

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of a petition seeking a posterior examination of the unconstitutionality of a statute, and – acting *ex officio* – in the subject of eliminating an unconstitutional omission of legislative duty, the Constitutional Court has adopted the following

decision:

1. The Constitutional Court holds that Section 14 para. (1) item b) of Act IV of 1998 on the Regulation of Activities of Personal and Property Protection and Private Investigation Performed on an Entrepreneurial Basis and on the Professional Chamber of Personal and Property Protection and Private Investigation is unconstitutional, therefore it annuls the above provision as of 31 December 2004.

2. Acting *ex officio*, the Constitutional Court holds that the failure of the Parliament to provide in Act IV of 1998 on the Regulation of Activities of Personal and Property Protection and Private Investigation Performed on an Entrepreneurial Basis and on the Professional Chamber of Personal and Property Protection and Private Investigation for an obligation of confidentiality and for data handling rules in the field of the activities of personal and property protection has resulted in an unconstitutional situation violating the right to the protection of secrecy in private affairs and personal data as enshrined in Article 59 para. (1) of the Constitution.

The Constitutional Court calls upon the Parliament to eliminate the unconstitutional omission by 31 December 2004.

3. The Constitutional Court rejects the petition seeking the establishment of the unconstitutionality and declaration of the annulment of Section 14 para. (1) item a), para. (3) item b) and Section 15 para. (1) of Act IV of 1998 on the Regulation of Activities of Personal

and Property Protection and Private Investigation Performed on an Entrepreneurial Basis and on the Professional Chamber of Personal and Property Protection and Private Investigation.

The Constitutional Court publishes this Decision in the Hungarian Official Gazette.

Reasoning

I

1. The Constitutional Court received a petition seeking the establishment of the unconstitutionality and the annulment of Section 14 para. (1) items a)-b), para. (3) item b) and Section 15 para. (1) of Act IV of 1998 on the Regulation of Activities of Personal and Property Protection and Private Investigation Performed on an Entrepreneurial Basis and on the Professional Chamber of Personal and Property Protection and Private Investigation (hereinafter: the PPP). According to the petitioner, the challenged provisions violate the right to human dignity enshrined in Article 54 para. (1) of the Constitution, the presumption of innocence guaranteed in Article 57 para. (2) of the Constitution, and the right to the protection of privacy granted in Article 59 para. (1) of the Constitution.

In addition, the petitioner referred to Article 8 paras (1)-(2) of the Constitution, which provide for respecting the fundamental rights and state that the essential content of a fundamental right may not be restricted even by law. The petitioner also referred to the provisions on the inviolability of privacy contained in Act XXXI of 1993 on the promulgation of the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and the related eight Additional Protocols, and in the Universal Declaration of Human Rights.

According to the petitioner, the checking of bags or a vehicle by a property guard is nothing else but the examination of personal property, i.e. it qualifies as an insight into one's privacy. The petitioner pointed out that although property guards are not official persons, they are empowered to perform controls to an extent exceeding the rights of a policeman.

In the opinion of the petitioner, not all facilities have a character justifying the act of requiring proof of identity, and it is not clear whether property guards have a right to restrain a person in cases where they have to request an official person to require the proof of one's identity.

2. The following statutory provisions were taken into account in the course of judging the matter:

2.1. The relevant provisions of the Constitution:

“Article 8 para. (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 law; such law, however, may not restrict the basic meaning and contents of fundamental rights.”

“Article 54 para. (1) In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights.”

“Article 57 para. (2) In the Republic of Hungary no one shall be considered guilty until a court has rendered a final legal judgment determining criminal culpability.”

“Article 59 para. (1) In the Republic of Hungary everyone has the right to the good standing of his reputation, the privacy of his home and the protection of secrecy in private affairs and personal data.”

2.2. The provisions of the PPP challenged by the petitioner:

“Section 14 para. (1) In the course of guarding the principal's facilities not qualifying as public ground, the property guard may:

a) request persons entering or staying within the area to prove their identity, to state the aim of entering or staying in the area, and to verify entitlement to the foregoing, and if such a person refuses to comply with the above requests or states obviously false data, the guard may

prohibit the person from entering or staying within the area and may order such a person to leave the area;

b) call upon persons entering, leaving or staying within the area to present their bags or shipment/cargo documents, and the guard may check the bags, the vehicle and the cargo;

[...]

(3) Personal and property guards securing an event may:

[...]

b) prevent the taking of certain objects into a closed area or place where an event is organised – as required by the police or the person in charge of organising the event – and, for this purpose, the guard may examine the bags of those who enter the site of the event.”

“Section 15 para. (1) In the course of exercising his activities, the personal and property guard – under the terms provided for in the present Act – may request the person concerned by his action to prove their identity. If the requested person fails to prove their identity voluntarily and verifiably, the guard may – where justified – call for an official person empowered to require the proof of one’s identity in order for the identity of the person concerned to be established.”

II

The petition is, in part, well-founded.

1. First, the Constitutional Court examined the constitutionality of the property guards’ right to check and inspect bags, as provided for in Section 14 para. (1) item b) and para. (3) item b) of the PPP.

1.1. According to the interpretative provision under Section 47 point 2 of the PPP, the activities of personal and property protection cover – among others – the guarding of facilities, sites, areas, vehicles or other objects, as well as securing events. From among the provisions under review, Section 14 para. (1) item b) allows the checking of bags in connection with the guarding of facilities, while item b) of para. (3) empowers the property guard to inspect bags in the course of securing events.

However, the PPP does not contain any interpretative provision on what types of objects are to be regarded as bags. According to Section 30 para. (2) of Act XXXIV of 1994 on the Police (hereinafter: the AP), the police may – in certain cases – examine buildings, facilities, sites, bags and vehicles. As stated in the interpretative provision in the AP, bags are considered to be part of clothing [Section 97 para. (1) item b): “clothing: clothes worn by the person concerned by the action, and the clothes, bags or objects with him, under his direct control or at his disposal at the scene of the action”]. Based on the above interpretation and on the everyday usage of the term, one may conclude that the term “bag” means all objects suitable for hiding other objects from external observers – including the security guard –, in particular: ordinary bags, rucksacks, briefcases, carrier-bags. Covering objects may be merely functional, i.e. it is reasonable to keep and transport small objects in a bigger object (bag), but one may not exclude that covering is aimed at hiding personal objects (including intimate objects that belong exclusively to one’s privacy) from the sight of external viewers.

According to the further interpretative provision contained in Section 47 point 1 of the PPP, the term “activities of personal and property protection and private investigation performed on an entrepreneurial basis” means services provided in a legal relation under civil law, performed on a contractual basis by a sole entrepreneur or a company, within the framework of the rights enjoyed by the principal and vested with the entrepreneur.

However, the provisions empowering property guards to examine the bags of third persons are not to be examined on the basis of civil law. Although this right stems from the contract of agency, i.e. from the concrete duty of the property guard to protect property items or the personal safety of the participants of an event, acting in the interest of the principal, this is a right extending beyond the scope of the contractual relation, since the property guard’s exercise of his right affects the constitutional right of protecting privacy.

1.2. The Constitutional Court pointed out in one of its recent decisions related to the protection of privacy: “Article 54 para. (1) and Article 59 para. (1) of the Constitution protect the privacy of people as well as their private secrets, good standing of reputation, and personal data. According to the standing practice of the Constitutional Court, it is the violation of the above rights originating from the fundamental right to human dignity when the State interferes without due reasons with relations that fall into the scope of privacy, [...]. The limitations of State interference are set by the formal and substantial requirements defined

under Article 8 para. (2) of the Constitution, and eventually by the requirements of necessity and proportionality elaborated by the Constitutional Court on the basis of the Constitution.” [Decision 50/2003 (XI. 5.) AB, ABH 2003, 566, 578]

The so-called euthanasia decision established the following about the restrictability of the component rights derived from the right to human dignity: “The Constitutional Court holds the right to human dignity to be of special importance among the fundamental rights. This is reflected by the fact that this right, together with the right to life, is found in the Constitution at the beginning of the chapter on fundamental rights and obligations, and the Constitution declares this right to be an inherent right of man, and as such, it is the “greatest value over all the others” as termed in Decision 23/1990 (X. 31.) AB (ABH 1990, 88, 93). As already established by the Constitutional Court in the above decision, the right to human life and the right to human dignity are considered to be an unrestrictable fundamental right of indivisible unity. Later on, the Constitutional Court elaborated the context of the unrestrictable nature of human dignity. The Constitutional Court has held that the right to human dignity is absolute and unrestrictable only as a determinant of one’s human status and in its unity with life. [Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 308, 312] Therefore, the component rights derived from it as a mother right (such as the right to self-determination and the right to one’s physical integrity) may be restricted in accordance with Article 8 para. (2) of the Constitution just like any other fundamental right. [Decision 75/1995 (XII. 21.) AB, ABH 1995, 376, 383]” [Decision 22/2003 (IV. 28.) AB, ABH 2003, 235, 260]

„According to the standing practice of the Constitutional Court summed up in Decision 6/1998 (III. 11.) AB (ABH 1998, 91, 98-99), restricting a fundamental right can only be deemed constitutional when the restriction is unavoidable, i.e. when it is the sole way to secure the protection or enforcement of another constitutional fundamental right or constitutional value, or the performance of a constitutional duty, and provided that the injury caused to the fundamental right is proportionate to the importance of the desired objective.” (Decision 1234/B/1995 AB, ABH 1999, 524, 530)

1.3. It is the safeguarding of other constitutional rights related to the protection of persons and property that forms the constitutional basis of the property guards’ right affecting privacy that is provided for in the statutory provisions under review, thus it is the cause justifying the restriction of the fundamental right. When examining the proportionality of the restriction, the

Constitutional Court took into account and evaluated individually the different circumstances occurring in the scope of exercising the right concerned.

One of the differences was deemed relevant by the legislature itself, as according to the provision found under Section 14 para. (3) item b) of the PPP, in the case of securing an event, the property guard can only check the bags of those who enter the event. This provision does not regulate the examination of the bags of persons who have already entered the event and of those who are leaving the site of the event. Thus the examination of bags serves the sole purpose of preventing the taking of objects that are suitable for causing injury or raising fright in the crowd into the area. Accordingly, the constitutionally relevant content of the provision under review is that securing the protection of privacy collides with the social interest in establishing and maintaining public safety, and with the enforcement of the right to life and personal safety [Article 54 para. (1), Article 55 para. (1) of the Constitution].

Thus, the fundamental right restriction contained in Section 14 para. (3) item b) of the PPP is in compliance with the requirement that only allows restriction when there is no other way to secure the protection or enforcement of another constitutional fundamental right. The necessity of the restriction is factually justified as within the scope of persons affected by the right to checking the obliged persons are in the same legal position. The checking of bags is of general nature, the restriction of the fundamental right is in each case based on the enforcement of the right to life and personal safety, and any affected person may back out of the checking, based on his or her own discretion and decision. In view of the above, the Constitutional Court established the proportionality of the restriction, and therefore rejected the petition aimed at the declaration of the unconstitutionality and the annulment of the provision concerned.

Section 14 para. (1) item b) of the PPP – in contrast with the provision examined above – allows the checking of the bags of persons entering, staying within and leaving the area. In this scope, the situation of the persons affected by the restriction of the fundamental right realised in the form of the control and the character of the particular areas protected by the property guard are different, but the regulation is uniform. This means that the regulation does not provide for differentiated conditions of the exercise the property guard's right in relation to the various cases.

The concept of “area” is broader and more complex than that of “event”. It may include any facility not qualifying as public ground, if the principal assigns the property guard to protect that facility. In addition to the broad scale of sectors involved, the differences found in the function of such facilities are to be taken as relevant, i.e. protection by property guards may cover both places open to the public (shops, entertainment and cultural facilities), and facilities typically closed to the public [sites of public utility providers, industrial areas (parks), public institutions entirely or partially closed to clients].

In the case of persons about to enter an area of any function, two determining factors must be considered. One of the factors is that entry may be conditional; for example – among others – the entering person may be required to comply with the criteria of personal and property protection. The other factor is that although the person concerned is not subject to external coercion (by the property guard), the personal situation of that person does not allow in all cases to decide freely whether to accept the control under the given circumstances or to change one’s mind and refrain from entering. There can be situations when the person wishing to enter is forced to accept the control, since he or she has to enter the area in question for the purpose of managing his or her affairs, or failure to enter would entail a legal sanction (e.g. obligation to appear upon summons).

The differences in the functions of the areas (facilities protected by property guards) result in a need to differentiate with regard to the severity and the level of the conditions of entry as well as to the method of control. There are facilities with general checking upon entrance, in some facilities checking is occasional, and there are ones with no checking at all. Nevertheless, the regulation under review allows the checking of the bags of entering persons in a general and uniform manner. At the same time, the regulation does contain any provision stating that the enforcement of the conditions (including the checking of bags) may be neither arbitrary nor abusive, and it may not be aimed at preventing lawful entry. To put it in another way: there should be a provision regulating in what cases and in what manner is the checking of bags to be performed.

Neither does the regulation mention the objects the prohibition of the taking in of which is justified, and consequently it does not provide for an obligation of the principal (the owner or user of the facility) or the sole entrepreneur or company performing property guard tasks to give prior information about them to the persons entering the area. Similarly, there is no

provision about where and how objects seized during entry must be kept. All the above are related to the right to the protection of privacy, as the person affected by the checking of bags cannot know what objects can be seized from him or her, and he or she cannot be sure that the seized objects are guarded in compliance with the requirements resulting from the protection of the fundamental right, i.e. that seized objects are kept safely and no third persons have access thereto.

The checking of bags during entry raises many problems, but the situation is even more complex in the two other types of cases. In the case of checking bags within the area, just like in the case of entering the area, there can be concerns related to security and the protection of property, but here the affected person has no option at all to back out of the control based on his or her free will. As persons leaving the facility bear no security risk, such persons can only be subjected to bags checking by property guards on the basis of the protection of property. Another important difference is that while checking at entry is differentiated according to the nature of the facility (general checking, occasional, or no checking), on-site checking is always accidental: it can be either targeted or random, depending on the situation. When leaving the area, again, the nature of the facility is the determining factor: there might be general checking, but at many places (e.g. retail trade facilities) it is typically an individual act. Beyond doubt, this can increase the danger of exercising rights abusively, or the person affected by the checking might regard the act more easily as an act of abuse.

The different situations outlined above have different impacts on the restriction of the right to privacy during the application of the law, yet the regulation under review provides for uniform property guard's rights. Due to the uniformity of regulation the checking of bags may be ordered in any case, even when it is unnecessary. In addition, the lack of differentiation in regulation offers no way to identify the cause of the restriction ordered. As a result, one cannot determine the concrete justification of the checking of bags, i.e. whether it is based merely on the protection of property, or also on grounds of security.

1.4. In connection with the above, the Constitutional Court examined separately the nature and the content of the obligation of the legislature with regard to the protection of privacy in cases where the checking of bags is justified solely by the protection of property.

According to one of the closing provisions of the Constitution, the Constitution and constitutional statutes equally bind everyone.

The specification of fundamental rights in the Constitution sets direct obligations primarily for the State and its organs.

It is provided in Article 8 para. (1) of the Constitution that the Republic of Hungary recognises inviolable and inalienable human rights, and the respect and protection of these rights is a primary obligation of the State. The second part of the above constitutional provision specifies the relation between the enforcement of human rights and the State's conduct. It specifies that fundamental rights have a subjective side guaranteeing for the individual the exercise of that right, but it also expresses that fundamental rights have an objective side of institutional protection, which means that the State must implement measures to facilitate the enforcement of fundamental rights and to protect them against its own institutions, and other persons and organisations.

The Constitutional Court pointed out in the reasoning of the so-called first decision on abortion: "The State duty to 'respect and protect' fundamental rights is, with respect to subjective fundamental rights, not exhausted by the duty not to encroach on them, but incorporates the obligation to ensure the conditions necessary for their realisation." [Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 302]

In the case of the PPP, this requirement means that, while ensuring the protection of property in a technical sense, within the scope of the constitutional protection of property rights, the State must at the same time guarantee that no other fundamental right is injured disproportionately as a result. Allowing the checking of bags is one of the tools for the technical protection of objects of property owned by a particular person (private individual, legal person, other organisation, the State or a local government), but it necessarily affects the right of other persons to the protection of privacy. In other words: the objective content of the fundamental rights concerning institutional protection requires the legislature to ensure the constitutional enforcement of other fundamental rights – in the present case: the right to the protection of privacy – against anyone empowered to protect property.

Based on the above requirement, the property guard acting – empowered by the PPP – on behalf of the person having a right to the protection of property, should perform the checking of bags in a manner preventing any access by unauthorised persons to the private secrets and personal data of the person affected by the control. In contrast, the provision under examination contains only the entitlement without providing for rules that ensure the proportionality of restricting the right to the protection of privacy.

Accordingly, the Constitutional Court had to form an opinion on whether the disproportionate restriction of the fundamental right resulting from the deficiency of the regulation is to be regarded as resulting in direct unconstitutionality or an unconstitutional omission of legislative duty. In order to come to a decision, the Constitutional Court reviewed its own relevant practice.

The Constitutional Court establishes the unconstitutionality of a situation when the legislature gives State authorities a too broad and unclear authorisation for restricting a fundamental right. Thus, regulations are required to comply with the criterion of having well-described conditions justifying the restriction. [see Decision 13/2001 (V. 14.) AB, ABH 2001, 177, 199-200; and Decision 24/1998 (VI. 9.) AB, ABH 1998, 191, 195]

It is one of the elements of the test of necessity-proportionality that, when deciding on the constitutionality of the restriction of the fundamental right, the requirement of choosing the least severe tool is to be taken into account as well. The Constitutional Court stated in its Decision 30/1992 (V. 26.) AB: “Therefore, it is not enough for the constitutionality of restricting the fundamental right to refer to the protection of another fundamental right, liberty or constitutional objective, but the requirement of proportionality must be complied with as well: the importance of the objective to be achieved must be proportionate to the restriction of the fundamental right concerned. In enacting a limitation, the legislator is bound to employ the most moderate means suitable for reaching the specified purpose.” (ABH 1992, 167, 171)

The Constitutional Court has established with regard to the regulation examined in the present procedure that the undifferentiated rules enacted by the legislature provide for a too general and as a result too broad authorisation for restricting to the same extent the right to the protection of privacy in various situations, and that the regulation is also incompatible with the requirement of applying the least severe tool. On the basis of the above, the Constitutional

Court has established that Section 14 para. (1) item b) of the PPP violates the provision contained in Article 59 para. (1) of the Constitution, and therefore annulled the unconstitutional provision as of 31 December 2004.

With regard to the annulled provision, the Constitutional Court emphasises that it has not established the unconstitutionality of bags control itself, but it has merely established the unconstitutionality of the fact that – as detailed in the reasoning – the legislature regulated inadequately the relevant right of the property guards.

According to Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC), if unconstitutionality is established, the principal rule is the annulment of the provision under review, and that the annulled provision ceases to have effect on the day the decision is published [Section 42 para. (1) and Section 43 para. (1) of the ACC]. The Constitutional Court may determine another date for annulment if that is justified by legal certainty [Section 43 para. (4) of the ACC].

The Constitutional Court took into account in its decision that the immediate annulment of Section 14 para. (1) item b) of the PPP would have resulted in prohibiting the checking of bags also in cases where such a measure would constitute a necessary and proportionate restriction of the fundamental right. As the Constitutional Court wishes to allow adequate time for the Parliament to provide for a constitutional, differentiated regulation taking due account of the different situations, it has annulled the unconstitutional provision as of a future date, 31 December 2004.

1.5. The petitioner also alleged in respect of the provisions under review that they are contrary to the rule providing for the presumption of innocence in Article 57 para. (2) of the Constitution.

The Constitutional Court detailed in several of its decisions that the presumption of innocence as a constitutional principle applies not only to criminal liability, but to other proceedings as well. [Decision 41/1991 (VII. 3.) AB, ABH 1991, 193, 195; Decision 1284/B/1990 AB, ABH 1991, 562, 563; Decision 63/1997 (XII. 11.) AB, ABH 1997, 365, 372]

At the same time, the standing practice of the Constitutional Court is consistent in respect of the idea that the constitutional protection originating from Article 57 para. (2) of the Constitution cannot be extended in an unlimited manner. (Decision 26/B/1998 AB, ABH

1999, 647, 650) Accordingly, it has to be examined on a case-by-case basis whether the statute in question is related or not to the constitutional principle of the presumption of innocence.

The relation is considered to exist only in cases where the constitutional review is aimed at proceedings including the establishment of liability. As the provisions under review do not contain such regulation, the Constitutional Court has established that Section 14 para. (1) item b) and para. (3) item b) are not related in a relevant manner to the presumption of innocence, and rejected the petition in this respect.

2. In accordance with the petition, next the Constitutional Court examined Section 14 para. (1) item a) and Section 15 para. (1) of the PPP.

On the one hand, the property guard is entitled in the course of performing his activities to request persons entering or staying within the facility to prove their identity, and on the other hand to call for an official person empowered to require proof of one's identity in order to establish the identity of the person concerned if such person refuses to prove his identity. This means that the property guard is not empowered to require proof of one's identity for the purpose of establishing one's identity, property guards do not have the right to take such measures.

Although Section 14 para. (1) item a) empowers the property guard to call upon persons to prove their identity, but the person concerned may refuse to do so and then he or she may leave the facility either voluntarily or upon order, or may decide not to enter the facility. Thus, the content of the norm under review does not extend beyond the scope of the rights and entitlements of the principal and transferred to the entrepreneur (the property guard) under the contract of agency, therefore it is not considered to be in connection with the constitutional provisions cited by the petitioner.

Although section 15 para. (1) of the PPP empowers the property guard to ask for the assistance of an official person for the establishment of one's identity, it does not grant to the property guard a right to restrain the person concerned until the arrival of the official person.

Other provisions of the PPP regulate the cases where the property guard may use coercive measures. Pursuant to Section 15 para. (3), coercion is allowed – among others – when the property guard intends to prevent the entry of an unauthorised person, or when it is necessary

to remove an unauthorised person from the area. Section 15 para. (5) provides that the property guard may use a chemical tool (gas-spray), baton, guard dog, and a firearm, gas- or warning weapon only in a situation of justifiable defence or extreme necessity. This means that the property guard may use neither physical force nor any other tool for the purpose of establishing one's identity. Accordingly, Section 15 para. (1) of the PPP is not related to the right to human dignity, the protection of privacy and the presumption of innocence.

Based on the above, the Constitutional Court has established that Section 14 para. (1) item a) and Section 15 para. (1) of the PPP are not in conflict with the provisions found under Article 54 para. (1), Article 57 para. (2) and Article 59 para. (1) of the Constitution, therefore it has rejected the petition.

III

In the course of examining the constitutionality of the regulation on checking bags and verifying one's identity, the Constitutional Court took note of the fact that with regard to personal and property guards – in contrast with private investigators – the PPP does not contain any provision on the obligation of confidentiality and the handling of personal data.

Persons entering or staying within the area place their personal data at the disposal of the property guard when they comply voluntarily with the request for proof of their identity. It may occur also in the case of checking one's bags that the property guard performing the check obtains information qualifying as personal secret or personal data. However, the legislature failed to provide that the property guard, in the course of performing his activity (occupational duties), – just like the private investigator [Section 18 paras (1) and (3), Section 20 para. (1) of the PPP] – is bound by an obligation of confidentiality, and neither did it provide, in connection with the foregoing, for the manner and method of handling personal data obtained by the property guard. Consequently, the Constitutional Court examined *ex officio* [Section 49 para. (1) of the ACC] whether the lack of regulation constituted an unconstitutional omission of legislative duty.

1. To decide this question, the Constitutional Court reviewed its practice in respect of unconstitutional omissions of legislative duty, then in respect of the protection of private secrets and personal data.

1.1. The competence of the Constitutional Court pertaining to unconstitutional omission is regulated in Section 49 of the ACC, according to which an unconstitutional omission of legislative duty may be established by the Constitutional Court if the legislature has failed to fulfil its statutorily mandated legislative duty, and this has given rise to an unconstitutional situation.

“According to the established practice of the Constitutional Court, the legislature shall be obliged to legislate even when there is no concrete mandate given by a statute if the unconstitutional situation – the lack of legal regulation – is the result of the State’s interference with certain situations of life by way of a statute, thus depriving some of the citizens of their potential to enforce their constitutional rights. [Decision 22/1990 (X. 16.) AB, ABH 1990, 83, 86] The Constitutional Court also establishes an unconstitutional omission of legislative duty in the case of the lack of the statutory guarantees necessary for the enforcement of a fundamental right. [Decision 37/1992 (VI. 10.) AB, ABH 1992, 227, 231]

The Constitutional Court establishes an unconstitutional omission of legislative duty not only if there is no regulation at all regarding a certain subject [Decision 35/1992 (VI. 10.) AB, ABH 1992, 204] but also if any statutory provision with a content deducible from the Constitution is missing from the regulatory concept concerned. [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, ABK May 1998, 222, 225] Even when an unconstitutional omission is established due to the incompleteness of the content of the regulation concerned, the omission itself is based on the non-performance of a legislative duty deriving either from an explicit statutory authorisation or – if there is no such authorisation – from the absolute necessity to have a statutory regulation.” [Decision 4/1999 (III. 31.) AB, ABH 1999, 52, 56-57]

1.2. Decision 15/1991 (IV. 13.) AB detailed the content of the right of informational self-determination in the scope of the constitutional protection of personal data: “Thus, the right to the protection of personal data, as guaranteed by Article 59 of the Constitution, means that everyone has the right to decide about the disclosure and use of his personal data. Hence, approval by the person concerned is generally required to register and use personal data; the entire route of data processing and handling shall be made accessible to everyone, i.e. everyone has the right to know who, when, where and for what purpose uses his data. In exceptional cases, an Act may exceptionally require the compulsory supply of personal data

and prescribe the manner in which these data may be used. Such an Act restricts the fundamental right to informational self-determination, and it is constitutional only if it is in accordance with the requirements specified in Article 8 of the Constitution.” (ABH 1991, 40, 42)

Decision 47/2003 (X. 27.) AB underlined the obligation to include any provisions related to data handling in an Act of Parliament: “Pursuant to Article 59 para. (2) of the Constitution, the legal regulations on the protection of personal data shall be presented in Acts of Parliament. The prohibition of collecting data for a specific purpose and the legal gap concerning the lawfulness of data collection may not be circumvented by using internal orders related to methods that presume actual data collection.” (ABK October 2003, 668, 675)

2. The detailed rules – in compliance with Decision 15/1991 (IV. 13.) AB (ABH 1991, 40) of the Constitutional Court – of protecting the fundamental right guaranteed under Article 59 para. (1) of the Constitution can be found in Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Information of Public Interest (hereinafter: the DPA) adopted on the basis of the authorisation given in Article 59 para. (2).

Pursuant to the interpretative provision in Section 2 point 9 of the DPA, the recording or collection of personal data shall be considered as data handling. Section 3 para. (1) of the DPA provides that personal data may be handled if the data subject agrees thereto, or if it is ordered by an Act of Parliament or a local government decree on the basis of the authorisation of an Act of Parliament, within the scope defined therein. According to paragraph (3), in the case of mandatory data handling, the aim and the conditions of data handling, the scope of and access to the data to be handled, the term of data handling and the person handling the data shall be defined in the Act of Parliament or local government decree ordering the handling of data.

Although Section 14 para. (1) item a) of the PPP does not provide for mandatory data handling, when an affected person complies voluntarily with his request, the property guard qualifies as a data handler. Consequently, Section 5 para. (1) of the DPA shall be applicable, which provides that personal data may only be handled for a particular purpose, exercise of rights or fulfilment of obligations. Within the meaning of para. (2), only personal data indispensable and suitable for accomplishing the purpose of data handling may be handled,

and only to the extent and for the time required for the accomplishment of that purpose. The PPP does not comply with the above requirement of adherence to a specific purpose.

According to the established practice of the Constitutional Court, the criterion that the handling of personal data must adhere to a specific purpose is considered as a necessary element of the enforcement of the right to the protection of personal data granted under Article 59 para. (1) of the Constitution; also as a constitutional guarantee of the right of informational self-determination. [Decision 15/1991 (IV. 13.) AB, ABH 1991, 40, 42; Decision 29/1994 (V. 20.) AB, ABH 1994, 148, 153; Decision 46/1995 (VI. 30.) AB, ABH 1995, 219, 221; Decision 59/1998 (XII. 11.) AB, ABH 1998, 512, 514; Decision 54/2000 (XII. 18.) AB, ABH 2000, 516, 519; Decision 35/2002 (VII. 19.) AB, ABH 2002, 199, 207; Decision 65/2002 (XII. 3.) AB, ABH 2002, 357, 362]

In the present case, the Constitutional Court has established that in respect of the PPP the legislature failed to adopt rules, pertaining to the activities of personal and property guards, on the obligation of confidentiality and the handling of personal data – in particular with regard to the checking of bags and the verification of one’s identity – and this has resulted in an unconstitutional situation.

As the Constitutional Court has established the existence of an unconstitutional omission of legislative duty with regard to Sections 14 and 15 of the PPP, it has called upon the Parliament, in accordance with Section 49 para. (1) of the ACC, to perform its legislative duty by 31 December 2004. Section 49 para. (2) of the ACC provides that the organ in default shall comply with its legislative duty within the specified deadline.

The publication of the Decision is based on Section 41 of the ACC.

Budapest, 14 June 2004

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President of the Constitutional Court

Dr. István Bagi
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Dr. Mihály Bihari
Judge of the Constitutional Court

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