

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of the petition seeking a posterior review of the unconstitutionality of a statute, the Constitutional Court has adopted the following

decision:

1. The Constitutional Court establishes that in the implementation of Article 62 (1) and (2) contained in Section 2 of the Act I/1994 on the promulgation of the Europe Agreement signed in Brussels on 16 December 1991 establishing an association between the Republic of Hungary and the European Communities and their Member States (hereinafter: the “Europe Agreement”), it is a constitutional requirement that the Hungarian executive authorities may not apply directly the application criteria referred to in Article 62 (2).
2. The Constitutional Court rejects the petition to establish the unconstitutional character of, and to annul, Article 62 (2) of the Europe Agreement and the petition to establish the unconstitutional character of, and to annul, Article 8 (2) of Protocol 2 on ECSC products as promulgated by the Europe Agreement.
3. The Constitutional Court establishes the following: the first and second paragraphs of Article 1 and Article 6 of the Annex to Government Decree 230/1996 (XII. 26.) Korm. on “the promulgation of Hungarian-EC Association Council Decision 2/96 on the implementation rules of Article 62 (1), points (i) and (ii) and Article 62 (2) of the Europe Agreement establishing an association between the Republic of Hungary and the European Communities and their Member States, and of Article 8 (1) points (i) and (ii) and Article 8 (2) of Protocol 2 of the above Agreement on ECSC products” are unconstitutional.
4. The Constitutional Court suspends its proceedings concerning the nullification of the unconstitutional provisions until 31 December 1999.

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

## Reasoning

## I

1. The petitioner requested the establishment of the unconstitutional character of Article 62 (2) of the Europe Agreement and Article 8 (2) of the Protocol on ECSC products, and initiated the nullification thereof. In the petitioner's opinion, these provisions enlist in respect of certain groups of matters the criteria originating from the application of Articles 85, 86 and 92 of the Treaty establishing the EEC (hereinafter: the "EC Treaty") among the rules to be applied directly by the Hungarian competition authority. The petitioner referred to the fact that the criteria in question form a part of the internal law of the European Economic Community (hereinafter: the "Community") as the public law norms of the prohibition to restrict competition, the substantial criteria of which are presented to a great extent in the legislation and legal practice of the Community.

The petitioner based its constitutional concern, on one hand, on the fact that the implementation criteria provided for by Article 62 (2) cover the future development of Community legislation even after the Europe Agreement has come into force, and, on the other hand, on the fact that such criteria are to be directly enforced in the application of law in Hungary, without being included in any domestic legal norm. In the petitioner's opinion, the constitutional problem is caused by the principle-level provision of the implementing regulation referred to in Article 62 (3) of the Europe Agreement. The petition had originally referred to the draft of the implementing regulation as the source determining the substance of Article 62 (2) of the Europe Agreement, then, in an adjoining petition, the petitioner independently challenged Articles 1 and 6 of the Implementing Regulation promulgated by the Government Decree.

The petitioner fundamentally raised objections to the way of direct enforcement incumbent upon the application of law in Hungary in respect of the future criteria of the Community competition law, as this would open up the Hungarian legal system for the automatic absorption and application of the public law provisions of another jurisdiction. The petitioner considered this to be an "unconstitutional transfer of legislative power, as part of the state's sovereignty, upon another sovereign entity". The petitioner referred to the lack of constitutional authorisation as well as to the contents of Article 2 (1) of the Constitution.

Moreover, the petitioner mentioned that the application of the Community law criteria and principles in question cannot be compared to the order of internal application of international treaties, it cannot be based on the collision mechanisms of private international law and it is not the legislative act of an international organisation with the participation of Hungary. The supplement to the petition referred to the legal difficulties and solutions used in defining the limits and potential methods of the applicability of Community law in third countries in respect of the establishment of the European Economic Area.

2. The new adjoining petition sought the establishment of the unconstitutional character, and the nullification, of Articles 1 and 6 of the Annex to Government Decree 230/1996 (XII. 26.) Korm. (hereinafter: the “Implementation Rules”) on “the promulgation of Hungarian-EC Association Council Decision 2/96 on the implementation rules of Article 62 (1), points (i) and (ii) and Article 62 (2) of the Europe Agreement establishing an association between the Republic of Hungary and the European Communities and their Member States, and of Article 8 (1) points (i) and (ii) and Article 8 (2) of Protocol 2 of the above Agreement on ECSC products.”

The petitioner argued that Article 1 of the Implementation Rules was unconstitutional as this provision allocated the criteria provided for by Article 62 (2) of the Europe Agreement upon the domestic authority in charge of applying the law (Hungarian Competition Authority, hereinafter: the GVH). The petitioner considered it necessary to review the constitutionality of the Implementation Rules, claiming that “a Hungarian statute providing for a domestic executive authority to assess the matters in its own procedure according to the prevailing application criteria of the internal competition rules of another legal system was unconstitutional in itself”. In the petitioner’s point of view, the contents of Article 62 (2) of the Europe Agreement and Article 1 of the Implementation Rules must be seen as a single unit in terms of the constitutional concern, and each of them may only be assessed by taking into account the other, however, the constitutionality of the two legal norms may be examined independently as well.

In addition, the petitioner challenged Article 6 of the Implementation Rules, by which the Hungarian competition authorities must secure full-scale application – in line with their prevailing effect – of the principles constituting a part of Community law as presented in certain regulations of the Council of Ministers and the European Commission. In the

petitioner's opinion, this provision may be challenged as the construction concerned provides for direct applicability regarding the principles of future legal regulations as well, without these principles being presented in any Hungarian legal norm.

**3.** For the assessment of the petition, the Constitutional Court has acquired and used the opinion of the Minister of Justice. In respect of Article 62 (2) of the Europe Agreement, the opinion referred to the notion of constitutional interpretation, according to which it is not absolutely necessary to establish the unconstitutional character of a challenged statute if there is another interpretation conforming to the Constitution, and the statute concerned is not to be annulled in every case on the basis of finding a possible interpretation failing the test of constitutional requirements. Furthermore, the Minister's opinion referred to the fact that the related implementation rules were decisive in respect of interpretation. In the Minister's opinion, Article 62 may not be interpreted in a way that would not meet the constitutional requirements.

The Minister challenged the assumption that the criteria to be enforced on the basis of Article 62 (2) of the Europe Agreement meet the conditions of direct applicability, as in the Minister's opinion, they "may not be directly applied to either individuals or concrete cases of competition law". The Minister argued that the requirements prescribed by Article 62 of the Europe Agreement entail an obligation for legislation and they neither allow, nor necessitate, the direct application of Community law in the national application of law. The Republic of Hungary undertook to comply with the requirements under Article 62 "by way of its domestic law, and obviously, not only through its written legislation but by way of its "living law" as well, so the term "assessment" as used in the article in question does not mean an assessment in the procedures in course at the domestic executive authorities. The above qualification of Article 62 means that "paragraph 1 thereof entails an obligation of substantive law on the Contracting Parties, requiring to create a harmony between their domestic laws and the obligation set by international law", and paragraph 2 "calls for the law of the Community to be used as an interpretation background, as a quasi norm applicable to conflicts of laws" regarding the provisions of paragraph 1, thus making the principles and criteria that may follow from the law concerned a basis of reference for joint interpretation by the parties.

4. Having regard to the petitioner's subsequent – adjoining – petition, the Constitutional Court invited the Minister of Foreign Affairs and, again, the Minister of Justice to deliver their official opinions about the petition on behalf of the Government.

According to the Minister of Foreign Affairs, the provisions challenged by the petition do not raise any constitutional concern as the Europe Agreement had been signed and promulgated in domestic law on the basis of a constitutional authorisation. The Minister referred to the fact that – based on the provisions of Article 19 para. (3) of the Constitution on the powers of the Parliament – the Constitution acknowledges a certain degree of restriction of national sovereignty in the scope of international relations. The traditional interpretation of national sovereignty based on, and overemphasising, the formal equality of nations can no longer be applied in international relations. Moreover, the Minister pointed out the fact that the petitioner had failed to take into account the aim of the challenged international treaty, i.e. that this agreement of association aims at the European integration of Hungary. In this respect, the Minister emphasised the provisions of Article 67 of the Europe Agreement, specifying – as *lex generalis* – that the approximation of Hungary's present and future legislation to Community law is one of the fundamental preconditions of Hungary's economic integration into the Community. Indeed, in the article concerned, Hungary has explicitly undertaken to approximate its laws as far as possible. Compared to the above general obligation, the provisions challenged are to be seen as *lex specialis* in the field of competition law. Consequently, Article 62 of the Europe Agreement has a subordinate and secondary character as compared to the general aims of integration of the association. The Association Agreement in itself presumes that the parties to the agreement should take into account the legislation of the European Community, including an effective enforcement thereof; and in such circumstances, the provisions challenged by the petitions do not raise constitutional concerns.

In a subsequent opinion, the Minister of Justice upheld and repeated his former position concerning the original petition and the possibility of a constitutional interpretation. According to the Minister, the provisions of the Implementation Rules challenged by the adjoining petition may be interpreted in a constitutional way as well. Accordingly, Article 6 of the Implementation Rules may be interpreted in such a way, too, that GVH will be in a position to comply with Article 62 of the Europe Agreement even when applying the Hungarian substantive competition law in force on the basis of Article 1. Naturally, the

enforcement by the Hungarian competition authority of the Community law principles referred to in Article 6 of the Implementation Rules is only possible in the framework of the norms of the Hungarian competition law, as according to the Implementation Rules, the application of the domestic substantive law is a fundamental principle and *ultima ratio*. The Minister challenged the petitioner's argument about the alleged obligation of the Hungarian competition authority to apply Article 62 (2) of the Europe Agreement directly. In the Minister's opinion, the purpose of Article 1 (2) of the Implementation Rules is merely that the parties formally name their competition authorities in the provision concerned in order to inform each other thereof.

Furthermore, the Minister referred to the fact, mentioned in the statement by the Minister of Foreign Affairs as well, that the Parliament has a constitutional authorisation to conclude treaties restricting the sovereignty of the country. In this context, the challenged provisions cannot raise constitutional concerns as the application of foreign law in Hungary applies to a very narrow scope of matters and a concretely defined area of regulation, namely, the law of competition restrictions. In any case, competition restriction regulations necessarily contain foreign elements, and therefore, it is constitutional to allow the application of Community law in this strictly limited scope of matters.

Finally, the Minister of Justice argued that even a potential establishment of the unconstitutional character of the challenged provisions of the Implementation Rules would not necessarily result in establishing the unconstitutionality of Article 62 of the Europe Agreement. Should the Constitutional Court find the challenged provisions of the Implementation Rules unconstitutional, the contracting parties would still be able to adopt a regulation on implementing Article 62 (2) of the Europe Agreement that would remain within the scope of the constitutional interpretation of the provisions contained in the paragraph concerned.

## II

1. According to Article 2 para. (1) of the Constitution, the Republic of Hungary is an independent democratic state under the rule of law. Under Article 2 para. (2), "in the Republic of Hungary all power belongs to the people, who exercise popular sovereignty through their elected representatives as well as directly."

**2.** Article 62 of the Europe Agreement contains the following provisions:

1. The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and Hungary:

(i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;

(ii) abuse by one or more undertakings of a dominant position in the territories of the Community or of Hungary as a whole or in a substantial part thereof;

(iii) any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.

2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 of the Treaty establishing the European Economic Community.

3. The Association Council shall, within three years of the entry into force of this Agreement, adopt by decision the necessary rules for the implementation of paragraphs 1 and 2.

According to Article 62 (6), the implementing rules defined in paragraph 3 are to be followed in respect of the practices referred to in Article 62 (1). On the basis of the above provision, however, in the absence of such implementing rules or an adequate procedure based on such implementing rules, the emerging cases are referred to the Association Council for consultation.

**3.** Under Article 1 of the Implementing Rules (Principle):

All cases related to the agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition or abuse by one or more undertakings of a dominant position in the territories of the Community or of Hungary as a whole or in a substantial part thereof, in so far as they may affect trade between the Community and Hungary must be settled on the basis of the principles referred to in Article 62 (1) and (2) of the Europe Agreement.

According to paragraph 2, such cases are for the above purpose dealt with by GVH (Hungarian Competition Authority) on behalf of Hungary and the European Commission (Directorate General IV) on behalf of the European Community.

Paragraph 3 provides that the powers of the Hungarian Competition Authority and of the European Commission to deal with such cases follow from the existing rules of the legal systems of Hungary and the European Community, respectively, including the cases where the parties apply these rules to undertakings located outside their respective territories.

It is stated in paragraph 4 that the authorities of both parties shall deal with such cases on the basis of their respective substantive laws, taking into account the following provisions. The rules of substantive law to be taken into account by the authorities are Act LVII/1996 on the Prohibition of Unfair and Restrictive Market Practices in respect of the Hungarian Competition Authority, and the competition rules contained in the Treaty establishing the European Community and the ECSC Treaty, including secondary legislation related to competition, in respect of the European Commission.

**4.** According to the first paragraph of Article 6 of the Implementing Rules regulating group exemptions:

In the application of Article 62 of the Europe Agreement according to Articles 2 and 3 of the present Implementing Rules, the competition authorities will provide for full-scale application of the principles contained in the Community's group exemption regulations in force. The Hungarian Competition Authority will be informed by the Community on any procedure aimed at approving, repealing or amending a group exemption.

The second paragraph of Article 6 provides the following:

Should Hungary raise serious objections against such group exemption regulations, consultation will take place in the framework of the Association Council in accordance with the provisions of Article 9 of the present Implementing Rules, taking into account the harmonisation of laws as provided for in the Europe Agreement.

Finally, according to the third paragraph:

The same principles apply in respect of any other significant changes in the competition policy of Hungary or the Community.

## III

1. In the present decision, the Constitutional Court had to form an opinion on how the legal criteria and principles of Community law may prevail in the Hungarian legal system, on the basis of Article 62 of the Europe Agreement and the Implementing Rules, in the legal field of prohibiting the restrictions of competition. Thus, the construction of enforcing the criteria referred to in Article 62 (2) of the Europe Agreement as provided for by the Implementing Rules is in the focus of constitutional review. Accordingly, it is a question of constitutionality whether it is possible to directly apply by the Hungarian Competition Authority the norms of internal law of another subject of international law, of another independent public authority system, and of an autonomous legal system that serve the purpose of regulating legal relations of public law, without having these foreign public law norms made a part of Hungarian law.

2. The concepts mentioned in the reasoning of the decision are interpreted by the Constitutional Court in the following way. Direct effect or judicial effect (*applicabilité directe*) means that a specific provision of an international treaty results in a subjective right or obligation that may be enforced by subjects of private law in court or at other authorities administering the law.

In the reasoning of the decision, direct applicability (*applicabilité immédiate*) has the meaning as used in Community law. In relations between the Community and its Member States, the rules of Community law as adopted become a part of the law to be enforced in the Member States without the need to transform Community law into domestic law (by way of confirmation, incorporation, transformation or promulgation by the Member States). Direct applicability is a feature characteristic of the presentation of Community law within the Member States as compared to the way international treaties become a part of domestic law in general (through confirmation and promulgation, or confirmation and incorporation, transformation, promulgation etc.).

The petition hereby reviewed raises questions concerning the direct applicability of Article 62 (1) and (2) of the Europe Agreement and the direct applicability in the Hungarian legal system of the Community law criteria referred to in Article 62 (2).

3. As far as direct applicability is concerned, the Constitutional Court points out the following. The matters falling within the scope of application of the Europe Agreement must be judged according to the criteria referred to in paragraph 2 in respect of the facts of the case provided for by Article 62 (1). Neither Article 62 of the Europe Agreement nor the Implementing Rules contain any prohibition regarding the undertakings, or defines legal consequences to be enforced against undertakings.

In judging whether the competition rules referred to in Article 62 (1) are violated, paragraph 2 requires the application of the legal criteria under the Europe Agreement. However, the Europe Agreement does not set the way of enforcing these provisions. Article 1 of the Implementing Rules provides that according to the provisions of Article 62 (1) and (2), the competition authority is responsible for settling the matters. Thus the procedural position of the undertakings in respect of the application of Article 62 is determined according to the Implementing Rules by their falling under the jurisdiction and procedure of the parties' competition authorities. In the opinion of the Constitutional Court – contrary to the Minister's opinion – the joint interpretation of the first and second paragraphs of Article 1 of the Implementing Rules leads not only to naming the competition authorities of the parties but to the obligation of GVH (Hungarian Competition Authority) to apply the criteria provided for in Article 62 of the Europe Agreement.

Although the contents of the requirements provided for by Article 62 (1) of the Europe Agreement was detailed on the basis of paragraph 2 and the Implementing Rules, Article 62 itself does not entail any direct prohibition or legal consequence for the subjects of private law. Therefore, Article 62 may not be enforced directly in terms of undertakings but this can only be done indirectly through the interpretation of the challenged provisions of the Implementing Rules. Consequently, the direct applicability of Article 62 (1) and (2) cannot be established. However, Article 62 (2) is relevant for establishing the existence of a potential violation of law according to the Europe Agreement: it namely defines certain substantial criteria the breach of which qualifies as the violation of the competition rules referred to in Article 62 (1).

4. In the opinion of the Constitutional Court, despite the lack of direct applicability of Article 62 (1) and (2) of the Europe Agreement, the legal criteria of the EC Treaty referred to in Article 62 (2) must – in another context – be taken into account by the Hungarian executive

authorities. Indeed, Article 1 of the Implementing Rules provides on one hand that the matters covered by the Europe Agreement – and handled by GVH in the case of Hungary – must be dealt with according to the principles of Article 62 (1) and (2). On the other hand, according to Article 1 (4) of the Principle, the authorities of both parties handle the matters on the basis of their respective substantive law.

Therefore, the matters falling within the scope of the Europe Agreement and to be dealt with by GVH are subject to a special dual regulation: they must be judged on the basis of the legal criteria of the EC Treaty as referred to in Article 62 (2) of the Europe Agreement, however, this must be done in accordance with the substantive laws of both parties. As the requirement established by Article 62 (2) of the Europe Agreement is allocated by the first two paragraphs of Article 1 of the Implementing Rules to the Hungarian Competition Authority, the provision of the Implementing Rules on the application of the parties' own substantive laws, in contrast to the Government's opinion, does not result in allowing GVH to deal with the matters in its jurisdiction solely by applying the Hungarian Act on Competition. This means that in addition to the rules of the Hungarian competition law, GVH must follow the relevant Community law criteria as well. [The above dual regulation is justified by the evaluation made by the EC Commission, too, which refers to the domestic law applicable by the individual parties' competition authorities as the main instrument concerning the application of association agreements rather than defining such law as the complete or exclusive source of substantive norms to be applied (XXIVth Report on Competition Policy, COM(95) 142 final, point 402, p. 284)]

**5.** In the opinion of the Constitutional Court, the obligation to take into account the legal criteria of the EC Treaty referred to in Article 62 (2) of the Europe Agreement means that, on the basis of the above, GVH must – in matters falling within the scope of the Europe Agreement – follow the criteria arising from the application of Articles 85 and 86 of the EC Treaty as the criteria of interpretation applicable to the provisions of substantive law in the Hungarian Competition Act. Consequently, if matters cannot be judged according to the prevailing Community law criteria through the interpretation activity of GVH in the application of the Hungarian substantive law, Article 62 of the Europe Agreement is violated. As a result, diplomatic consultations may be needed and – finally – sanctions of trade policy may be applied.

Although GVH applies, instead of Article 62 (1) and (2) of the Europe Agreement due to the lack of its direct applicability, the substantive law provisions of the Hungarian Act on Competition that contain prohibitions and legal consequences as well, the contents of these provisions must be defined by GVH in a way ensuring adequate enforcement of the relevant Community law criteria in the Hungarian legal practice. This way, the relevant Community law criteria have an indirect effect on the contents of the decisions adopted by the competition authority in respect of undertakings (subjects of private law) subject to proceedings by GVH.

Summing up the above, the Constitutional Court establishes that – regardless of the lack of direct applicability of Article 62 (1) and (2) of the Europe Agreement – in assessing specific cases, GVH is bound to take into account the Community law criteria referred to in paragraph 2 on the basis of the Implementing Rules, as a result of the challenged provisions of the Implementing Rules. In the opinion of the Constitutional Court, no interpretation to the contrary is possible. As far as the evaluation of constitutionality is concerned, it is of secondary importance that the Community law criteria in question are merely interpretation guidelines in GVH's procedure.

#### IV

1. In the following, the Constitutional Court examined in respect of direct applicability the source of the Community law criteria referred to in Article 62 (2) of the Europe Agreement and the way of presenting such criteria in the administrative acts of the Hungarian Competition Authority. The matters within the scope of applicability of the Europe Agreement shall – according to Article 62 (2) – be assessed on the basis of the criteria arising from the application of the rules laid down in Articles 85, 86 and 92 of the Treaty establishing the European Economic Community. The examination necessary in this respect is limited to Articles 85 and 86 of the EC Treaty.

The provisions of Article 85 prohibit all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition, in so far as they may affect trade between the Member States. Article 85 (3) defines the basis of exemptions, while the related Community regulations lay down rules for the so-called group exemptions.

According to Article 86, it is prohibited to abuse by one or more undertakings of a dominant position on the market in so far as it may affect trade between the Member States.

The meanings and contents of certain elements of Articles 85 and 86 are defined by the legal practice, such as, for example, the meaning of the term “undertaking”, the contents of the concepts “agreement” or “concerted practice”, the preconditions for establishing the distortion or restriction of competition, the factors of evaluating the relevant market, the evaluation of potential influence on trade between the Member States, and the meaning of a dominant position or abuse. As far as prohibiting the restriction of competition is concerned, Community competition law is, in fact, a set of application criteria formed and constantly developed in the practice of Articles 85 and 86. The relevant criteria of application include the contents of Community competition law in its entirety, together with the developments of the legal practice, the rules of group exemption regulations related to Article 85 as well as the experience gathered during their practical application. Therefore, the “criteria arising from the application” of Articles 85 and 86 refer to the complete nature of the contents of Community law, and they are, in fact, identical with the totality of relevant Community competition norms.

2. According to the Constitutional Court, the problem of direct applicability may be raised in this respect as, on the basis of Article 62 (2) of the Europe Agreement and the Implementing Rules, the criteria arising from the application of Articles 85 and 86 must be taken into account by the Hungarian Competition Authority applying the law. However, Article 62 (2) of the Europe Agreement does not contain such criteria; it only refers to them as they are existing and developing in Community law. At the same time, according to the Implementing Rules, GVH is bound to apply such legal criteria in the assessment of matters on behalf of Hungary when applying the rules of domestic substantive law in compliance with the prevailing Community law practice related to the application of Articles 85 and 86. This means that on the basis of Article 62 (2) of the Europe Agreement and Article 1 of the Implementing Rules, the Hungarian Competition Authority applying the law must take into account and apply the Community law criteria concerned, as soon as published in the decisions of the Community competition authorities or courts, or in the regulations of the Community.

3. The Constitutional Court points out that the mechanism of direct applicability is a particular feature of the relation between the legal system of the Community and the EU Member States. The situation resulting from the joint application of Article 62 (2) of the Europe Agreement and Article 1 of the Implementing Rules must, however, be assessed in the constitutional review based on the fact that at present, the Republic of Hungary is not a Member State of the European Union.

Presenting in the Hungarian legal practice the Community law criteria referred to in Article 62 (2) of the Europe Agreement may not be fitted into the order of enforcing international treaties. This is explained, basically, by the fact that the relevant criteria are presented in the form of a reference. Indeed, the reference is made to the internal legislation and the legal practice of internal forums (EC Commission, EC Court of First Instance, EC Court of Justice) of a subject of international law. Thus, the relevant Community law criteria are to be applied in the procedure of GVH without any confirmation and incorporation, or transformation, or promulgation in the domestic law, as provided for by Hungarian law for the internal applicability of international treaties. It is pointed out by the Constitutional Court already here that the second sentence of Article 7 para. (1) of the Constitution does not establish a constitutional basis for the challenged provisions especially by taking into account the reference form of the regulation.

4. Moreover, the Constitutional Court argues that the direct application by the Hungarian executive authorities of the Community law criteria referred to may not be based on the norms of international private law concerning the conflict of laws either. The prohibition of restrictive agreements, practices and decisions, and the prohibition of abusing a dominant market position are, in fact, legal fields where the prohibitive measures are of a public law nature, and the application of the law itself entails the establishment of relations in public law. In these fields, the competition authority of the state enforces statutory prohibitions against the undertakings and applies repressive sanctions when the law is violated. However, the direct application of the rules of another jurisdiction regarding public law (in the field of offences, administrative-police relations, prohibition of restricting competition) is outside the scope of the rules of international private law concerning the conflict of laws, as the underlying legal relations are not private law relations, and therefore, they are not the subject of the law relating to the conflict of laws. It is another issue that in assessing cases of international private law, certain rules of a public law nature of the prevailing foreign law

may be taken into account as in such a case, the Hungarian forum does not judge any legal relation of public law on the basis and with the application of foreign rules of public law. Therefore, we have to make a distinction between legal relations of international private law – even if affected by a peremptory norm – and legal relations of public law affecting sovereignty, where it is necessary to have a constitutional authorisation for being bound by foreign law.

5. In addition, the way of enforcing Article 62 (2) of the Europe Agreement cannot be classified into the category of abstract and general transformation specified in Article 7 para. (1) of the Constitution, as the contents of the relevant criteria of Community law may not, in any respect, be identified either with the generally recognised rules of international law, or the international *ius cogens* norms [see Dec. 53/1993 (X. 13.) AB, ABH 1993, 323].

## V

1. In line with the above arguments, the domestic authorities applying the law are required, according to Article 62 (2) of the Europe Agreement, to assess the matters on the basis of the prevailing provisions of the Hungarian substantive law and the relevant Community law criteria. Such Community law criteria are to be applied as norms influencing the interpretation of the provisions of substantive law in the Hungarian Act on Competition. The normative sources of the relevant application criteria are the following: the decisions of the EC Commission as well as the judgements of the EC Court of First Instance and the EC Court of Justice, and the group exemption rules referred to in the Community regulations. Consequently, the application criteria referred to in Article 62 (2) of the Europe Agreement are, in fact, norms of a public law nature in the internal law and legal practice of the Community.

The Constitutional Court holds that the obligation undertaken in Article 62 (2) of the Europe Agreement is not limited to the application criteria existing in Community law at the time of signing the Agreement. Such a provision cannot be found either in the Europe Agreement itself, or in the Implementing Rules. As a consequence, the legal practice and the norms of the Community bodies to be adopted after signing the Agreement form a part of the Community law application criteria referred to before. As a result, however, not only the "application criteria" existing and enforced in Community law are presented in the Hungarian legal system

but the legal norms, principles and criteria, too, developing in Community law after signing the Agreement – specifically in the decisions of the European Commission as a competition authority, the judgements of the Community courts and the regulations of the Community. Moreover, the “application criteria” referred to in Article 62 (2) of the Europe Agreement include – in addition to the developments of legal practice – the group exemption regulations that form a part of the so-called secondary legislation of the Community. The above argument is supported by the Implementing Rules prescribing full-scale application of the principles of group exemption regulations effective in Community law concerning the application of Article 62.

2. The Constitutional Court points out that the said criteria of the Community's internal law are qualified as foreign law in respect of the application of law in Hungary, as the Republic of Hungary is not a Member State of the European Union. The underlying legal relations of a public law and official nature – providing for the obligation to assess matters according to Community law criteria – are directly linked to the sovereignty of the state: the right to prohibit the restriction of competition – similarly to criminal law or the law related to offences – is within the scope of exclusive jurisdiction of the state authority due to its contents and way of enforcement. Extending beyond the principle of objective territoriality of regulations in this field of law is not acknowledged by the international law either. Neither may such regulations be qualified as generally recognised rules of international law, thus they are not covered by the first sentence of Article 7 para. (1) of the Constitution.

The exclusivity of state sovereignty linked to territoriality means that the state may, in its international relations, dispose over its sovereign rights. Limitations to sovereignty are natural consequences of participation by the state in international relations as well as of the fact that it undertakes international obligations. However, it applies to the development of international relations as well that the powers of the Parliament – and of other state organs, too – are not unlimited. As pointed out by the Constitutional Court earlier, the provisions of the Constitution set the conditions for exercising power (Dec. 2/1993 (I. 22.) AB, ABH 1993, 33, 36). Therefore – contrary to the reasoning found in the Ministers’ opinions quoted before – without an express authorisation by the Constitution, the Parliament may not, in an international treaty, constitutionally extend beyond the principle of territoriality in a field of law covered by the exclusive jurisdiction of the sovereign state. In this respect, it is not relevant from the aspect of constitutionality that this extension is related to a relatively narrow

and strictly limited subject, i.e. the so-called law of competition restrictions. The requirement of constitutionality means that the whole legal system as well as any of its partial fields must be in line with the Constitution.

The Constitutional Court also established earlier that examining the procedure of adopting a statute that promulgates an international treaty – including a review of the powers, authorisations and procedures linked to undertaking the international obligation – is a question of constitutionality falling within the scope of powers of the Constitutional Court. The results of the review may, therefore, form a basis for establishing the unconstitutionality of the promulgating Act of Parliament [Dec. 4/1997 (I. 22.) AB, ABH 1997, 42, and in a similar sense, the judgement of the EC Court of Justice: Case C-327/91, (1994) ECR I-3641, 3678].

The Constitutional Court points out that – as a general rule – an international treaty with a generally binding content must be promulgated in an internal source of law in order to make the legal norm contained in the treaty applicable to Hungarian subjects of law. However, the constitutional concern raised by the petition actually lies in the fact that Article 62 (2) of the Europe Agreement merely refers to the Community law criteria without having them presented in an international treaty or in the promulgating domestic legal norm.

**3.** According to Article 2 para. (2) of the Constitution: in the Republic of Hungary all power belongs to the people, who exercise popular sovereignty through their elected representatives as well as directly. However, state authority exercised by the Parliament embodying sovereignty through representatives is not an unlimited power; the Parliament may only act in the framework of the Constitution and the provisions of the Constitution limit its powers (Dec. 2/1993 (I. 22.) AB, ABH 1993, 33, 36). This rule certainly applies, as appropriate, to other organs empowered to exercise state sovereignty as well.

According to Article 2 para. (1) of the Constitution: the Republic of Hungary is an independent democratic state under the rule of law. The constitutional requirements of a democratic state under the rule of law determine the framework and the limits of exercising sovereign authority, and in particular, the acts of the Parliament and the Government. One of the requirements of a democratic state under the rule of law based on popular sovereignty – in connection with the principle of popular sovereignty declared in Article 2 para. (2) of the

Constitution – is that public authority may only be exercised on the basis of democratic legitimacy. The exercise of public authority includes – among others – the determination of the institutional, procedural and substantial features of legislation and the enforcement of law. The democratic legitimacy of exercising public authority is a constitutional requirement for both internal and external acts of sovereign power aimed at the determination of international relations or resulting in international obligations.

According to the Constitution, as far as the legal norms to be applied in the Republic of Hungary are concerned, the requirement of democratic legitimacy based on popular sovereignty and on being a democratic state under the rule of law means that the adoption of such norms can be traced back to the absolute source of sovereignty. It is, therefore, a general principle to be followed on the basis of Article 2 paras (1) and (2) of the Constitution that all legal norms of a public law nature to be applied in the domestic law to Hungarian subjects of law must be based on democratic legitimacy allowing to be traced back to popular sovereignty.

Since, as a joint result of Article 62 (2) of the Europe Agreement and the Implementing Rules, the Hungarian authorities applying the law must in the assessment of certain matters take into account particular Community law criteria regarding contents and interpretation in addition to the provisions of domestic substantive law, and since such criteria are legal norms established through the legislation and legal practice of Community institutions, they cannot be traced back to the absolute source of Hungarian sovereign power. Indeed, the Community is an independent system of sovereignty different from the Republic of Hungary, with its own autonomous legal system and legal subjectivity in international law.

**4.** On the basis of Article 2 paras (1) and (2) of the Constitution, the public law norms that form a part of the internal law of another system of public power – in the present case, the Community – and the adoption of which may not be influenced by any means by the Republic of Hungary, as it is not a Member State of the European Union, cannot bind – without violating sovereignty – the Hungarian authorities practising the law to apply them. It would take a specific authorisation in the Constitution to allow that. Contrary to the opinions expressed by the Government representatives consulted, this fact is pointed out and emphasised by the Constitutional Court in assessing the present petition. Undertaking a concrete and exact obligation by the state in an international treaty or making a specific field

of law the subject of another system of public authority – even if in a narrow and strictly limited scope only – are completely different acts. Consequently, it violates Article 2 paras (1) and (2) of the Constitution that – as a joint result of Article 62 (2) of the Europe Agreement and Article 1 of the Implementing Rules – the Hungarian Competition Authority must, in addition to the provisions of domestic substantive law, directly apply in the assessment of certain matters the criteria of Community law merely referred to in Article 62 (2) of the Europe Agreement.

According to Article 2 para. (2) of the Constitution, popular sovereignty is in principle exercised by the Parliament: the general form of exercising power is through acts of the Parliament. It is emphasised by the Constitutional Court that – especially in relation to the arguments expressed in the opinion of the Minister of Foreign Affairs – the Parliament must not violate Article 2 paras (1) and (2) of the Constitution by the adoption or promulgation of international treaties. As provided for by Article 19 para. (3) item a) of the Constitution, the adoption and the amendment of the Constitution are within the powers of the Parliament. In this respect, the Parliament must act in a constitutional way, in compliance with the procedural and decision-making requirements regulating the amendment of the Constitution, upon a direct and expressed order of the legislative power aimed at amending the Constitution, in accordance with Decision 1260/B/1997 AB of the Constitutional Court (ABK February 1998, 82).

The Parliament may not amend the Constitution in a disguised manner by adopting or promulgating an international treaty. The provisions of the Constitution also apply restrictions on the bodies exercising public authority by not authorising the adoption of “intergovernmental international treaties” or “interstate agreements”, and prohibiting the enforcement in Hungarian law of international obligations the contents of which would violate the Constitution.

**5.** The requirements resulting from Article 2 paras (1) and (2) of the Constitution directly bind all organs exercising public authority, including the Government. Based on Article 62 (3) of the Europe Agreement, the Association Council adopted a decision specifying the rules necessary for the implementation of paragraphs 1 and 2. The decision was adopted in November 1996, and the implementing regulations can be found in the Implementing Rules.

In the opinion of the Constitutional Court, it was the first and second paragraphs of Article 1 of the Implementing Rules that resulted in the obligation of the competition authorities, such as GVH on the part of Hungary, to take into account in the matters assessed by them the Community law criteria referred to in Article 62 (2) of the Europe Agreement. The Europe Agreement itself did not specify the order of implementing the obligation laid down in Article 62 (2). On behalf of Hungary, the Government had participated in the preparation and adoption of the decisions of the Association Council, and the decision was promulgated in a Government Decree.

In respect of the Implementing Regulations, the Constitutional Court examined separately the fulfilment of the constitutional requirements of democratic legitimacy, taking into account the fact that it was the Implementing Regulations that ordered the Hungarian competition authorities to apply the relevant Community law criteria, and thus, it established a mechanism of direct application regarding the criteria referred to.

In the framework of this review, the Constitutional Court establishes the following: paragraphs 1 and 2 of Article 1 (Principle) of the Implementing Rules violate Article 2 paras (1) and (2) of the Constitution, as they enlist among the procedures to be handled by GVH the matters within the scope of the Europe Agreement to be assessed on the basis of Article 62 (1) and (2) of the Europe Agreement, thus obliging GVH to directly apply in its assessments the Community law criteria referred to in Article 62 (2) of the Europe Agreement, in addition to the application of domestic substantive norms.

The Constitutional Court emphasises that any provision of law resulting in the direct application in Hungary of Community law criteria to be adopted in the future is unconstitutional, as the source of such criteria is not the legitimate public authority, or an institution thereof, as defined by the Hungarian Constitution. As the challenged provisions of the Implementing Rules order the Hungarian Competition Authority to directly apply – among the Community law criteria referred to – the norms of a public law nature to be adopted in the future, the provisions reviewed are unconstitutional.

1. In the review of constitutionality, the Constitutional Court examined Article 62 (1) and (2) of the Europe Agreement and Article 1 (Principle) of the Implementing Rules as closely related regulatory units. As a consequence, the Constitutional Court established the unconstitutional character of certain provisions of the Implementing Rules with respect to the fact that it is Article 1 of the Implementing Rules that obliges the Hungarian authority applying the law to take into account the Community law criteria referred to in Article 62 (2) of the Europe Agreement, in addition to the application of domestic substantive rules, through the mechanism of direct application explained above. As a result, the Constitutional Court establishes the following in respect of the constitutional review of Article 62 (2) of the Europe Agreement.

Without the Implementing Rules, the provision contained in Article 62 (2) of the Europe Agreement does not, in itself, result in the unconstitutionality of the regulation. This is explained by the fact that Article 62 (2) of the Europe Agreement does not, in itself, allocate to the Hungarian authority applying the law the obligation of assessing matters according to Community law criteria. At the same time, Article 1 (Principle) of the Implementing Rules would not, in itself, raise a constitutional concern for naming the Hungarian executive authority (GVH) as the organisation in charge of applying the competition rules according to the Agreement if the Hungarian authority applying the law was not obliged to assess matters on the basis of Community law criteria in compliance with Article 62 (2) of the Europe Agreement, by directly applying the relevant norms of Community law.

2. According to Dec. 4/1997 (I. 22.) AB of the Constitutional Court, if any provision of an international treaty were found unconstitutional by the Constitutional Court, it would establish the unconstitutionality of the domestic statute promulgating thereof. The decision declaring unconstitutionality has no effect on the obligations assumed by the Republic of Hungary under international law. The legislator must harmonise the obligations assumed under international law and domestic law, and pending this process, the Constitutional Court suspends its proceedings concerning the determination of the date of nullification for a reasonable time (ABH 1997, 41).

According to Dec. 53/1993 (X. 13.) AB of the Constitutional Court (ABH 1993, 327), the second sentence of Article 7 para. (1) of the Constitution – the harmony between international obligations and domestic law – applies to every international obligation “assumed”, including

the generally recognised rules of international law and the contents of international treaties as well. It is necessary to harmonize obligations assumed under international law with the entire domestic law, with particular regard to the provisions of the Constitution. In assessing the above, it is necessary for enforcing Article 7 of the Constitution to examine whether or not the obligations assumed under international law are in harmony with the Constitution.

The Constitutional Court points out that establishing a partial unconstitutionality of the Implementing Rules has no effect on Decision 2/96 of the EC-Hungary Association Council as the source of the obligation assumed by the Republic of Hungary under international law. However, in the domestic law of Hungary, the Implementing Rules adopted by the decision of the Association Council is unconstitutional concerning the part affected by the decision of the Constitutional Court. Therefore, no international obligation found unconstitutional as a result of the unconstitutionality of the promulgating domestic statute may be enforced and applied in domestic law.

The valid obligation assumed under international law, i.e. the decision of the Association Council, binds the Republic of Hungary, as a subject of international law, even after the establishment of the unconstitutionality of the promulgating legal provisions. According to Article 7 para. (1) of the Constitution, it is the legislator's duty to create a harmony between domestic law and the obligation assumed under international law.

**3.** Furthermore, the Constitutional Court examined the effect of the sustained validity under international law of the obligation provided for by the decision of the Association Council on applying in Hungary Article 62 (2) of the Europe Agreement.

In the opinion of the Constitutional Court, the petition aimed at declaring the unconstitutional character of Article 62 (2) of the Europe Agreement is unfounded. Taking into account the establishment of the unconstitutionality of paragraphs 1 and 2 of Article 1 of the Implementing Rules, and having regard to the fact – as detailed above – that the obligation assumed under international law does not, in itself, result in the direct application in Hungary of the relevant Community law criteria, the unconstitutionality of Article 62 (2) of the Europe Agreement cannot be established. However, for the sake of clarity, the Constitutional Court considered it necessary to define the constitutional requirement determining the basic constitutional limits to the enforcement in the Hungarian legal system of the obligation

assumed in Article 62 (2), according to which the Hungarian executive authorities may not directly apply the application criteria referred to in Article 62 (2) of the Europe Agreement.

The Constitutional Court emphasises the following: the simple fact that an international treaty does not become a part of domestic law for the lack of adequate transformation (incorporation) shall not necessarily mean that the provisions of the treaty in question are not to be taken into account during the application of Hungarian law. Article 7 para. (1) of the Constitution requires a harmony between the obligations assumed under international law and domestic law, in the framework of which the domestic statute promulgating the international treaty must be interpreted in a way corresponding to the living substance of the treaty recognised under international law. Therefore, Article 7 para. (1) of the Constitution orders the harmonisation of obligations assumed under international law with the whole of domestic law, including the Constitution. At the same time, under Article 7 para. (1) of the Constitution, the legal system of the Republic of Hungary accepts the universally recognised principles of international law, and a similar constitutional order applies to the enforcement of the international *ius cogens* norms as well. However, contractual obligations assumed under international law outside the scope of international *ius cogens* rules may not be enforced as far as their unconstitutional content is concerned.

The principle of *favor conventionis* may only be applied to an extent not violating the Constitution as a result of interpreting Hungarian law in conformity with the international treaty. If an appropriate interpretation of the obligation assumed under international law results in violating Article 2 of the Constitution, the harmony required under Article 7 para. (1) of the Constitution is not achieved. As paragraphs 1 and 2 of Article 1 of the Implementing Rules are unconstitutional, as detailed above, they may not be taken into account either in the Hungarian legal system, or in interpreting and applying Article 62 (2) of the Europe Agreement. Consequently, the application criteria referred to in Article 62 (2) of the Europe Agreement may not be applied directly by the Hungarian executive authorities.

## VII

1. According to Article 6 of the Implementing Rules, the competition authorities shall ensure full-scale application of the principles contained in the prevailing group exemption regulations of the Community. GVH will be informed by the Community on any procedure

aimed at approving, repealing or amending a group exemption. Accordingly, the Hungarian Competition Authority shall ensure full-scale application of the principles contained in the group exemption regulations of the Community.

In the opinion of the Constitutional Court, enforcing the “principles” expressed in Community regulations means the application in the domestic law of Hungary of certain fields of Community law, as the contents of the principles in question may only be ascertained based on all the provisions of the relevant Community law regulations and the legal practices related thereto. As a consequence, even the principles themselves may be considered legal norms.

The group exemption regulations of the Community – the application of the principles of which must be secured by the Hungarian Competition Authority – form a part of the legislation related to the prohibition of the restriction of competition and they are of a public law nature linked directly to sovereignty and the exercise of public authority. According to the provisions of Article 6 reviewed, the competition authorities secure the application of the relevant Community law principles, and therefore, this obligation is addressed to the authority applying the law, which means the direct applicability of Community law principles. The above interpretation is supported by the second sentence of Article 6 itself, providing for GVH to be informed on the actual state of Community law in order to allow the actual application of prevailing Community law norms in the assessment of concrete cases covered by the Europe Agreement.

On the basis of Article 6 reviewed, the Community law principles to be applied by GVH must, therefore, be taken into account by the Hungarian executive authority regardless of whether or not they are a part of Hungarian law, and they must be applied merely on the basis of their existence without any further act of transformation or incorporation. Nevertheless, as pointed out above by the Constitutional Court, any provision ordering the direct applicability of internal public law norms of the Community in the Hungarian legal system, and in legal relations of a public law nature between the Hungarian state and the subjects of law under its sovereignty, violates Article 2 paras (1) and (2) of the Constitution. It is a constitutional requirement based on the principles of popular sovereignty and the democratic rule of law that in the Hungarian Republic, public authority may only be exercised on the basis of democratic legitimacy. Therefore, the Constitutional Court found Article 6 of the Implementing Rules unconstitutional.

2. The Constitutional Court suspends its proceedings concerning the nullification of the unconstitutional provisions. The deadline was determined with respect to allowing the legislator adequate time to establish the harmony provided for by Article 7 para. (1) of the Constitution.

3. The provision pertaining to the publication of the Decision is based on Section 41 of the Constitutional Court Act.

Budapest, 22. June, 1998.

Dr. László Sólyom  
President of the Constitutional Court

Dr. Antal Ádám  
Judge of the Constitutional Court

Dr. István Bagi  
Judge of the Constitutional Court

Dr. Árpád Erdei  
Judge of the Constitutional Court

Dr. András Holló  
Judge of the Constitutional Court

Dr. Géza Kilényi  
Judge of the Constitutional Court

Dr. László Kiss  
Judge of the Constitutional Court

Dr. Tamás Lábady  
presenting Judge of the Constitutional Court

Dr. János Németh  
Judge of the Constitutional Court

Dr. Ödön Tersztyánszky  
Judge of the Constitutional Court

Constitutional Court file number: 483/B/1996

Published in the Official Gazette (Magyar Közlöny) MK 1998/55