Decision 62/2006 (XI. 23.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

In the matter of petitions seeking posterior establishment of the unconstitutionality of a statute and elimination of an unconstitutional omission of legislative duty, furthermore, having regard to a constitutional complaint, the Constitutional Court has adopted the following

decision:

1. The Constitutional Court establishes that, when regulating the institution of objection under Section 196 and the time limit for the pressing of charges in Chapter X of Act XIX of 1998 on Criminal Procedure, the Parliament caused an unconstitutional omission of legislative duty, in violation of Article 2 para. (1) of the Constitution, by its failure to provide adequate protection for the rights of the persons participating in the criminal procedure against exceeding the relevant statutory deadlines specified for the investigating authority and the public prosecutor.

The Parliament is obliged to perform its legislative duty by 31 March 2007.

2. The Constitutional Court rejects the petition seeking establishment of the unconstitutionality and annulment of Section 216 paras (1) and (3) of Act XIX of 1998 on Criminal Procedure.

3. The Constitutional Court rejects the petition aimed at the elimination of an unconstitutional omission of legislative duty according to which the legislature caused an unconstitutional situation by its failure to grant judicial remedy in Title IV Chapter IX of Act XIX of 1998 on Criminal Procedure against the procedure by the investigating authority and the public prosecutor.

4. The Constitutional Court rejects the petition seeking establishment of the legal consequences and completion of the provisions related to exceeding the time limits specified in Section 216 paras (1) and (3) of Act XIX of 1998 on Criminal Procedure.

5. The Constitutional Court dismisses the constitutional complaint filed against communications Nos B.6210/2004/I-III and B.6210/2004/2-II issued by the Public Prosecutor's Office of Budapest Districts V and XIII.

The Constitutional Court publishes this Decision in the Official Gazette.

Reasoning

I

Several petitions and a constitutional complaint have been filed regarding the legal consequences of the breaches of procedural rules by the investigating authority and the public prosecutor and the lack of judicial remedy. Under Section 28 para. (1) of amended and consolidated Decision 3/2001 (XII. 3.) Tü. by the Full Session on the Constitutional Court's Provisional Rules of Procedure and on the Publication Thereof, the Constitutional Court consolidated the above documents and judged them in a single procedure.

1.1. Originally, the petitioner requested the Constitutional Court to perform the posterior constitutional review of Section 145 paras (1) to (6) of Act I of 1973 on Criminal Procedure (hereinafter: the ACP of 1973). According to those provisions, the investigating authority was obliged to send, within 8 days upon the completion of the investigation, the documents to the public prosecutor, who had to decide within 30 days whether to press charges, to order a supplementary investigation or to suspend or terminate the investigation. There was an exceptional option to prolong the time limit by 30 days.

In the opinion of the petitioner, Section 145 was in violation of Article 55 para. (1) of the Constitution, due to containing a legal gap in respect of the procedure aimed at the deprivation of one's personal freedom, and it was also contrary to the provision under Section 9 para. (2) of the ACP of 1973, according to which a proceeding at the court could only be started on the basis of lawful charges.

In the opinion of the petitioner, the legal gap was caused by the failure of Section 145 in the ACP of 1973 to govern "what procedure is to follow, and what procedural acts are to be made by which authority in the event of expiry of the strict deadlines fixed for the measures to be taken in this phase of the procedure". According to the petitioner, "due to the legal gap, by failing to perform the acts specified in the relevant statutory provision within the specified deadlines, the public prosecutor looses his competence and jurisdiction to follow the procedure in the case concerned, and thus his procedural rights automatically become void." The petitioner complained about the fact that there was no provision in Section 145 of the ACP of 1973 regulating "which authority is in charge of declaring the forfeiture of rights when it occurs due to the expiry of thirty days, and to state that the procedure is not to be continued due to the lapse of time". Therefore, the petitioner asked for the annulment of "the unconstitutional statute due to a legal gap", as well as for the elimination of the legal gap.

1.2. After the entry into force of Act XIX of 1998 on Criminal Procedure (hereinafter: the ACP), the petitioner maintained the petition in respect of Section 216 paras (1) and (3) of the ACP. When supplementing the petition with reference to the connection between the procedural guarantees and the rule of law by virtue of Article 2 para. (1) of the Constitution as well as to the State's risks related to exercising the punitive power by virtue of Article 57 para. (2) of the Constitution, the petitioner requested the Constitutional Court to establish the forfeiture of rights due to the lapse of the deadlines specified in Section 216 paras (1) and (3) of the ACP, together with the fact that the pressing of charges by the public prosecutor after the expiry of the deadline did not qualify as lawful charges, wherefore, any court procedure commenced on the basis of charges submitted after the expiry of the deadline was unlawful and illegal due to the lack of lawful charges.

1.3. The petitioner only requested the posterior review of the unconstitutionality of the statute and the annulment of the specified statutory provision with reference to Section 21 para. (2) and Section 37 of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC). According to the consistent practice of the Constitutional Court, in the procedure, the Constitutional Court considers the petition by its contents rather than its denomination. As the contents of the petition

are aimed at both the establishment and the elimination of an unconstitutional omission of legislative duty, the Constitutional Court has assessed it from both aspects.

1.4. The Constitutional Court has obtained the opinion of the Minister of Justice about the petition.

2.1. Another petitioner requests the establishment of an unconstitutional omission of legislative duty related to the lack of effective legal remedies against the overstepping of the time limits for "administering the case" by the investigating authority and the public prosecutor as specified in the ACP of 1973.

In the petitioner's opinion, the right to legal remedies, as granted in Article 57 para. (5) of the Constitution, is violated by the failure of the ACP of 1973 to provide for effective legal remedies for the affected persons in the case of the investigating authority and the public prosecutor not acting within the statutorily defined "administrative" deadlines. The petitioner refers to Decision 72/1995 (XII. 15.) AB, according to which "the constitutional requirements of legal certainty and the rule of law are impaired due to the lack of legal remedies available for the clients against the default of public administration authorities in keeping the specifically determined deadlines of administration". (ABH 1995, 351, 354-355)

2.2. The petitioner has not responded to the Constitutional Court's call for the modification of the petition after the repealing of the ACP of 1973.

The Constitutional Court only examines the unconstitutionality of a repealed statute in the case of a judicial initiative as defined in Section 38 para. (1) of the ACC or a constitutional complaint filed in accordance with Section 48 of the ACC. However, when the statute challenged in the petition loses force meanwhile but the replacing statute also contains the challenged provisions in the same regulatory context, the Constitutional Court shall continue the procedure in respect of the new provision. (Decision 137/B/1991 AB, ABH 1992, 456, 457; Decision 1271/B/1997 AB, ABH 2004, 1183, 1185) This practice is applicable in the present case too, as the regulatory situation complained of in the petition has not been changed by the ACP.

3. The third petitioner objects to the fact that no legal remedies are offered in Sections 195 to 199 under Title IV ("Legal Remedies in the Investigation") Chapter IX of the ACP for the case when the rules of procedure are breached by the "investigating and prosecuting authorities". In the petitioner's opinion, this omission violates Article 57 para. (1) (the right to have one's case judged by the court) and Article 57 para. (5) of the Constitution (the right to legal remedy). Therefore, the petitioner has initiated elimination of an unconstitutional omission by virtue of Section 1 item *e)* of the ACC – with due account to Section 49 para. (1) as well.

In addition, under Section 1 item *d)* subject to Section 48 para. (1) of the ACC, the petitioner has filed a constitutional complaint against communications Nos B. 6210/2004/I-III and B.6210/2004/2-II issued by the Public Prosecutor's Office of Budapest Districts V and XIII. Since in the petitioner' opinion, the provisions laid down in the second sentence of Section 195 para. (4) and in Section 196 of the ACP – which only allow the review of an appeal against the public prosecutor's decision within the public prosecutors' organisation – violate Article 57 para. (1) of the Constitution granting the right to have one's case judged upon by the court, the petitioner has asked for annulment of the above provisions. In addition, the petitioner has requested "prohibition of the applicability" of the above provisions "to investigation procedure No KÜNYH Nyom 154/2002 conducted at the Prosecutor General's Office, criminal procedure No XI.B. 1521/2004 conducted at the Central District Court of Pest, bill of indictment No KÜNYH Nyom. 154/2002, dated 14 April 2004, as well as to the decisions passed by the Public Prosecutor's Office of Budapest Districts V and XIII under Nos B.6210/2004/I-III, dated Bp. 17 June, and B.6210/2004/2-II, dated 22 September 2004."

II

The Constitutional Court has reviewed the petitions on the basis of the following provisions:

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

"Article 2 (1) The Republic of Hungary is an independent democratic state under the rule of law."

"Article 55 para. (1) In the Republic of Hungary everyone has the right to freedom and personal security; no one shall be deprived of his freedom except on the grounds and in accordance with the procedures specified by Act of Parliament."

"Article 57 (1) In the Republic of Hungary everyone is equal before the law and has the right to have the accusations brought against him, as well as his rights and duties in legal proceedings, judged in a just public trial by an independent and impartial court established by Act of Parliament.

[…]

(5) In the Republic of Hungary everyone may seek legal remedy, in accordance with the provisions of the law, to judicial, administrative or other official decisions, which infringe on his rights or justified interests. An Act of Parliament passed by a majority of two-thirds of the votes of the Members of Parliament present may impose restrictions on the right to legal remedy in the interest of, and in proportion with, adjudication of legal disputes within a reasonable period of time."

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

"Section 2 (1) In the course of sentencing, the court proceeds on the basis of lawful charges.

(2) Charges are held to be lawful when an accusatory instrument has been filed at the court by a person empowered to press charges, initiating the procedure by the court on the basis of well-defined acts committed by the person specified in the accusation and violating the criminal legislation."

"Section 3 (3) With the exceptions provided for in the present Act, legal remedies may be sought against the decisions by the court, the public prosecutor and the investigating authority, as well as against the measures taken by the public prosecutor and the investigating authority, and – where allowed in the present Act – legal remedies may be sought in the case of the failure of the investigating authority and the public prosecutor taking measures in due time."

"Section 64 (1) The time available for the performance of various procedural actions (deadline) and the time that should pass between two procedural actions (time interval) is stipulated by this Act; the deadline shall be established by the court, the prosecutor or the investigating authority pursuant to this Act. The deadline shall be specified in hours, days, months or years."

„Section 195 (1) Save if otherwise provided in this Act, anyone affected by the dispositions in the decision of the public prosecutor or the investigating authority may protest it within eight days following its communication.

[…]

(3) Unless an exception is provided for in this Act, the protest shall have no staying effect. In exceptionally justified cases the party having made the decision or judging the protest may postpone the execution of the decision until the protest is judged.

(4) If the party having adopted the decision does not sustain the protest within three days, it shall be submitted without delay to the party who is entitled to judge it. The protest against the decision of the public prosecutor shall be judged by the superior prosecutor, while the protest against the decision of the investigating authority shall be judged by the public prosecutor within fifteen days of receipt, or, in the case of a decision on termination, within thirty days in a decision.

(5) The party having filed the protest – in the case of repealing or modifying a decision, those to whom the decision had been communicated – shall be advised on judging upon the protest. With the exception of the cases stipulated in paragraph (6), the decision judging upon the protest may not be subject to further legal remedies.

(6) Against the decision concerning the rejection of the protest against decisions made under Section 149 para. (3), Section 150 para. (2), Section 151 para. (4) and Section 153 para. (2) and the decision of the public prosecutor adopted under Section 151 para. (2), a motion for review may be filed with the prosecutor's office having made the latter decisions within eight days of delivery; the prosecutor's office shall forward the motion for review, together with the documents and its own motion to the court within three days.

[…]

(8) Protests excluded in an Act of Parliament, late protests and protests lodged by a non-entitled party shall be rejected without reasoning.

Section 196 Anyone being affected by the measure or omitted measure of the prosecutor or the investigating authority may make an objection thereto. When the objection is well-founded, the prosecutor or the investigating authority shall take the necessary and justified measures."

"Section 216 (1) Having performed the procedural action specified in Section 193 para. (1) – or, if the action was performed by the investigating authority, within thirty days after receiving the documents – the prosecutor shall examine the files of the case and based on this, may

a) perform, or order the performance of further investigatory action,

b) suspend the investigation,

c) terminate the investigation,

d) press charges, or make a decision on the partial omission of pressing charges or on the postponement of pressing charges.

(2) In exceptional cases, the deadline specified in paragraph (1) may be extended by the head of the prosecutor's office by thirty days. In cases having an extensive scope, at the recommendation of the head of the prosecutor's office, the superior prosecutor may exceptionally permit a longer – but a maximum of ninety-days' – deadline as well. In the case regulated in paragraph (1) item *a)*, the deadline shall be calculated from the performance of the investigatory action."

"Section 228 (1) Anyone affected by the dispositions in the decision of the public prosecutor made in the procedure under this Chapter may protest it within eight days following its communication.

(2) If the public prosecutor does not grant the protest within three days, the protest shall be forthwith submitted to the superior prosecutor.

(3) The superior prosecutor shall make a decision on the protest within fifteen days of receipt. If the protest is deemed well-founded, the superior prosecutor may modify or repeal the decision, and order the same public prosecutor to adopt a new decision; in an adverse case, the superior prosecutor shall reject the protest. The protest shall also be rejected if it is late or was lodged by a non-entitled party.

(4) The party having filed the protest – in the case of repealing or modifying a decision, those to whom the decision had been communicated – shall be advised on judging upon the protest. The decision judging upon the protest may not be protested against.

(5) The pressing of charges shall not be subject to an appeal."

III

The petitions are, in part, well-founded.

A

First of all, the Constitutional Court holds that the conditions required for filing a constitutional complaint under Section 48 of the ACC are not fulfilled in respect of the alleged unconstitutionality of Section 196 in the ACP as well as of the text “the protest against the decision of the public prosecutor shall be judged by the superior prosecutor” in Section 195 para. (4) of the ACP. Anyone may lodge a constitutional complaint with the Constitutional Court for the violation of his/her rights guaranteed by the Constitution if the injury is consequential to the application of the unconstitutional statute and if he/she has exhausted all other possible legal remedies or no further legal remedies are available to him/her. Constitutional complaints are to be submitted in writing not later than 60 days of serving the decision with final force.

As established by the Constitutional Court from the documents available, letters Nos B.6210/2004/I-III and B.6210/2004/2-II issued by the Public Prosecutor’s Office of Budapest Districts V and XIII are not decisions by the public prosecutor but only notices informing the petitioner that by the pressing of charges the case reached the judicial phase and the motion submitted by the petitioner was forwarded to the court. The rules challenged in the constitutional complaint were not actually applied, and the communication by the public prosecutor is not connected to the fact that the protest against the decision of the public prosecutor is judged by the superior prosecutor [Section 196 para. (4) of the ACP], or to the rule that anyone being affected by the measure or omitted measure of the public prosecutor may make an objection thereto and when the objection is well-founded, the public prosecutor shall take the necessary and justified measures (Section 196 of the ACP).

With regard to the above, the Constitutional Court has rejected the constitutional complaint by virtue of Section 29 item (e) of the CCRP.

B

The Constitutional Court holds that no unconstitutional omission of legislative duty may be established due to legislature's failure to provide for legal sanctions in the criminal procedure for overstepping by the investigating authority and the public prosecutor the time limits fixed in respect of the phases of the investigation and the pressing of charges, and no unconstitutionality may be established due to the time limit for the pressing of charges by the public prosecutor not being a forfeit deadline.

1. Under Section 49 para (1) of the ACC, an unconstitutional omission of legislative duty may only be established if the legislature has failed to fulfil its statutorily mandated legislative duty, and this has given rise to an unconstitutional situation. The Constitutional Court establishes an unconstitutional omission of legislative duty not only when there is no statute at all regarding a certain subject but also if there is a regulation but there are no guarantees necessary for the enforcement of fundamental rights, or the deficiency of the regulations endangers the enforcement of fundamental rights. [The relevant practice is summarised in e.g.: Decision 17/2005 (IV. 28.) AB, ABH 2005, 175, 194; Decision 40/2005 (X. 19.) AB, ABH 2005, 427, 443-444; Decision 12/2006 (IV. 24.) AB, ABK April 2006, 274, 281] Therefore, an unconstitutional omission of legislative duty is established subject to the fulfilment of two conditions, namely an omission by the legislation and the resulting unconstitutional situation.

2. Under Section 64 para. (1) of the ACP, the deadline is the time available for the performance of various procedural actions. First, the Constitutional Court examines whether an unconstitutional omission was committed when establishing the sanctions for overstepping the time limits applicable to the statutory procedures in the phases of investigation and prosecution.

2.1. Based on the principle of the Constitutional Court's decisions pertaining to the administration of criminal justice, in a democratic State under the rule of law, punitive power is the – constitutionally limited – public law right of the State to punish those who commit crimes. Criminal offences represent violation of the legal order of the society, and the right of punishment may only be exercised by the State as public authority. The State's monopoly of the administration of criminal justice results in the obligation of enforcing its punitive demand. [Decision 42/2005 (XI. 14.) AB, ABH 2005, 504, 517-518]

For the enforcement of the constitutional requirements developed in the decisions of the Constitutional Court, important guarantees must be secured in the regulations about the deadlines set – and the legal consequences thereof – by the legislation for the bodies practically empowered and obliged to exercise the punitive power, i.e. the investigating authority, the public prosecutor and the court. The deadlines determined for performing the acts of procedure by the authorities support various constitutional values connected to the rule of law, fair trial, personal freedom and the right to defence. Those values include inducing the continuity and swift completion of the criminal procedure, enforcing the procedural principles that facilitate the ascertaining of justice, securing the calculability of the acts by the authorities in charge, limiting in time the procedural acts that restrict fundamental constitutional rights, and periodical reviewing their necessity.

Stressing the importance of the procedural deadlines as guarantees is not contrary to the general rule stating that overstepping by the investigating authority and the public prosecutor the time limits determined for the acts of procedure has no implications under the law of criminal procedure, i.e. it has no forfeit effect or invalidating force, indeed, the authority in default shall remedy the delay as soon as possible.

2.2. The Constitutional Court sees no unconstitutional omission in respect of the legislation not sanctioning (forfeiture and invalidity) in the ACP the overstepping of time limits by the investigating authority and the public prosecutor.

The Constitutional Court rejected in Decision 72/1995 (XII. 15.) AB the petition challenging the Act on public administration – in force at that time – due to the deadlines of administration regulated there not being of forfeit nature. (ABH 1995, 351) As explained in the Decision, no legislative omission may be established on the basis of regulating the overstepping of administrative case handling time limits without imposing an effect of forfeiture. The state agencies or other organs authorised to handle cases of public administration are authorities required to ascertain the rights and the obligations of the clients. The requirement of legal certainty shall always be taken into account by the legislation in the course of the regulation. The constitutional requirement of legal certainty would be impaired if the decision by an authority

overstepping the applicable time limit – due either to an objective cause or a delay in judging upon the case – were to be held invalid, as it would result in a mass of debated legal situations remaining open – without any reason under public or private interests. (ABH 1995, 351, 352)

In the present case, when considering the omission of legislative duty, the Constitutional Court has relied upon several important principles developed by the Constitutional Court about the rule of law, including the relationship between legal certainty and procedural guarantees in general, as explained in Decision 9/1992 (I. 30.) AB, (ABH 1992, 59, 65), and punitive power in particular, as explained in Decision 11/1992 (III. 5.) AB, (ABH 1992, 77, 84-85). The Constitutional Court holds that the Constitution does not confer a right to the enforcement of substantive justice. These are the aims and the duties of the State under the rule of law. The Constitution confers the right for procedures necessary and appropriate in the majority of cases for the realisation of substantive justice. However, it is a fundamental requirement in the procedural method of enforcing the punitive demand, i.e. in the criminal procedure to ascertain the justice concerning the criminal offence, the identity of the perpetrator, and his/her culpability. This is a fundamental precondition for having just judgements on criminal liability. [Decision 14/2004 (V. 7.) AB, ABH 2004, 241, 266]

As pointed out consistently by the Constitutional Court several times, the State is to bear the risk of enforcing the punitive demand. In a state under the rule of law, the prosecution of crime must take place in the framework of strict limitations and conditions under substantive and procedural law, and the risk of the failure of prosecution is to be borne by the State. This risk-allocation is a constitutional guarantee for the presumption of innocence. [Decision 9/1992 (I. 30.) AB, ABH 1990, 59, 70] As held by the Constitutional Court with regard to the legislative attempts to the retroactive amendment of the statutes of limitation of the punitive demand, the perpetrator may not be expected to bear the burden of not achieving – due to the default of the State – the ideal purpose of the criminal proceedings, namely the imposition of a just punishment accomplishing its desired objective. Regarding the above constitutional distribution of burdens, it is irrelevant whether the State has enforced its punitive demand deficiently or not at all, for whatever reason. [Decision 11/1992 (III. 5.) AB, ABH, 1992, 77, 92] However, it does not follow from the above constitutional principles that the guarantees of constitutional criminal law completely exclude all

methods of procedure that could limit the State's risks related to the failure of enforcing the punitive demand. [Decision 14/2004 (V. 7.) AB, ABH 2004, 241, 254-255]

The Constitutional Court holds the ACP's failure to impose sanctions in the form of forfeiture of invalidity with regard to overstepping the time limits by the investigating authority and the public prosecutor to be a risk-diminishing solution as explained above. The authorities' overstepping of the procedural deadlines does not affect the punitive power to be enforced; the delay, inactivity by the authorities in charge of acting in the concrete cases on the basis of the State's punitive power – due to either objective causes or negligence – may not prevent the continuation of the procedure of enforcing criminal liability within the statutes of limitation fixed in respect of culpability. Under the Constitution and the principle of acting *ex officio*, the public prosecutor and the investigating authority shall start and proceed the criminal procedure, or abstain from doing so when its statutory conditions are fulfilled (Section 6 of the ACP), irrespectively of the lapse of the time limit specified in the Act with regard to making the act of procedure. Due to the regulations of the ACP, performing the acts of procedure (e.g. rejecting the reporting of crime, terminating investigation, pressing charges) after the expiry of the required deadline – i.e. with a formal defect – does not invalidate the acts by the authorities, as it would be justified by neither the need to ascertain the objective justice nor the protection of the interests of the persons participating in the procedure.

When examining the omission of legislative duty, one has to take into consideration that the concrete criminal procedure is the practical operation of the State's organs authorised to exercise the punitive power, and it is subject to not only the ACP but also other Acts of Parliament regulating the organisational and service conditions. Overstepping the time limits is a breach of the procedural rules by the members of the investigating authority or by the public prosecutors, to be sanctioned outside the scope of the law of criminal procedure, i.e. in the framework of the legal relation of employment or within the scope of disciplinary measures and/or liability under criminal law. The regulations pertaining to the members of the investigating authority are laid down in Act XLIII of 1996 on the Service of the Professional Members of the Armed Organisations, and the ones applicable to public prosecutors are laid down in Act LXXX of 1994 on the Service Relations of Public Prosecutors and on Data Handling by the Public Prosecutor's

Office. When overstepping the deadline qualifies as a criminal offence, e.g. abuse of authority, unlawful detention, harbouring a criminal, or bribery, the member of the investigating authority or the public prosecutor must be called to account under the rules of Act IV of 1978 on the Criminal Code. Any breach of procedural duty by the prosecutor or the member of the investigating authority violating the criminal law may – upon the establishment of criminal liability with final force – form a basis of using an extraordinary legal remedy in the criminal procedure, namely: retrial (Section 408).

3. For the reasons detailed under point 2, the Constitutional Court holds that no legislative omission and no unconstitutional situation results from the fact that overstepping the deadlines specified in Section 216 para. (1) of the ACP for the pressing of charges by the public prosecutor has no effect of forfeiture and that it does not influence the "lawfulness" of accusation, which determines the ground and the framework of the court's procedure.

3.1. It is not against the requirement of legal certainty as a fundamental element of the rule of law to maintain the lawfulness of pressing charges after the expiry of the procedural deadline opened for the public prosecutor, and such an accusation is suitable for being the foundation of the court's procedure; keeping the deadline is not a precondition of its validity. Legal certainty requires the calculable operation of the individual legal institutions, and the legal institutions may only operate constitutionally when the procedural norms are complied with. Notwithstanding this, the principle of legal certainty leaves ample room for balancing and decision-making opportunities for the legislature since the rule of law also demands the realisation of other principles, some of which may conflict with the requirement of legal certainty. [Decision 9/1992 (I. 30.) AB, ABH 1992, 59, 65]

Under the Constitution, the administration of justice and the punishment of those who commit criminal offences is the function of the courts [Article 45 para. (1), Article 50 para. (1)]. To fulfil this function, it is – as a general rule – indispensable for the office of the public prosecutor to perform the constitutional duties resulting from its legal status to be in charge of public prosecution [Article 51 paras (1) and (2)]. Within the statutes of limitation, the enforcement of the State's punitive demand – provided that its preconditions are fulfilled on the basis of the

investigation – should not be frustrated by the public prosecutor's failure to keep the deadline of 30 or 60 days – or, exceptionally, 90 days when the case is of extensive scope. Such a consequence would pose a threat on legal certainty.

In respect of both the criminal procedure and constitutionality, the pressing of charges is an act of paramount importance for the order of enforcing criminal liability. At the same time – with due regard to the reasoning detailed in point 2 in connection with the enforcement of the State's punitive demand – the failure to keep the deadline specified for the pressing of charges does not constitute a grave breach of the rules of procedure, and its consequences are the same as the ones applicable to overstepping the time limits by the investigating authority and the public prosecutor in the phase of investigation. It is justified by the interests related to performing the constitutional duties by the public prosecutor that overstepping the time limit should not affect the enforceability of the punitive demand but it should result in imposing legal sanctions under the service relation of the public prosecutor outside the scope of the criminal procedure, including disciplinary liability in the case of negligence, or criminal liability when a criminal offence has been committed.

3.2. Furthermore, the Constitutional Court holds that there is no constitutionally recognisable relationship between, on the one hand, Sections 216 paras (1) and (3) of the ACP and, on the other hand, Article 55 para. (1) guaranteeing personal freedom and Article 57 para. (2) enshrining the presumption of innocence in the Constitution.

In view of the above, the Constitutional Court has rejected the petition seeking establishment of the unconstitutionality and annulment of Section 216 paras (1) and (2) of the ACP.

3.3. The competence of the Constitutional Court as determined in the Constitution and the ACC does not include legislation, i.e. the amendment of the provisions contained in Section 216 paras (1) and (3) of the ACP. Therefore, the Constitutional Court has rejected the relevant petition by virtue of Section 29 item *b)* of the CCRP.

C

The Constitutional Court has established an unconstitutional omission of legislative duty impairing the requirements for exercising the punitive power under the rule of law and the principle of legal certainty guaranteed in Article 2 para. (1) of the Constitution, as the institution of "objection" regulated under Section 196 of the ACP – against exceeding the time limit for the pressing of charges, having regard to the fact that a deadline binding the investigating authority and the public prosecutor in the phase of investigation does not provide adequate protection for the rights of the persons participating in the criminal procedure. Moreover, the rights are not protected effectively as the affected persons may not raise a complaint – even in the form of objection – against overstepping the statutory deadline.

The Constitutional Court, acting in accordance with the petition, has examined the question of an effective protection of rights concerning the right to legal remedy, the rule of law, and legal certainty.

1.1. As determined by the ACP among the fundamental provisions, "where allowed in the present Act, legal remedies may be sought in the case of the failure of the investigative authority and the public prosecutor taking measures in due time." [Section 3 para. (3) of the ACP] Under Section 196 of the ACP, in the phase of the investigation, anyone affected by an omitted measure of the prosecutor or the investigating authority may make an "objection" thereto. In line with the reasoning attached to Section 196 of the ACP, the "objection is an informal legal remedy without any requirement of formality or time limit, and the investigating authority or the office of the public prosecutor shall take the necessary and justified measures on the basis thereof." In line with Section 228 of the ACP, however, in the phase of pressing charges, there is no way to make any objection or to use any other legal tool against a default by the public prosecutor.

Failure to take measures includes the overstepping of the statutorily specified time limits with regard to the acts of procedure. Based on Section 196 of the ACP, the objection to such overstepping shall be judged upon by the same person who has failed to keep the deadline. According to the implementing regulations pertaining to the relevant provision of the ACP and

determining the duties of the public prosecutor as well as of the investigating authority, the objection is to be forwarded to the person whose default is complained of by the affected party. The objection is to be judged upon by the public prosecutor, or, when the member of the investigating authority is in default, by the head of the investigating authority

By the introduction – as of 1 April 2006 – of the legal institution of "objection" in the criminal procedure, justified by the extension of court procedures, the legislature has created a tool of legal remedy available for the accused person, the defence lawyer and the private party to raise a complaint against failure to keep the statutory deadline specified for the court. The objection is to be judged upon by the court on the next level above the court in default – with the exception of the Supreme Court. [Sections 262/A-262/B of the ACP]

1.2. In its decisions, Constitutional Court has explained the constitutional content of the right to legal remedy in many aspects. The Constitution leaves it to the statutory regulations pertaining to the various procedures to determine the applicable forms of legal remedies, to specify the forums in charge of reviewing the legal remedies and to fix the number of the levels of the system of legal remedies. (Decision 1437/B/1990 AB, ABH 1992, 453, 454) However, the right to legal remedy is only guaranteed in the Constitution as a fundamental right against the decisions by the authority. According to the essential content of the fundamental right, the legislation is only required to grant the possibility of turning to another organ or to a higher forum within the same organisation against the authorities' decisions on the merits, judging upon the case. [Decision 5/1992 (I. 30.) AB, ABH 1992, 27, 31]

With regard to the above arguments, the Constitutional Court holds that from a constitutional point of view, objection is not a legal remedy, and Section 57 para. (5) of the Constitution does not guarantee the fundamental right to having legal remedy against defaults by the authorities. Consequently, the right to legal remedy is not impaired by Section 196 of the ACP regulating the institution of objection, nor is it impaired by the inability of the affected persons to raise a complaint against overstepping the statutory deadline specified for the pressing of charges.

2.1. As established by the Constitutional Court in Decision 72/1995 (XII. 15.) AB on the "silence" of public administration, the Acts in force regulating the procedure of public administration provide neither legal remedy, nor other effective legal means for the client to compel the passing of a decision, because of a long delay in meeting the statutorily determined deadlines. In the opinion of the Constitutional Court, this omission of legislative duty violated the constitutional requirement of legal certainty as an element of the content of the rule of law, as the means available under the regulation under review (the liability of the public administration organs for damages, and the option to turn to the superior organ) did not offer adequate protection for the rights. (ABH 1995, 351, 354–355)

In the present case, the Constitutional Court has had to assess – in light of the requirements concerning the rule of law and the constitutional criminal law – what the implications the regulation on objection and the lack of a possibility to take a stand on overstepping the public prosecutor's time limit for the pressing of charges may have on the effectiveness of protecting the rights of the persons involved in the criminal procedure. To this end, the principles concerning the relationship among the rule of law, legal certainty and procedural guarantees have been applied.

According to the essence of the Constitutional Court's practice relevant to the present case, the procedural guarantees are decisive for the calculability of the operation of the individual legal institutions. [Decision 9/1992 (I. 30.) AB, ABH 1992, 59, 65] In a procedure operating without adequate procedural guarantees, legal certainty is impaired. Regulating rights and obligations with effective guarantees is a requirement originating in the rule of law, with particular regard to legal certainty. For legal certainty, it is especially important to have statutory provisions guaranteeing that the authorities applying the law comply with the law, which means here that the investigating authority and the public prosecutor perform their duties within the statutory deadlines.

As declared by the Constitutional Court in the early phase of its operation, "It is one of the fundamental requirements of the rule of law that the organs exercising public authority must operate within the organisational limits specified by the law, in the order of operation determined

by the law, and within the limitations regulated by the law, in a manner, which is calculable and which can be known by the citizens." [Decision 56/1991 (XI. 8.) AB, ABH 1991, 454, 456]

2.2. The criteria of the rule of law and constitutional criminal law require the State to exercise its punitive power according to such rules that create a balance between the guaranteeing rules protecting individuals against the State – and in particular, safeguarding the constitutional rights of persons subjected to criminal proceedings – and the expectations of society regarding the proper operation of the system of administration of criminal justice. [Decision 42/2005 (XI. 14.) AB, ABH 2005, 504, 518]

The Constitution does not contain any normative text about the requirement to have the punitive demand judged upon within a "reasonable" time. However, as pointed out by the Constitutional Court when examining the constitutionality of the legal institutions aimed at simplifying the criminal procedure, it is a constitutional requirement deductible from the normative content of the rule of law and the constitutional fundamental right to fair trial that the State's punitive demand must be enforced and judged upon within a reasonable time. The above decisions have stressed the experience about the harmful effects of lengthy criminal procedures with regard to the operation and the prestige of criminal jurisdiction. Delays in the criminal procedure make it more difficult to prove the committing of a criminal act as well as the identity of the perpetrator, it has a negative effect on the victim's rights and interests, and it has the undesired implication of causing a time gap between committing the criminal act and imposing the sanction. [Decision 14/2004 (V. 7.) AB, ABH 2004, 241, 254]

2.3. Breaches of the rules of procedure committed by the authorities acting in criminal cases can be of different weights in respect of constitutionality, and certain breaches of the rules of procedure can impair constitutional guarantees [c.p.: Decision 49/1998 (XI. 27.) AB, ABH 1998, 372, 377] Overstepping the statutory deadlines by the investigating authority and the public prosecutor, and the resulting delayed decision-making about the investigation and the pressing of charges may cause significant damage to the affected persons. The extension of the criminal procedure is in itself harmful for the accused person even if he/she is not restrained in his/her personal freedom (e.g. restricting proprietary rights in the form of seizure, sequestration, or

security measures). The delay of the punitive authorities may have a negative effect on the victims and on other persons whose proprietary rights are restricted.

As explained in details by the Constitutional Court in Decision 42/1993 (VI. 30.) AB, the criminal procedure allows the restricting of one's fundamental constitutional rights, i.e. his/her freedom (Article 55 of the Constitution), the right to move freely and to choose one's whereabouts, including the right to leave one's domicile or the country [Article 58 para. (1)], the right to the good standing of one's reputation, the privacy of one's home and the protection of secrecy in private affairs and personal data [Article 59 para. (1)]. The potential restrictions affect not only the person drawn under the criminal procedure, but they might also affect the constitutional fundamental rights of the "third" persons obliged to participate in the procedure as witnesses, or bound to tolerate the procedural acts applied in the interest of obtaining evidence (survey, seizure, search of premises, bodily search etc.). (ABH 1993, 300, 305)

Keeping the deadlines for the investigation and the pressing of charges also serve the purpose of directly protecting the rights and the interests of the persons victimised as a result of the criminal acts: they expect to enjoy their procedural rights within the statutory time limits (Section 51 of the ACP) and to enforce their claim for damages in connection with the criminal offence (Section 54 of the ACP). They also have a direct interest in having a criminal court judgement of final force in due time, as the judgement has binding force concerning the commitment of the crime and the perpetrator's identity when proprietary law demands resulting from the criminal offence are to be judged upon by a civil court.

2.4. The Constitutional Court holds that for the non-authority parties of the criminal procedure the legislation has not granted an effective protection of rights – weighing, on the one hand, the negative consequences on the constitutional fundamental rights and the constitutionally protected interests caused by overstepping the time limits by the investigating authority and the public prosecutor, as well as the resulting extension of the case, and, on the other hand, the regulation on the institution of objection and the lack of a possibility to seek remedies against overstepping the time limit for the pressing of charges.

As based on the arguments detailed earlier in the decision, overstepping the deadline by the authority has no specific sanction under the criminal procedure, the enforcement of the rule of law and legal certainty require to empower the affected persons to have a tool for the protection of their rights even prior to the court phase of the criminal procedure, allowing them to exercise adequate influence on the authorities to have the specified deadlines kept. The affected persons participating in the criminal procedure and negatively affected by the delay of the authorities must have a chance to "make a plea", offering them adequate protection against having the procedure extended due to the overstepping of deadlines by the investigating authority and the public prosecutor, or to not keeping the deadline for the pressing of charges.

In the phase of prosecution, there is no tool available to indicate overstepping of the deadline, and the objection which can be used in the investigation phase is not considered efficient. As the objection is judged upon by the public prosecutor accused to be in default, or by the head of the investigating authority alleged to be in default, there are no rules to guarantee that the assessment of the objection as made by the head of the investigating authority would reach the public prosecutor, and to secure that the superior public prosecutor would be informed about the assessment made by the public prosecutor in respect of the challenged overstepping of the deadline. Without the above rules, the regulation does not guarantee an objective and unbiased evaluation of the delay, to make the authority in default present its reasoning about the delay, to allow the superior organs to determine the necessary steps, or to initiate disciplinary and criminal sanctions when necessary.

Accordingly, the Constitutional Court has established an unconstitutional omission due to the lack of an adequate protection of rights, and it has called upon the Parliament to perform its legislative duty, setting a deadline in accordance with Section 49 para. (1) of the ACC.

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The Constitutional Court holds that the legislation is not to be blamed for an unconstitutional omission of legislative duty violating Article 57 paras (1) and (5) of the Constitution with regard to the fact that the provisions under Title IV Chapter IX of the ACP do not provide among the

legal remedies available in the investigation phase for a judicial review of breaching the rules of procedure by the investigating authority and the public prosecutor.

1. The procedural model of enforcing criminal liability as developed in the ACP is based on the division of the procedural functions and the principle of prosecution (Sections 1 and 2 of the ACP).

The procedural model is based on the provisions of the Constitution, reflecting the division of the branches of power, as well as the constitutional status of the organs exercising the State's punitive power, the office of the public prosecutor and the court. (Decision 197/D/2000. AB, ABK March 2006, 225, 228)

As established in Decision 3/2004 (II. 17.) AB (ABH 2004, 48.) interpreting the constitutional and public law status of the Prosecutor General and the public prosecutor's office, the public prosecutor's office is – in contrast with the courts – not an independent branch of power, but it is an independent constitutional organisation (ABH 2004, 48, 58.). In the system of administering justice in a broad sense, the public prosecutor's office has the rights specified in the Constitution, and it has to perform certain duties. It follows from the function of public prosecution that in the case of criminal offences subject to public prosecution – with the exception of the cases of supplementary private prosecution as specified in an Act of Parliament – only the public prosecutor's office has the right to decide on pressing or dropping charges; no other organ may review its decision or force it to change its decision about pressing or dropping charges. (ABH 2004, 48, 57-58)

The public prosecutor's office and the Prosecutor General are independent, their activities and procedures are only subject to the Constitution and other statutes, and there is no other organ exercising any right of supervision, control, direction or instruction in relation to them. It is within the free discretion and professional responsibility of the public prosecutor to evaluate the data, facts etc. available in a given case and to draw conclusions therefrom. (ABH 2004, 48, 62)

As pointed out in Decision 14/2002 (III. 20.) AB examining the constitutional questions related to the division of functions in the criminal procedure, it follows from the constitutional principle of the division of power – as one of the constituents of the rule of law specified in Article 2 para.

(1) of the Constitution – that "in the constitutional structure of separating the branches of power, the independence of the judicial branch plays a prominent role". [Decision 17/1994 (III. 29.) AB, ABH 1994, 84, 85] The principle of the division of power results in the court's monopoly in respect of the administration of justice granted in Article 45 para. (1) of the Constitution, which becomes finally manifested in concrete cases, in the exclusivity of the activity of judgement specified in Article 46 para. (1). In the system of administering justice in criminal cases, examined as a process, there are participating organisations and persons other than the courts. The participating organisations (police, public prosecutor's office, court) have different tasks in the specific phases of the criminal procedure, to be performed by them independently within the limits and according to the principles set by procedural law and the Acts of Parliament regulating their organisation. The Constitution also separates the functions related to the administration of criminal justice, naming – in addition to judgement as mentioned above – in Article 51 para. (2) the prosecutory monopoly of the public prosecutor's office, and in Article 57 para. (3) the right to defence. Accordingly, the principle of the division of procedural functions has a direct constitutional foundation.

It is a requirement resulting from the essence of the adversary and prosecution-based procedure that the competencies, activities and scope of action of both the court – having the monopoly of administering justice – and the public prosecutor's office – possessing exclusively the power of public prosecution – must be transparent and foreseeable. It follows from the provisions of the Constitution that the monopoly of public prosecution vested on the public prosecutor should be just as intact as the independence and impartiality of the judge in respect of judgement. (ABH 2002, 101, 112-113)

2. There is no contradiction between the above principle explained in the decisions of the Constitutional Court and the fact that courts have duties as early as in the phase of the investigation and the pressing of charges. Some of the duties and the competencies of investigating judges and of the higher courts involved in the procedure prior to the pressing of charges serve the purpose of protecting constitutional fundamental rights in the procedural phase before the pressing of charges (Section 207 of the ACP).

As an extra protection of constitutional fundamental rights, the ACP regulates, among the legal remedies available in the course of the investigation, the motion for review, offering the judicial review of any complaint rejected in the public prosecutor's decision, in the case of search of premises, bodily search, or seizure in the scope of competence of the investigating authority and the public prosecutor. Among the same regulations, there is another provision supporting the status of victims according to which in certain cases when the public prosecutor has no intention to press charges, the victim may act in the form of supplementary private prosecution (Section 199 of the ACP).

However, the court's competence prior to the pressing of charges does not mean any supervision of "legality" over the activities by the investigating authority and the public prosecutor. No such judicial competence can be deducted from the Constitution's provisions determining the duties of the courts – indeed it would be contrary to that – or from Article 57 para. (1) granting the fundamental right to the judicial way. The public prosecutor remains the master of the investigation and the pressing of charges, being in charge of performing – with full professional competence and responsibility – his duties and competencies based on Article 51 paras (1) and (2) of the Constitution in respect of the prosecution of crime and the function of public prosecution.

The legal remedies opened in the course of the investigation, as specified in Title IV Chapter IX of the ACP do not violate Article 57 para. (5) of the Constitution either, as they offer a possibility to turn to another organisation or to a higher forum within the same organisation against the decisions on the merits by the investigating authority and the public prosecutor.

Based on the above reasoning, the Constitutional Court has rejected the petition seeking establishment of the unconstitutionality of, and elimination of the unconstitutional omission of legislative duty related to, Title IV Chapter IX of the ACP.

With regard to point 1 of the holdings, the Constitutional Court has ordered the publication of this Decision in the Hungarian Official Gazette.

Budapest, 21 November 2006.

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