Constitutional Court's practice I still hold to be a benchmark, "the social burdens of property make constitutionally permissible a far-reaching restriction on the autonomy of the property owner". In line with the Constitutional Court's practice followed since 1993, in order to protect the fundamental right to property the essential division line is not between the "restriction" of the property and its "deprivation" in the sense of civil law, but the key constitutional question is to distinguish the cases when property owners must accept

restrictions by the public authorities without compensation and the cases when they may claim compensation for the restriction on their property rights. In the practice of the Constitutional Court, as Article 13 para. (2) of the Constitution merely requires "public interest" to justify expropriation, i.e. the deprivation of property if compensation of equal value is guaranteed, a more compelling "necessity" is not a requirement under the Constitution. Under the same decision, “the constitutional review of the ‘public interest’ determined by the legislation does not focus upon the question of whether such legislation was unavoidably necessary, rather (…) it confines its enquiry to the question of whether the invocation of ‘public interest’ is justified, and whether the solution adopted in ‘public interest’ violates some other constitutional rights (such as the prohibition of negative discrimination).” [Decision 64/1993 (XII. 22.) AB, ABH 1993, 373, 380–382]

The legislation empowers the communications authority to restrict the use of private land, i.e. real estates in private ownership. However, in a concrete case, a mere reference to public interest is not sufficient to justify such restriction, and the authority may only restrict the use of real property when in the concrete case, reference to public interest is justified under the conditions laid down in Section 94 paras (2) and (3) as well as in Section 95 para. (1) of the AEC. Consequently, I hold that the statutory regulation does not allow the authority to restrict the right to property in a manner which is incalculable and arbitrary, without the actual existence of public interest.

Therefore, Section 95 paras (1) to (3) do not violate Article 13 para. (1) of the Constitution, guaranteeing the right to property.

Finally, I have concerns about the Constitutional Court setting – as expressly intended by the Decision – more stringent standards than before with regard to the legislation restricting the fundamental right to property. In 1993, the requirements related to the constitutional restriction of the right to property were detached by the Constitutional Court from Article 8 para. (2) of the Constitution. This was partly explained by the fact that according to the practice of the Constitutional Court, the right to property was the only fundamental right allowed to be restricted by reference to public interest. [c.p. Decision 60/1994 (XII. 24.) AB, ABH 1994, 342, 354] There is no reason for the Constitutional Court to diverge from this practice without a due ground.

Budapest, 3 October 2006.

Dr. Péter Paczolay

Judge of the Constitutional Court

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