

DECISION 3/2020. (I. 3.) OF THE CONSTITUTIONAL COURT

In the posterior examination of a statutory regulation's compatibility with the Fundamental Law and in the subject of a constitutional complaint, the plenary session of the Constitutional Court – with concurring reasoning by Justice *dr. Marcel Szabó* – adopted the following

d e c i s i o n:

1. Acting *ex officio*, the Constitutional Court states that the omission by the Parliament had resulted in a situation in conflict with Article XII (1) of the Fundamental Law, because together with restricting the retail trade of electronic cigarettes and the connected products to the tobacco shops with mandatory concession, it failed to provide appropriate compensation for those affected by the restriction of the right to enterprise.

The Constitutional Court calls upon the Parliament to comply with its legislative duty by 30 June 2020.

2. The Constitutional Court rejects the petition aimed at the declaration of conflict with the Fundamental Law and the annulment of Section 7/E (1) and Section 7/F of the Act XLII of 1999 on the Protection of Non-Smokers and Certain Regulations on the Consumption and Distribution of Tobacco Products, and of the text “electronic cigarettes” in Section 1 (1) and the text “and the products specified in Section 3 point 8 *m*)” of the Section 11 (1) of the Act CXXXIV of 2012 on Repelling Smoking Among Minors and on the Retail Trade of Tobacco Products.

The Constitutional Court orders the publication of its decision in the Hungarian Official Gazette.

R e a s o n i n g

I.

[1] Fifty-three Members of the Parliament submitted an initiative of posterior norm control and the legal representative (*dr. István Molnár, Molnár & Co. Law Office*) of a petitioner company turned to the Constitutional Court with a constitutional complaint.

[2] 1 In their initiative of posterior norm control, submitted on the basis of Section 24 (1) of the Act CLI of 2011 on the Constitutional Court (hereinafter “ACC”), the Members of the Parliament, as petitioners, challenged the amendment of Section 11 (1) of the Act CXXXIV of 2012 on Repelling Smoking Among Minors and on the Retail

Trade of Tobacco Products (hereinafter "ASM") that entered into force on 20 May 2016. According to this amendment, the retail trade of the products specified in Section 3 point 8 *m*) of the ASM (electronic cigarettes, refill container and electronic tool imitating smoking) is only possible in tobacco shops. As held by the petitioners, the amendment is discriminative [violating Article XV (2) of the Fundamental Law] and it is in breach of the right to health [Article XX (1) of the Fundamental Law]. Ordering the sale of such products in a tobacco shop means that the law-maker binds the persons, who use an electronic cigarette not containing nicotine – possibly being in the midst of the process of quitting smoking – "to stay in the company of persons, who [...] use such products, this way making the tobacco products, smoking and tobacco smoke itself accessible and close to the affected persons". The petitioners also hold that the regulation violates the constitutional right of the freedom of contract deductible from Article M) and Article XIII (1) of the Fundamental Law. By replying the Constitutional Court's notice to remedy deficiencies of their petition, the petitioners indicated the reason for the violation of the freedom of contract in the fact that the challenged legal regulation overwrites the contracts already concluded on the distribution and the sale of electronic cigarettes.

[3] 2 The petitioner submitting the constitutional complaint, asked the Constitutional Court, in his petition submitted on the basis of Section 26 (2) of the ACC, to declare the conflict with the Fundamental Law and to annul the text "electronic cigarettes" in Section 1 (1) and the text "and the products specified in Section 3 point 8 *m*)" of the Section 11 (1) of the ASM, as well as of Section 7/E (1) and Section 7/F of the Act XLII of 1999 on the Protection of Non-Smokers and Certain Regulations on the Consumption and Distribution of Tobacco Products (hereinafter "ANS"), by referring to the violation of Article M) (1), Article IX (1), Article XII (1) and Article XIII of the Fundamental Law.

[4] 2.1 According to the point of the case underlying the constitutional complaint, since 2011, the petitioner has been engaged – and in particular specified – in the retail trade sale of electronic cigarettes and their accessory products (e.g. refill container) as well as the products necessary for their maintenance, through the webshop operated by the petitioner and in its shops the number of which has grown to four over the years. As claimed in the petition, in line with the sales data, the petitioner was one of the market leader companies with regard to the products in question. It was in business contacts with a wide range of international and domestic suppliers, and the company has developed a high level of consumer trust and reputation due to its product descriptions and its product testing activity. However, with the entry into force on 20 May 2016 of the amendment of Section 1 (1) and Section 11 (1) of the ASM, the law-maker referred the retail trade of the relevant products into the scope of activities to be performed only by tobacco shops. At the

same time, Section 7/F of the ANS, which also entered into force on 20 May 2016, banned distance sale as well, and Section 7/E prohibited the commercial communication related to electronic cigarettes and refill containers. The law-maker failed to provide for any compensation or to announce new concessions offering an opportunity to continue the activity. Consequently, the petitioner had to stop its commercial activity related to the relevant products, it had to close its shops and displace two thirds of its employees. Its stock of goods that remained after 20 May 2016 has become unsellable, and the law failed to provide for the wholesale traders' obligation of repurchase.

[5] 2.2. In the context of Section 1 (1) and Section 11 (1) of the ASM, the petitioner referred to the violation of Article M) (1), Article XII (1) of the Fundamental Law (right to enterprise) and of Article XIII (right to property).

[6] With respect to the right to enterprise, the petitioner put forward the following arguments. The aim of the amendment of the Act was the repression of the use of electronic cigarettes among minors, a prominent objective of public health, however, according to the petitioner, this aim could be achieved by other means as well (for example by regulating the outlook of the shops, the purchases by young persons or their presence in the shops). Thus, the restriction of a fundamental right is not necessary. The other aim of the regulation was to provide the users of the products with professional and satisfactory services. The petitioner holds that the amendment is unsuitable for achieving this aim, as the majority of the operators of tobacco shops do not possess the special knowledge and expertise or the experience necessary for the retail trade sale of electronic cigarettes and related to using such devices. Finally, the restriction of the fundamental right is also disproportionate, as the electronic cigarette is not a tobacco product: it is a significantly different product on the basis of its objective features, its use, the scope of its users as well as its effect on health.

[7] As far as the objective criteria are concerned, on the one hand, the electronic cigarette does not contain any tobacco, it may be used with liquids both with or without nicotine, and the core of its mode of operation is not burning the material found in it, but evaporating the liquid. The scope of users is also significantly different, as, according to the studies, it is typically used by former smokers and it is not widespread at all among minors. The potentially addictive effect of introducing electronic cigarette to the market among young persons who have not smoked before is an assumption not verified by science. The exact survey of the long term health risks of using it has not been performed until today, but, according to the petitioner, one may state for sure that this risk is negligible compared to that of smoking, being as low as 5%, and indeed it may also be regarded as a tool of "harm reduction", supporting to quit smoking. The petitioner considers the restriction to be particularly disproportionate, as the law is applicable in a uniform way to all products

– electronic cigarette as an electronic device, refill containers with or without nicotine content, tools imitating smoking –, although there are significant differences between these.

[8] With regard to the right to property, the petitioner emphasizes that the recent case is different from the case underlying the Decision 3194/2014 (VII. 15.) AB, on the one hand because the affected products concerning their effects on human health are completely different. On the other hand, differently from the earlier case – taking into account the twenty years' period of the concession contracts on the sale of tobacco products, concluded before the amendment of the Act –, the petitioner did not have the opportunity to become integrated into the new sale system limited to tobacco shops, therefore, it has become excluded from the relevant activity for a long time, in fact, until 1 July 2033.

[9] The petitioner also referred to the case law of the European Court of Human Rights (hereinafter "ECHR"), in particular the judgement delivered on 13 January 2015 in the *Vékony v. Hungary case* (65681/13), declaring the violation of the right to property, and it argued that the relevant level of the protection of fundamental rights should also be applied by the Constitutional Court in its decisions. According to this judgement, the protection of property shall cover the peaceful enjoyment of the goods, not limited merely to ownership according to civil law, and the scope of protection shall also include the scope of clients, the business reputation, the goodwill and the popularity of the enterprise as well as its licence to run the business – as they all have a monetary value. As argued by the petitioner – referring both to the restriction of the right to property and to expropriation at the same time –, due to the amendment of the law, it has lost all the above, together with its economic existence built up over the years, as well as the basis of its livelihood. The petitioner furthermore points out that also the case law of the Constitutional Court acknowledges the property protection of a regular gainful activity providing a regular income for the beneficiary, who introduced it and who exercises it [see in particular: Decision 27/1999 (IX. 15.) AB], and, for example, it evaluated in the scope of the protection of property the business activity related to the operation of slot machines [Decision 26/2013 (X. 4.) AB].

[10] 2.3 In the context of the ban of (on-line) sales through the internet (Section 7/F of the ANS), the petitioner also alleged the violation of Article M) (1), Article XII (1) and Article XIII of the Fundamental Law.

[11] With regard to the right to enterprise, it pointed out that on the market of electronic cigarettes and the connected products, the majority of the trading took place over the internet; the petitioner also received 80-85% of the orders from the on-line platforms operated by it, and the opening and operation of the shops was

also made possible by the on-line commerce. The prohibition of distance sales, therefore, renders the petitioner's economic activity impossible. The prohibition is not absolutely necessary in the interest of protecting the health of minors, as there might be other ways to guarantee that only adults would be allowed to purchase products in a webshop (registration and package delivery linked to presenting an ID card bearing a photo). The restriction is also a disproportionate one, as although the health risks of the products concerned are unclear, but it is scientifically verified that this risk is for sure lower than the one connected to tobacco products. Consequently, the basis of the prohibition is a risk and a need for protection based on assumptions without scientific evidence, causing a serious injury of the petitioner's fundamental right.

[12] Regarding the injury of the right to property, the petitioner also referred to the fact that 85% of its price income resulted from on-line sales, therefore, prohibiting it shall lead to shrinking the geographical market and of the scope of buyers – by redirecting them to the beneficiaries, who possess tobacco product retail trade concessions –, destroying the foundations of the petitioner's livelihood. According to the petitioner, the restriction is neither necessary, nor proportionate, because the product is not typically used by minors and its effects on human health are not clear, however, it is scientifically proven that it is much less harmful than tobacco products.

[13] 2.4 The petitioner alleged to the violation of Article IX (1) in the context of Section 7/E (1) of ANS by also referring to the fact that the challenged provision has been introduced in the context of Article 20 (5) of the Directive 2014/40/EU of the European Parliament and of the Council, however, the Directive's prohibition originally applicable only to cross-border advertising was extended by the Hungarian law-maker.

[14] According to the petitioner, the challenged provision is in conflict with the Fundamental Law, as the complete prohibition renders any communication (internet forums, electronic newsletter to closed groups, dissemination of printed materials at the sales sites etc.) about electronic cigarettes with the consumers impossible – including even the presentation of products – irrespectively to the particular brand. As argued by the petitioner, everything is prohibited from purely commercial communications, through providing objective minimum information on the products to justify informed consumer choices, to the communications that educate the consumers or that refer to electronic cigarette as a product, affecting questions of public interest and public health – including information on quitting smoking. However, commercial speech is protected by Article IX (1) of the Fundamental Law, and in the case of examining its restrictability, in line with the case law of the Constitutional Court, the content and the addressee of the communication should also be taken into account. On the one hand, the option of a wider scale of

intervention is only justified in the case of communications of exclusively commercial interest, and on the other hand, a stronger protection shall be justified, if the addressees of the communication are the actual consumers – the explicit aim is providing them with information [Decision 23/2010. (III. 4.) AB]. This differentiation has not been implemented by the law-maker. The protection of health and of minors does not justify the provisions that restrict communication at the sales sites and communication addressing the consumers who have expressed their wilful prior request to receive such information (e.g. a newsletter). Adult consumers are entitled to receive information about the products that they may legally purchase. Moreover, it is unjustified to exclude the smokers from the information on the option of acquiring knowledge about this device, allowing them to change to using electronic cigarette, to protect their own health.

[15] As held by the petitioner, the prohibition of commercial communication also violates the right to enterprise, because the right of the enterprise to communicate itself and its products/services is an integral part of this fundamental right. Thus Section 7/E (1) of the ANS is an obstacle of becoming an entrepreneur, by taking away one of its substantial conditions.

II.

[16] 1. The affected provisions of the Fundamental Law:

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

"Article IX (1) Everyone shall have the right to freedom of expression."

"Article XII (1) Everyone shall have the right to choose his or her work, and employment freely and to engage in entrepreneurial activities. Everyone shall be obliged to contribute to the enrichment of the community through his or her work, in accordance with his or her abilities and potential."

"Article XIII (1) Everyone shall have the right to property and inheritance." Property shall entail social responsibility.

(2) Property may only be expropriated exceptionally, in the public interest and in those cases and ways provided for by an Act, subject to full, unconditional and immediate compensation."

[17] 2 The relevant provisions of the ASM, taking force on 20 May 2016:

“Section 1 (1) In Hungary, the retail trade of tobacco products, electronic cigarettes and electronic devices imitating smoking shall only be carried out in compliance with the provisions of this Act.”

“Section 3 For the purposes of this Act,

[...]

8. Tobacco shop means a non-moving (and non-movable without disassembling to its parts) independent shop separated from other shops, the outer appearance of which does not show any tobacco product, which shall only be visible inside the shop, and in which only

[...]

m) electronic cigarette, refill container and a device imitating smoking specified in the Act XLII of 1999 on the Protection of Non-Smokers and Certain Regulations on the Consumption and Distribution of Tobacco Products”

“Section 11 (1) Unless an exception is made in this Act, the retail trade of tobacco products and the retail trade of the products under Section 3 (8) *m)* shall only be carried out in a tobacco shop.”

[18] 3 The relevant provisions of the ASM – in force at the time of examining the petitions – are as follows:

“Section 1 (1) In Hungary, the retail trade of tobacco products, electronic cigarettes and electronic devices imitating smoking, smokeless tobacco products and the new categories of tobacco products shall only be carried out in compliance with the provisions of this Act.”

“Section 3 For the purposes of this Act

[...]

8. Tobacco shop means a non-moving (and non-movable without disassembling to its parts) independent shop separated from other shops, the outer appearance of which does not show any tobacco product, which shall only be visible inside the shop, and in which only

[...]

m) electronic cigarette, refill container and electronic devices imitating smoking, smokeless tobacco products and the new categories of tobacco products, and”

“Section 11 (1) Unless an exception is made by this Act, the retail trade of tobacco products, the retail trade of the products under Section 3 (8) *m)*, cigarette tube, cigarette paper and tobacco leaf filler shall only be carried out in a tobacco shop.”

[19] 4 The relevant provisions of the ANS:

“Section 1 For the purposes of this Act

[...]

p) «electronic cigarette» means an electronic product (disposable or refillable by means of a refill container and a tank, or rechargeable with single use cartridges) that can be used for consumption of nicotine-containing vapour via a mouth piece, or any component of that product, including a cartridge, a tank and the device without cartridge or tank;

q) «refill container» means a receptacle that contains a nicotine-containing liquid, which can be used to refill an electronic cigarette;”

“Section 7/E (1) In the framework of the information society service, in the press and in other printed publications, disclosing any commercial communication, according to the Act CLXXXV of 2010 on Media Services and Mass Media [...], aimed at, or having the direct or indirect effect of promoting electronic cigarettes and refill containers shall be prohibited. This prohibition shall not be applicable to the publications that exclusively address the professional representatives of the trade of electronic cigarettes and refill containers, or to the publications printed and published in third countries, provided that they are not intended to be distributed in the Union market.”

“Section 7/F The distance selling of electronic cigarettes and refill containers shall be prohibited.”

III

[20] 1 First of all, the Constitutional Court examined whether the petitions comply with the conditions laid down in the Fundamental Law and in the Acts, i.e. if they are suitable for being evaluated on the merits.

[21] 1.1. The petition for posterior norm control was submitted, in accordance with Article 24 (2) e) of the Fundamental Law, by the authorised persons: by fifty-three Members of the Parliament, reaching the number of one quarter of the MPs. However, despite of the notice to remedy deficiencies, the petition fails to contain an explicit request with regard to the negative discrimination and the contractual freedom. The petitioners only claimed but have not given reasons why they hold that the challenged provision of the law applied differentiation between certain groups of persons, and what is the basis of the alleged differentiation. Similarly, they failed to support with exact arguments their statement about the aspects of violating the contractual freedom (what contracts are affected by the amendment of the Act). Consequently, these elements of the petition are not suitable for being evaluated on the merits

[22] 1.2. With regard to the constitutional complaint, the Constitutional Court found the following.

[23] The challenged statutory provisions entered into force on 20 May 2016, thus the constitutional complaint received on 11 November 2016 was submitted within the time limit of one hundred and eighty days specified in Section 30 (1) of the ACC.

[24] The petitioner has been authorised to submit a constitutional complaint and they also attached the legal representative's mandate. According to the attached documents, the petitioner is personally, directly and actually affected in the case, and it has also been verified that the alleged injury of rights is caused by the challenged provisions themselves: the provisions of the law under review are enforceable directly, without the intervention of any other act of the State. Therefore, the special conditions of the procedure under Section 26 (2) of the ACC are fulfilled.

[25] The petition complies with the requirements listed, in Section 52 (1b) of the ACC, of being an explicit request, namely it contains: *a*) the provision of the law that establishes the competence of the Constitutional Court to decide upon the petition, and the one which provides the ground for the petitioning right of the petitioner [Section 26 (2) of the ACC]; *b*) the reason for starting the procedure (the petitioner had to cease its activity of the retail trade of electronic cigarettes because of the provisions of the law held to be in conflict with the Fundamental Law); *c*) the provisions of the law to be reviewed by the Constitutional Court [the text "electronic cigarettes" in Section 1 (1) and the text "and the products specified in Section 3 point 8 *m*)" of the Section 11 (1) of the ASM; Section 7/E (1) and Section 7/F of the ANS]; *d*) the provision of the Fundamental Law alleged to be violated [Article M) (1), Article IX (1), Article XII (1) and Article XIII of the Fundamental Law]; *e*) the reasoning why the challenged provisions of the law are in conflict with the specified provisions of the Fundamental Law; *f*) an explicit request addressed to the Constitutional Court to declare that the challenged provisions of the law are in conflict with the Fundamental Law and to annul them.

[26] One should note in this context that, according to the case law of the Constitutional Court, Article M) (1) of the Fundamental Law does not qualify as a constitutional provision containing the petitioner's fundamental right granted in the Fundamental Law, upon which a constitutional complaint could be based [see most recently, for example: Decision 3021/2019. (I. 21.) AB]. Consequently, the Constitutional Court could not review the element of the petition, which had been based on this Article.

[27] The Constitutional Court held as a question of fundamental constitutional importance (Section 29 of the ACC) the issue of linking the distribution of the affected scope of products to the concession licence of trading tobacco products, by

taking into account that the entrepreneur shall not be entitled to continue its former activity. In the course of developing the system of tobacco shops, the traders of tobacco products had the opportunity in principle to participate in the competitions for concessions and to win tobacco product trade concessions. On the other hand, with regard to electronic cigarettes, refill containers and devices imitating smoking, the regulation that entered into force on 20 May 2016 channelled retail trade into the network of tobacco shops operated by the licence holders of the concessions already allocated. As a result, the affected enterprises cannot continue their activities. With respect to the prohibition of distance sales, the question is again the necessary and proportionate restriction of the right to enterprise, as the petition had founded the alleged violation of the fundamental right on the basis of claiming that the legislative aim could have been achieved through less restrictive tools as well. A review on the merits of the case is also needed to answer the question whether or not the restriction of the freedom of expression by the provisions on prohibiting the advertising of electronic cigarettes is proportionate, and if the full ban of commercial communication leads to the injury of the fundamental right to enterprise.

[28] Based on all the above, at the panel sitting of 20 June 2017, the five-member panel of the Constitutional Court decided on admitting the constitutional complaint.

[29] 2. In the subject matter of the petition for posterior norm control, the minister for national development, as the minister in charge of the professional management of organising the retail trade activity of tobacco products, as well as the secretary of State for healthcare of the ministry of human capacities provided the Constitutional Court with information on their positions taken in the case. With regard to the petition of constitutional complaint, the minister for national development and the minister for human capacities sent a joint position paper.

[30] 3. The Constitutional Court – with regard to the fact that the subject matter of the petitions is the same – consolidated the petitions and judged them in a single procedure on the basis of Section 58 (2) of the ACC.

[31] 4. The provisions of the ASM challenged by the petitions have been amended after the submission of the petitions. The amendment only affected the extension of the scope of products that can only be sold in tobacco shops, but due to the amendment, the placement of conjunctives and commas has been modified to a limited extent also with respect to the parts of the text affected by the petitions.

[32] With respect to the amendment, it needs to be laid down that the present decision of the Constitutional Court – in accordance with its case law {see for example: Decision 3197/2018. (VI. 21.) AB, Reasoning [6]} – shall be applicable to the text of the challenged statutory provisions in force at the time of their review by the Constitutional Court.

IV

[33] The petitions are in part well-founded, for the reasons set out hereunder.

[34] 1 The Constitutional Court first examined the violation alleged by the petitioner of the right to enterprise granted in Article XII (1) of the Fundamental Law, in the context of Section 1 (1) and Section 11 (1) of the ASM. First it verified the constitutional context of the right to enterprise (point IV/1.1., Reasoning [35] et seq.), then it provided an overview of the relevant regulatory environment (point IV/1.2., Reasoning [37] et seq.), followed by examining the challenged regulation with respect to the fundamental right in question (point IV/1.3–5, Reasoning [43]).

[35] 1.1 The core of the case law of the Constitutional Court affecting Article XII (1) of the Fundamental Law can be summarised as follows: “the fundamental right to enterprise means that anyone shall have the right, granted in the Fundamental Law, to run an enterprise, i.e. to be engaged in a business activity. However, the right to enterprise shall mean providing an opportunity to enter into a system of economic conditions created by the State for the enterprises, in other words, granting the possibility of becoming an entrepreneur that may be, in certain cases, bound by or limited to conditions motivated on professional grounds. The right to enterprise is not an absolute one and it may be subject to restrictions: no one has a subjective right to exercise an entrepreneurial activity connected to a specific occupation, nor to exercise it in a particular legal form of enterprise. The right to enterprise means only – but this much is set as a constitutional requirement – that the State should not prevent from or make impossible becoming an entrepreneur {Decision 54/1993. (X. 13.) AB, ABH 1993, 340, 341–342.; reinforced in Decision 32/2012. (VII. 4.) AB, Reasoning [155]}. The Constitutional Court also pointed out in the determination of the constitutional content of the fundamental right to enterprise that »the right to enterprise should not be considered to bear a meaning according to which the legal environment applicable to functioning enterprises could not be changed« {Decision 282/B/2007. AB, ABH 2007, 2168.; reinforced in the Decision 32/2012. (VII. 4.) AB, Reasoning [161]}. In the case law of the Constitutional Court, the fundamental right to occupation, enterprise receives the same protection from State intervention and restriction that is afforded to freedoms. However, the constitutionality of these restrictions is evaluated by different standards depending upon whether it is the practice or the free choice of the occupation which is restricted by the State and, with respect to the latter, the judgement differs depending on whether the State limits the choice of occupation by subjective or by objective criteria. [...] What endangers the right to occupation, enterprise the most is precluding a person from engaging in that activity, i.e. he is not permitted to choose it. The prescription of subjective requirements is also a restriction on the freedom of choice. However, in principle, compliance with these requirements is open for everyone (if not, the restriction is an

objective one)." For this reason, the lawmaker's margin of action is somewhat greater than in the case of objective restrictions. Finally, restricting the practice of occupations is in most cases justified on professional and efficiency grounds, and they raise concerns related to fundamental rights only in particular cases. {Decision 21/1994. (IV. 16.) AB, ABH 1994, 117, 121., reinforced in Decision 3134/2013. (VII. 2.) AB, Reasoning [13]}." {Decision 3194/2014. (VII. 15.) AB, Reasoning [28]; see most recently: Decision 17/2018. (X. 10.) AB, Reasoning [112]}. "Article XII (1) of the Fundamental Law acknowledges the right to enterprise, placing both starting and continuing the enterprise under the protection of the fundamental right {c.p. Decision 3194/2014. (VII. 15.) AB, Reasoning [30] to [31]; Decision 17/2018. (X. 10.) AB, Reasoning [114]}. {Decision 8/2019. (III. 22.) AB, Reasoning [45]; Decision 3222/2019. (X. 11.) AB, Reasoning [14]}.

[36] Thus, the scope of protection of the right to enterprise, as a fundamental right, covers both the market entry (the free "selection" of a specific business activity, becoming an entrepreneur and commencing the activity), and the continuing of an activity already commenced, underlining, however, that the fundamental right in question does not guarantee an unchanged legal environment. The difference between the subjective and the objective limitations – to be assessed in both cases according to the test specified in Article I (3) of the Fundamental Law – is basically in the fact that the subjective conditions can, in principle, be fulfilled by anyone, while the objective restrictions mean requirements, which are independent from the person, who intends to be an entrepreneur.

[37] 1.2 By providing an overview of the regulatory environment under review, one may find the following.

[38] By virtue of Section 2 of the ASM entered into force on 1 July 2013, the lawmaker qualified the retail trade of tobacco products as an activity to be exercised exclusively in the State's competence – making it a State monopoly – and it declared that with a concession contract the State may transfer the exercising of this activity for a specific period of time. In the latter case, the retail trade of tobacco products can only be carried out on the basis of the eligibility granted by the terms of the concession contract (the right to the retail trade of tobacco products), in the possession of a tobacco product retail trade licence.

[39] The competitive procedure had been carried out, the concession contracts were signed and on 1 July 2013 the retail trade system operating on completely new grounds has been launched. Based on Section 7 (4) of the ASM, the concession period is twenty years, therefore, in the twenty years following the 1 July 2013, the right to the retail trade of tobacco products may only be acquired in exceptional cases (basically if a new competition is announced somewhere in the country due to a

public competition being unsuccessful or the termination of exercising the right to the retail trade of tobacco products) (c.p. Section 14 of the ASM). The only exceptions from requiring retail trade sales in tobacco shops are the cases laid down in Section 1 (3) and Section 11 (2) to (3) of the ASM.

[40] As from 20 May 2016, the restriction applicable to the retail trade of electronic cigarettes and the connected products (e.g. refill containers and devices imitating smoking) [Section 11 (1) of the ASM], challenged by the petitioner, was introduced into this regulatory environment and the system of conditions. In accordance with Section 1 (1) of the ASM, challenged by the petitioner, from 20 May 2016, the regime has been applicable to these products. In line with the above, it is the explicit provision of Section 11 (1) of the ASM, that unless an exception is made in this Act, the retail trade of tobacco products and the retail trade of the products under Section 3 (8) *m*) (the Act also mentions electronic cigarette under this point) shall only be carried out in a tobacco shop. At the same time, a prohibition on the distance sale of electronic cigarettes and refill containers has also been introduced by Section 7/F of the ANS.

[41] It should be pointed out, however, that according to the Hungarian regulation, electronic cigarette shall only mean the versions containing nicotine [Section 1 *p*) of ANS], while the nicotine-free version is classified as a so called device imitating smoking [Section 1 *r*) of the ANS] and their distribution is subject to the same rules and restrictions. Nevertheless, as the petition explicitly challenged the text “electronic cigarette” in Section 1 (1) of the ASM and not the term “electronic devices imitating smoking”, the constitutional review could not cover the latter, in line with the principle of being bound to the petition [Section 52 (2) of the ACC].

[42] Finally it should be noted that the relevant restriction was only applicable to retail trade: the mandatory provision [Section 15 (1) of the ASM] on the procurement of products from the supplier of tobacco retail trade covered only tobacco products (Section 3 point 1 of the ASM) and was not applicable to electronic cigarettes and the connected products. Consequently, wholesale trade – sales for tobacco shops – is still possible.

[43] 1.3 Based on the Decision 3194/2014. (VII. 15.) AB (hereinafter: “CCDec 1”) – according to which “the activity of the retail trade of tobacco products carried out for a significant period of time shall qualify as carrying out a business activity” (Reasoning [28]) – the activity of the retail trade of electronic cigarettes performed by the petitioner before the challenged amendment of the ASM also qualifies as carrying out a business activity, and as such it shall be covered by the scope of protection of the right to enterprise granted in Article XII (1) of the Fundamental Law.

[44] 1.4 Similarly to the previous case, this case concerns the restriction of the affected activity: the amendment of the ASM set a limit for carrying out the retail trade activity of electronic cigarettes when it provided that continuing this activity was only possible in tobacco shops on the basis of a concession contract. On the one hand, it means a restriction of market entry, and on the other hand – as in the case of the petitioner – it is a limitation on further continuing the activity.

[45] According to fundamental rights' test laid down in Article I (3) of the Fundamental Law, a fundamental right may only be restricted in order to allow the exercise of another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary, proportionately to the objective pursued, and respecting the essential content of such fundamental right. In the present case, the Constitutional Court carried out the test of necessity and proportionality with due account to the above arguments and in the framework outlined above, by first examining the necessity of restricting the fundamental right.

[46] According to the joint position taken by the ministers, the concerned product is fairly new in the sense that until early 2012 there had been only a few enterprises in Hungary engaged in selling electronic cigarette and the market started to expand afterwards. Accordingly, currently there are active debates about the issue of the health risks related to using electronic cigarettes, in particular concerning the level of the risk. This debate is well demonstrated by the differences between the positions found in the petition and the ones referred to in the minister's opinion.

[47] The petitioner primarily focused on stating that the electronic cigarette is not a tobacco product, and although it has harmful effects, they are much less serious than the harmful effects of smoking on health. The petitioner also argued by stating that the effect of getting the users into the habit of smoking and the so called "normalization effect" (undermining the efforts made for the "denormalization" of smoking) are not verified. It cannot be stated at present that using an electronic cigarette would lead to an addiction to nicotine, moreover, electronic cigarettes may also be used with nicotine-free liquids. The products are typically used by adults, who use it as a tool for quitting smoking or consider it as an alternative of smoking.

[48] On the other hand, the minister's opinion refers to position papers and reports that challenge the statements made by the petitioner (see page 8 to 13 of the minister's opinion). Furthermore, by referring to the judgement of the Court of Justice of the European Union delivered in the case No. C-477/14, the opinion underlines that in such cases the law-maker should take into account the precautionary principle, according to which if there is an uncertainty about the existence or the extent of a risk threatening human health, protective measures may be implemented even before the full verification of the occurrence and the severity of such risks. When

the existence or the extent of the alleged risk cannot be verified with absolute certainty due to the unconvincing nature of the study results, but the existence of an actual harmful effect on public health is substantiated in the case of the occurrence of the risk, the precautionary principle justifies the adoption of restrictive measures. Consequently, if the law-maker is in the possession of serious scientific information on the existence of potential risks to human health that might be caused by a product, which is relatively new on the market, the law-maker has to act according to the precautionary principle, by providing the high level of protecting human health. In this case, the law-maker may adopt protective measures, indeed, it is obliged to do so on the basis of the obligation of safeguarding human life and health, without waiting for the full verification of the actual occurrence and the severity of the risks.

[49] In line with that, the secretary of State for healthcare of the ministry of human capacities also warned about the risks related to using electronic cigarettes and he underlined that the electronic cigarette should not be regarded as a tool supporting the quitting of smoking, on the other hand, it serves maintaining the addiction to nicotine, and he also referred to the professional opinions that warn about the risks of the potentially poisonous compounds emitted to the air during using an electronic cigarette (see page 22 to 29 of the opinion).

[50] To sum up, the law-maker was motivated by certain actual or potential risks to introduce the restriction related to the trade of electronic cigarettes, while, according to the essence of the petitioner's arguments, non-existing, small or substantiated risks should not justify the serious restriction of the right to enterprise.

[51] First of all, it has to be laid down that the Constitutional Court is not empowered to decide, in any respect, about the level of the health risk related to using an electronic cigarette, and the examination of the necessity element of the fundamental rights test shall not be considered as a position taken in this regard. In fact, "in line with the Fundamental Law, the Constitutional Court's procedure may not be aimed at taking a stand in a question debated in science. Such a debated question is in the present case, whether or not e-cigarette poses risks, and if it does, to what extent is it harmful – compared to traditional tobacco products – to the health of active and passive users." {Decision 3292/2017. (XI. 20.) AB (hereinafter "CCDec 2"), Reasoning [23]; c.p. also Decision 3153/2019. (VII. 3.) AB, Reasoning [20]}.

[52] Therefore, the question can only be put in the form of asking whether the existence of a potential health risk – also admitted by the petitioner – may justify the restriction of a fundamental right. The Constitutional Court has already dealt with this question in the CCDec 2, and it concluded that, by enforcing the principle of prevention and the precautionary principle, it is not excluded to see the product in question as a potential "anteroom" of smoking, and therefore, to qualify as harmful

to health the using of electronic cigarettes (CCDec 2, Reasoning [37]). Thus, by taking into account the principle of prevention and the precautionary principle, due to the uncertainty about the existence of health risks and their level, the fundamental right to enterprise may be restricted.

[53] Consequently, – similarly to CCDec 1 (Reasoning [30]) – it can be stated in the present case as well, that the protection of the fundamental rights granted in Article XX (1) and Article XVI (1) of the Fundamental Law (right to health, and the children's right to the protection and care necessary for the proper physical, intellectual and moral development) as well as the performance of the State's constitutional obligation with regard to the protection of the child, laid down in Article XV (5) of the Fundamental Law – by improving the public health conditions of the society in the middle- and the long-run – provide a constitutional justification of due weigh for restricting the fundamental right to enterprise with regard to electronic cigarettes. In the course of performing the objective obligation of institutional protection securing the enforcement/performance of the fundamental rights and the constitutional obligation mentioned above, the State shall secure that the harms affecting physical and mental health of all members of the society, and in particular of minors, would be as little as possible.

[54] Electronic cigarette is not a common commodity, it is a product, which is potentially harmful to health. The restriction of its retail trade and of its widespread distribution is suitable of repressing the use of the product and its proliferation in general, and among minors in particular. It should be noted in this case as well that "the law-maker may freely assess – within the limits of the Fundamental Law – the scope of the preventive statutory regulation it intends to develop to minimise the risks, in the framework of the protection of the fundamental rights and the performance of the obligation of institutional protection serving the above, for the purpose of protecting the health of children and of minors. To choose from the potential regulatory methods shall be the duty and the responsibility of the law-maker; in the case under review, the law-maker could have introduced a more differentiated regulation, better enforcing the different individual aspects of the affected parties and being more equitable. The Constitutional Court could only examine the constitutional question – within the limits of the petition –, whether the regulation selected by the law-maker (and through this, the state intervention) was necessary and proportionate for achieving the given aim. The Constitutional Court could not review – in the absence of competence – the practicality, effectiveness and equity of the selected regulation." (CCDec 1, Reasoning [30])

[55] The selected statutory provisions serve the purpose of repressing the using of electronic cigarettes and, this way, the protection of health – directly a fundamental right. Consequently, necessity, as a precondition of the constitutionality of restricting

a fundamental right as laid down in Article I (3) of the Fundamental Law, is deemed to exist in the case under review.

[56] 1.5. With regard to proportionality – according to the case law of the Constitutional Court – the existence of an appropriate balance between the importance of the aim to be achieved and the weight of the injury of the fundamental right caused in the interest of the foregoing should be examined. In enacting a limitation, the law-maker is bound to employ the most moderate means suitable for reaching the specified purpose, i.e. the limitation should not exceed the level absolutely necessary for achieving the constitutionally justifiable objective. {See for example: Decision 24/2014. (VII. 22.) AB, Reasoning [135]; Decision 3312/2017. (XI. 30.) AB, Reasoning [43]}. Thus, in the scope of the review of proportionality, the Constitutional Court had to compare the weight of the intervention – the injury of the fundamental right caused – with the aim to be achieved (protection of health).

[57] 1.5.1. As far as the weight of the intervention is concerned, making the retail trade of electronic cigarettes a state monopoly and including it posteriorly in the concession system has not made carrying out the activity – the distribution of the affected scope of products – prohibited in general, as selling by the petitioner to tobacco shops has not been excluded, and it is a future option for the petitioner to take part in a concession competition in order to win the right of being a retail trader. However, the changing of the legal environment took place in the following manner: a) the ASM explicitly specifies the number of beneficiaries by settlements entitled to perform the activity of tobacco product retail trade [Section 6 (2) of the ASM], accordingly, the number of beneficiaries is limited, and, as a general rule, this number has already been reached in the year 2013; b) the durations of the concluded concession contracts last for twenty years (from 2013 to 2033), thus, any new entrance into the retail trade shall only be possible after a very long time, or – depending on the circumstances – only occasionally; c) at the same time, the law-maker also banned online sales (Section 7/F of the ANS). Consequently, the amendment of the ASM resulted in making the petitioner terminate its activity lawfully carried out for years. After 20 May 2016, performing retail trade has practically become impossible for the petitioner.

[58] Based on the above, this case is different from the one examined in the CCDec 1. By introducing the ASM in 2012, the retail trade of tobacco products was completely reformed together with the simultaneous a) introduction of the state monopoly, b) announcement of a public concession competition – covering the entire country – on transferring the right to perform the activity. Therefore, it could be stated without any concern that “the challenged statutory provisions have not completely deprived the complainants, for an indefinite time, of the possibility of performing a business activity (the retail trade of tobacco products); and they raised subjective limitations

on exercising the activity that could be fulfilled either by the petitioners or by an enterprise, which has not carried out such an activity before. Neither the complainants, nor anyone else are deprived of the possibility of exercising this business activity – in accordance with the statutory provisions of the Act on tobacco shops – after a successful competition.” (CCDec 1, Reasoning [29]) It was explicitly on the basis of the above starting point and perspective that the Constitutional Court had established earlier the necessity and the proportionality of the restriction, by applying the test under Article I (3) of the Fundamental Law (CCDec 1, Reasoning [30] to [31]). In the present case, however, this simultaneity does not exist: the petitioner had to cease its activity carried out before, but no new concession places have been announced in view of the amendment of the ASM.

[59] The case under review should also be differentiated from the Decision 26/2013. (X. 4.) AB, which was about the law-maker reclassifying the activity of operating slot machines – as a gambling activity – from the category of activities subject to an official licence to the category of activities to be exclusively performed in a gambling casino operating on the basis of a concession contract. The content of the introduction of the requirement of concluding a concession contract, as a precondition, in the case of activities lawfully performed earlier is the same as in the case under review now, as it is the very essence of the amendment of the ASM. It is an important difference, however, that the number of gambling casinos – differently from the number of tobacco retail trade rights – was not limited at the time of concluding the review by the Constitutional Court. This is why the Decision 26/2013. (X. 4.) AB could state that although the operation of slot machines in gambling casinos was possible with more limitations compared to the previous regulation, with a significant capital investment, “at the same time, the challenged laws do not make rendering this service impossible on the basis of a concession contract.” (Reasoning [177])

[60] As compared to the above, in the present case, the petitioner had to actually cease its activity lawfully performed before, and due to the limited number of beneficiaries, it may not continue/restart the activity until a concession place becomes empty for some reason, so that the petitioner may compete for it. With respect to the petitioner, the introduced condition – winning one of the predefined number of concession places – is fundamentally different and more than a simple adaptation to a new legal situation, or the prescription of an additional condition that can be fulfilled by anyone. The challenged provisions – with respect to their importance and weigh – are considered the same way as the objective limitations on market entry: the activity in question cannot be carried out freely, as it is subject to a condition the fulfilment of which is not related to the person, the abilities and the possibilities of the petitioner, due to being an external condition. The petitioner does

not have any influence on whether or not a concession place becomes empty, and whether a competition is announced with regard to that – although it is the precondition of continuing the activity. (According to the official data, since 2 April 2015 – for more than 4 years – no new competition has been announced [see: nemzetidohany.hu/palyazatok-2/], which means that the petitioner did not have any chance to win a concession place.)

[61] It means that the amendment of the ASM mandatorily ordered, as from 20 May 2016, the termination of the petitioner's retail trade activity carried out until that time, without providing for any real opportunity to continue it.

[62] 1.5.2. The intended aim of the amendment of the law, namely the protection of health, primarily – but not exclusively – the protection of the health of minors, had to be examined in the light of the above.

[63] On the one hand, it should be noted that the protection of the health of the members of the society – in particular, of minors – deserves primary protection. Hindering, preventing illnesses or the development of health damages require significantly less time and money than treating an illness already developed. The treatment of existing illnesses implies significant budgetary costs to be borne by the State. Therefore, in addition to the efforts of health education – information and prevention campaigns, screening and consultation –, the restriction of access to the products having a harmful effect on health may be considered as a proportionate restriction of fundamental rights. Especially, when the product concerned is one the using, operation, maintenance of which requires special knowledge.

[64] The "law-maker – within the limits of the Fundamental Law – enjoys a relatively wide discretion about what – and to what extent – to consider as dangerous to the society, and the result of this assessment shall only be regarded to be in conflict with the Fundamental Law, if it is unsuitable to provide a foundation for the subsequent legislation, due to being wrongful." (CCDec 1, Reasoning [31]) The intervention by the State may be influenced by the extent or the seriousness of the product's harmful effect to health – potentially in comparison to that of other, similar products –, but it is not a decisive factor. The challenged regulation addresses a real problem, therefore, just like in the case reviewed in CCDec 1, it is considered to be aimed at the enforcement of fundamental rights that deserve protection even in conflict with the fundamental right to enterprise. Restricting the liberalised retail trade to a limited number of shops – with the simultaneous ban on on-line trading – is undoubtedly narrowing down the possibility of accessing the affected products and it offers a chance for selecting the enterprises that possess adequate professional expertise, which may contribute to the safer use of electronic cigarette as an electronic product. If the other means of prevention essentially are, or are expected to be, unsuccessful

or inefficient, and other methods of restricting trade are not feasible, then this solution may also be considered as the least severe tool and it can be constitutional from the aspect of its suitability for reaching the desired objective.

[65] On the other hand, however, the law-maker's intervention into retail trade – as mentioned above – was in particular serious in the relevant case with respect to the petitioner and other enterprises in similar situation: the introduction of the concession system by amending the ASM was implemented in a form, which was equivalent with ordering the termination of the activities carried out by the petitioner and by the similar enterprises.

[66] Continuing the activity has become impossible without any compensation, although the law-maker has not otherwise considered it necessary to amend the law by completely banning the retail trade of the products in the interest of protecting the right to health.

[67] Furthermore, it is hard to comprehend how the tobacco shops could – in the absence of any requirement concerning their training and expertise – provide more professional information about using and maintaining electronic cigarettes than the shops that had functioned earlier. It should also be noted in this regard that neither is the rule under Section 16/A of the ASM – according to which, the retail trader of tobacco products must provide the consumer, upon his request, with the basic facts on the harmful effects of smoking – applicable to electronic cigarettes.

[68] With respect to carrying out retail trade, it is not reasonable to expect that the regulations would remain unchanged in the long run, as the laws must take into account the economic environment as well as the interest of both the traders and the consumers. However – with due account to the above –, in the case under review, the introduction of limiting sales exclusively to tobacco shops means nothing else but rendering the operation of the existing shops impossible by the law-maker simply allocating the retail trade of electronic cigarettes and the connecting products to other existing enterprises that already possess a concession. In contrast with the enterprises affected by the ASM in the first wave, the law-maker failed to make new concession places available for the enterprises affected negatively by the amendment, and it also failed to provide for compensating the persons concerned.

[69] It is worth noting that in 2015 the Constitutional Court of Austria reviewed a case similar to this one. There the challenged provision of the law extended the tobacco monopoly to the refill liquids with or without nicotine content and to disposable electronic cigarettes, thus, after the amendment of the law, these items could only be bought in tobacco shops. Thus, subsequently, the petitioners were only allowed to sell the electronic cigarette device itself. In its decisions No. G 118/2015, No. G 131/2015 and No. G 204/2015, the Constitutional Court of Austria found that the

restriction was necessary, but it was disproportionate with respect to the right to enterprise.

[70] 1.5.3. The mere fact of introducing – or, in the present case: extending – a concession system to electronic cigarettes and the connecting products is not in conflict with the Fundamental Law. The right to enterprise is not an unrestrictable fundamental right, therefore, the law-maker is undoubtedly entitled to decide about restricting it in the interest of protecting another fundamental right. In this regard – with due justification – it would also be possible to adopt a law that fundamentally reforms the rules or even prohibits the distribution of a specific product (or a scope of products). The right to enterprise does not vest anyone with the right to exercise a specific retail trade activity with unchanged content and conditions.

[71] From the aspect of the right to enterprise – as detailed above (see points IV/1.5.1. and IV/1.5.2. of the reasoning, Reasoning [57] et seq. and Reasoning [62] et seq.) –, the cause of concern is explicitly the manner in which imposing the mandatory concession on the retail trade of electronic cigarettes and the connecting products, as well as the redirecting of retail trade into the tobacco shops were implemented: the position of the enterprises dealing with the retail trade of electronic cigarettes, affected by, and already operating at the time of the amendment of the law was made worse due to the fact that the law-maker did not pay any attention to their right to maintaining their business activity or to the actual damage they suffered because of the law under review. On the one hand, the amendment of the law did not contain any obligation on announcing new concession competitions that could have provided a potential chance for continuing the activity. On the other hand, the law-maker also failed to provide for a compensation because of the mandatory termination of the activity, to offset the material damages directly and verifiably connected to the termination, and that cannot be enforced and equalized in any other way. Therefore, the conflict with the Fundamental Law due to the disproportionate restriction of the fundamental right results fundamentally from the amendment of the ASM being defective. {see similarly the Decision 10/2019. (III. 22.) AB, Reasoning [41] to [49]}.

[72] According to Section 46 (1) of the ACC, if the Constitutional Court, in its proceedings conducted in the exercise of its competences, establishes an omission on the part of the legislator that results in violating the Fundamental Law, it shall call upon the organ that committed the omission to perform its task and set a time-limit for that. According to Section 46 (2) c) of the ACC, the omission of the law-maker's tasks may also be established when the essential content of the legal regulation that can be derived from the Fundamental Law is incomplete. In the case under review, the regulatory deficit mentioned above (the lack of a statutory provision on establishing new concession places, and the lack of compensation for the material

damages directly and verifiably connected to the termination of the activity) results in the injury of the right to enterprise granted in Article XII (1) of the Fundamental Law.

[73] Based on all the above, for the purpose of eliminating the situation in conflict with the Fundamental Law by violating Article XII (1) of the Fundamental Law – also with due regard to the need to proceed by saving the law in force {see similarly in the Decision 22/2018. (XI. 20.) AB, Reasoning [85] to [88]}, the Constitutional Court established, as ruled in point 1 of the holdings of the decision, a conflict with the Fundamental Law caused by an omission. By way of declaring a legislative omission and by addressing a call to the law-maker – on the basis of which, the law-maker shall be in charge of finding the appropriate way of compensation –, the harmony between the ASM and the provisions of the Fundamental Law can be achieved. Therefore, at the same time, the Constitutional Court rejected the petition aimed at declaring the conflict with the Fundamental Law and the annulment of the text “electronic cigarettes” in Section 1 (1) and the text “and the products specified in Section 3 point 8 *m*)” of the Section 11 (1) of the ASM.

[74] 2. The petitioner who submitted the constitutional complaint also requested the declaration of the violation of Article XIII (1) of the Fundamental Law in the context of the text “electronic cigarettes” in Section 1 (1) and the text “and the products specified in Section 3 point 8 *m*)” of the Section 11 (1) of the ASM, on the basis of arguments similar to the ones submitted with regard to the right to enterprise. In line with the case law of the Constitutional Court, as the case under review affects in particular the scope of protection of the right to enterprise, it rejected the examination of the injury of the right to property on the basis of the same arguments, due to the lack of connection.

[75] In the petition for posterior norm control, the petitioners also refer to Article XX (1) of the Fundamental Law: the petitioners hold that the right to health is violated by the fact that prescribing the mandatory distribution in tobacco shops shall increase the chance of getting into, or back, to the habit of smoking among the persons who use electronic cigarettes that do not contain nicotine. With regard to the constitutional content and the scope of protection of the right to health (see: CCDec 2, Reasoning [18] to [22]), the Constitutional Court states that the mere fact of offering these products for sale only in the premises where tobacco products are also sold – i.e. that the customers shall see the tobacco products as well – cannot be interpreted, from a constitutional point of view, as a restriction of the right to health. The challenged provisions of the law do not force the affected persons to consume these products, and no explicit requirement on separated distribution is deductible from Article XX (1) of the Fundamental Law. As also referred to in CCDec 2, “in this respect [...] the restriction of the right to health of the persons, who consume the e-cigarette, which is dangerous to health, the proportionality of the challenged

restriction is not applicable”, and “no obligation of developing differentiated regulations concerning smokers and the users of electronic cigarettes is deductible from Article XX (1) and (2) of the Fundamental Law” (Reasoning [40] to [42]). Therefore, the Constitutional Court has rejected the petition in this respect, too.

[76] 3. The Constitutional Court then examined whether or not the prohibition of distance selling, under Section 7/F of the ANS, injures Article XII (1) of the Fundamental Law (right to enterprise) and Article XIII (1) (right to property).

[77] 3.1. The Act fails to provide a definition of distance sales – in contrast with the definition of cross-border distance sales [Section 1. o) of ANS] –, however, it evidently means the transactions where the contract is concluded without the simultaneous physical presence of the consumer and the service provider, i.e. when the trader does not personally meet the consumer. Typically it means ordering through the internet, but it also covers other methods of sale, such as purchasing over the phone. At the same time, the prohibition is only applicable to electronic cigarette and the refill container that are, according to Section 1 p) and q) of the ANS, defined as devices allowing the consuming of nicotine-containing vapour.

[78] It should be noted that there is no mandatory obligation of harmonisation with the Union law in the background of the prohibition of distance sales. Directive 2014/40/EU of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (hereinafter: “Directive 2014/40/EU”) only refers to cross-border distance sales to consumers. The judgement of the Court of Justice of the European Union delivered in the *Pillbox-case* (judgement delivered in the case No. C-477/14, Reasoning [36]) took a similar position with regard to the Directive 2014/40/EU authorising the Member States to enact legislation.

[79] 3.2. According to the consistent case law of the Constitutional Court, the scope and the method of the constitutional protection of property shall not necessarily follow the concepts of civil law, and it cannot be identified with the protection of the abstract property under civil law. The content of the right to property, protected as a fundamental right, shall be interpreted at all times together with the applicable limitations of public law and the (constitutional) limitations under private law. The extent of the constitutional protection of property is always concrete; it depends upon the subject matter, the object and the function of the property, as well as from the nature of the restriction as well. Viewed from the other side: the constitutional permissibility of intervention by the public authorities into the property varies according to these considerations. {see as a summary for example: Decision 3012/2017. (II. 8.) AB, Reasoning [46]}. Article XIII of the Fundamental Law protects

the property already acquired and, in exceptional cases, the expectations of property. {for example: Decision 3209/2015. (XI. 10.) AB, Reasoning [64] to [65]; Decision 3115/2013. (VI. 4.) AB, Reasoning [34]}.

[80] The provision challenged by the petitioner – the prohibition of distance sales – affects the manner of carrying out the retail trade activity. Accordingly, as far as their content is concerned, the arguments used in the context of the right to property apply to the right to enterprise, therefore, the Constitutional Court assessed them as such in the following points.

[81] 3.3. In the context of the right to enterprise [Article XII (1) of the Fundamental Law], it should be reiterated that this right means – as mentioned above (see: point IV/1.1. of the decision's reasoning, Reasoning [35] et seq.) – providing an opportunity to enter into a certain system of economic conditions created by the State for the enterprises, as well as granting the possibility to continue an activity already commenced. However, this fundamental right is not an absolute one and it may be subject to restrictions: no one has a subjective right to exercise an entrepreneurial activity, nor to exercise it in a particular legal form of enterprise. The conditions, requirements and prohibitions applicable to exercising a specific activity mean a restriction of the right to enterprise, however, this restriction may be justified by applying the test under Article I (3) of the Fundamental Law.

[82] The general prohibition of distance sales under the ANS is applicable to all kinds of distance sales, including the cross-border sales and the domestic ones. The circumstance that, instead of ordering and home delivery, the shop selling the product needs to be visited personally in order to purchase the product would surely restrict the accessibility of the product, and it would also reduce its turnover – for reasons of convenience alone. Therefore (in particular with regard to the fact that the law-maker simultaneously mandatorily redirected retail trade into the tobacco shops), the challenged regulation is suitable for repressing the using of the product as well its proliferation.

[83] As held by the Constitutional Court, the arguments justifying the necessity of the restriction are the same that had been identified as constitutionally acceptable justifications in the context of limiting retail trade to tobacco shops. By taking into account the principle of prevention and the precautionary principle, the protection of health, in particular, the health of minors [the protection of the fundamental rights granted in Article XX (1) and Article XVI (1) of the Fundamental Law as well as the performance of the State's constitutional obligation laid down in Article XV (5) of the Fundamental Law] provides a constitutional ground for the restriction of the wide-scale accessibility – distance sales and in particular on-line retail trade fall, beyond

doubt, in this category – of a product in the context of which there are verified health risks.

[84] With regard to the proportionality of the restriction, it should be taken into account, on the one hand, that retail trade has not been banned completely by the law-maker; it only excluded one of the methods of distribution for the purpose of protecting the right to health, i.e. it has not rendered the sales of the product impossible, it has only made it more difficult. On the other hand, the prohibition is not applicable to the entire scope of products, as it only applies to the devices that allow the consuming of nicotine-containing vapour, in relation to which the risk of being harmful to health is the highest. Thirdly, it should be noted, in particular in the context of protecting the health of minors, that although there are systems for age verification to control whether the consumer purchasing the product is of the minimum age required for the purchase, these measures are – as also referred to by the Court of Justice of the European Union in its judgement delivered in the case No. C-477/14 (Reasoning (127)) – prone to being circumvented or, respectively, manipulated. Prescribing a personal purchase may secure more effectively the prevention of minors from accessing the product.

[85] Based on the above, both the necessity and the proportionality of restricting the right to enterprise [Article XII (1) of the Fundamental Law] has been verified, therefore, the Constitutional Court rejected the petition aimed at declaring the conflict with the Fundamental Law and the annulment of Section 7/F of the ANS.

[86] It should also be noted that the Constitutional Court of Austria also reviewed the prohibition of the distance sales of electronic cigarettes, and in its decision delivered on 14 March 2017 in the case No. G 164/2016, it has found the restriction to be constitutional.

[87] 4. Finally, the Constitutional Court examined the compliance of Section 7/E (1) of the ANS with Article IX (1) and Article XII (1) of the Fundamental Law.

[88] The Constitutional Court first provided an overview of the regulatory environment under review (point IV/4.1., Reasoning [89] et seq.), followed by overview of the Constitutional Court's case law on the fundamental right of the freedom of expression (point IV/4.2., Reasoning [96] et seq.) and the advertising of tobacco products (point IV/4.3., Reasoning [101] et seq.), and finally the constitutional review of the norm (point IV/4.4. and its sub-points, Reasoning [105] et seq.).

[89] 4.1. Section 7/E (1) of the ANS – with the two exceptions made in the second sentence (the publications addressed to the professional representatives of the trade and the ones not for the EU market) – prohibits disclosing, in the framework of the information society service, in the press and in other printed publications, any

commercial communication, according to the Act CLXXXV of 2010 on Media Services and Mass Media (hereinafter: "Media Act"), aimed at, or having the direct or indirect effect of promoting electronic cigarettes and refill containers. Section 7/E (2) to (6) also prohibits other forms of sponsoring commercial communications, these, however, had not been challenged by the petitioner, therefore – with regard to being bound to the petition [Section 52 (2) of the ACC] –, the constitutional review could not cover these rules.

[90] The restriction is similar to the ban on advertising tobacco products [Section 19 to 20 of the Act XLVIII of 2008 on the Basic Conditions and Certain Restrictions of Business Advertising Activity (hereinafter: AA)] and it covers a wide spectrum of the communication with consumers, as follows.

[91] According to point 20 of the Media Act, commercial communication shall mean the media content aimed at promoting, directly or indirectly, the goods, services or image of a natural or legal person carrying out business activities.

[92] Although the Act does not provide a definition of "information society service", according to Section 2 *f*) of the Act CVIII of 2001 on certain issues of electronic commerce services and information society services, information society service shall mean distant services provided by electronic means, generally against payment, and accessed by the recipient of the service individually. Information society services encompass a wide spectrum of business activities carried out via computer networks (for example the on-line sales of goods, on-line provision of information or providing on-line commercial information, sending commercial information in electronic mail etc.).

[93] According to Section 203 point 60 of the Media Act, press products include not only daily newspapers or other periodical papers, but also on-line newspapers or news portals [see the same in Section 3 *n*) of the AA; Section 1 point 6 of the Act CIV of 2010 on the freedom of the press and the fundamental rules on media contents].

[94] The law does not provide for the definition of "printed publication": it may include any printed material, for example books, advertising materials, catalogues, brochures, advertising posters.

[95] With respect to the background of the regulation, it should be pointed out that although the provision on commercial speech can be found in the Directive 2014/40/EU, it is only applicable to cross-border activities (the Court of Justice of the European Union examined the validity of these rules of the Directive in the judgement delivered in the case No. C-477/14, Reasoning [109] to [118]). Thus, the full prohibition of advertising can be traced back to the obligation of harmonising the

Union law, although it does not follow mandatorily from the provisions of the Directive.

[96] 4.2. The petitioner alleged the violation of two fundamental rights with regard to the same rule, and it also referred to the injury of the right to enterprise in the context of the content of the injury of the freedom of commercial speech. The Constitutional Court first examined whether the challenged norm violated Article IX (1) of the Fundamental Law.

[97] The Decision 3208/2013. (XI. 18.) AB reiterated – by explicitly maintaining its earlier statements made during the force of the former Constitution about the relation between the freedom of commercial speech and freedom of expression (see: Decision 1270/B/1997. AB, ABH 2000, 713.; Decision 37/2000. (X. 31.) AB, ABH 2000, 293.) – that business advertising activity shall be covered by the protection of the right to freedom of expression. Accordingly, “the constitutional assessment of business advertising activity should also be based on the assumption that the right to the freedom of expression shall guarantee the free expression of one’s opinion not only with respect to certain ideas, facts and opinions, but it provides protection for free communication itself, the possibility of free expression in the broad sense”. However, “in the case of communicating information of commercial nature, a wider scale of state intervention may be constitutionally justified than in other cases of communicating opinions, as the case law “granted extra protection to the freedom of expression on account of it being an indispensable tool of one’s self-expression as well as of the free development of one’s personality, and for the purpose of facilitating one’s participation in the democratic society. However, as business advertisements are not directly linked to these fundamental values of the freedom of expression, because their aim is much more the promotion of the sales, the popularisation and of the use of the goods [...] rather than allowing one’s self-expression and one’s participation in the democratic dialogue, in the case of such commercial information, the option of restriction may be regarded constitutional in a wider scope” (Reasoning [101]).

[98] Commercial communication may also be connected to discussing public affairs, therefore, “with regard to the assessment of restricting the freedom of expression, the determining nature and the exclusiveness of the economic interests connected to the communications appearing in the commercial environment are decisive factors. [...] »The weaker constitutional protection of commercial communications is based on the fact that for commercial advertisers and other commercial entities these communications serve the purpose of enforcing their economic interests, rather than individual self-expression, self-realisation or the participation in the democratic dialogue.«” (Reasoning [103]) {In the context of the constitutional protection of commercial speech and its relation to the freedom of expression see also: Decision

26/2019. (VII. 23.) AB, Reasoning [35] to [37]; Decision 3001/2019. (I. 7.) AB, Reasoning [98]; Decision 3236/2018. (VII. 9.) AB, Reasoning [27]}

[99] As a summary: the freedom of commercial speech, including the publication of commercial communications affected in the present case – irrespectively to the fact whether or not the interest behind the communication is directly aimed at achieving an economic effect, gaining profits – shall fall in the scope of protection of Article IX (1) of the Fundamental Law. The actual existence of the fundamental rights' protection does not depend on the person of the communicator and the content or the aim of the communication. However, the extent of the protection – the scope of constitutional intervention by the State – depends on these circumstances.

[100] The prohibition under Section 7/E (1) of the ANS affects communications, which are aimed, on the basis of Section 203 point 20 of the Media Act, at “promoting, directly or indirectly, the goods, services or image of a natural or legal person carrying out business activities”. Taking into account the subject matter and the content of the communication (the promotion of electronic cigarette and refill container as goods as well as of the producer, distributor) and the subject (commercial advertiser) of the communication, the economic interest connected to the communication can be considered as a determining factor in the present case. The prohibition shall not be aimed at individual self-expression or the participation in the democratic dialogue, as it shall directly or indirectly – but explicitly – affect the communication targeting the sales, the promotion or the using of a specific product. The communication may not be linked, for example, to the discourse on the harms of electronic cigarettes, thus, it is not directly connected to the fundamental values of the freedom of expression. Consequently, although this communication is subject to the fundamental rights' protection under the Fundamental Law, and the restriction's conformity with the Fundamental Law should be decided on the basis of the test of necessity-proportionality laid down in Article I (3) of the Fundamental Law, this communication shall not be subject to a prominent constitutional protection.

[101] 4.3. In the past, before the entry into force of the Fundamental Law, the Constitutional Court had examined petitions related to the advertising of tobacco products multiple times.

[102] According to the Decision 37/2000 (X. 31.) AB, the complete prohibition of the advertising of tobacco products was not deductible from the Constitution. However, as stated in the decision, it did not exclude the law-maker formulating further restrictions, provided that they are needed for the purpose of providing the citizens with adequate information as well as for the protection of their lives and health. At the same time, the Constitutional Court also emphasized that the prohibitions and restrictions affecting the advertising of tobacco products would only comply with the

requirements raised by the right to the freedom of expression, if they are duly justified by the protection of the lives and the health of the citizens and the protection of the children's proper physical and mental development (ABH 2000, 293, 299.).

[103] The Decision 23/2010. (III. 4.) AB examined two particular forms of restricting advertising. On the one hand, the ban on placing tobacco advertisements on the shop façades, and on the other hand, the rule prohibiting the placement in the packaging of tobacco products a call to take part in a prize-drawing competition. In both cases, the Constitutional Court found that the commercial speech, protected by the freedom of expression, had been restricted necessarily and proportionately. However, it also pointed out that in the case of logos and inscriptions placed on the outer façade of the shops, the communication was accessible by anyone, including children, and it induced exclusively or predominantly to consume the product. In contrast with that, packaging inserts are addressed to the actual consumers. If the content of the communication is the promotion of participation in a prize-drawing competition, then it is an advertising activity of purely business purpose, motivating to additional consumption, therefore, the more severe state intervention may be accepted. Finally, the decision also emphasized that the information placed in the product packaging may contain general and neutral product information, data supporting the consumer's informed choice, information on the manufacturer's economic situation or its standpoint taken on economic policy, or even information of cultural nature. These communications may not be completely separated from the manufacturer's primary objective, namely the selling of the product, still the diversity of the potential content of information should not be disregarded (ABH 2010, 101, 136 to 145).

[104] The statements of principle that had been made in the earlier decisions – although in the past the Constitutional Court only examined particular provisions on advertising bans, rather than any provision on the general prohibition of advertising tobacco products – may have significance on the one hand because in its past decisions the Constitutional Court explicitly upheld its statements that had been made on the relation between the freedom of commercial speech and the freedom of expression. {Decision 3208/2013. (XI. 18.) AB, Reasoning [104]} On the other hand, according to the CCDec 2, by enforcing the principle of prevention and the precautionary principle, it is not excluded to see the product in question as a potential "anteroom" of smoking, and therefore, to qualify as harmful to health the using of electronic cigarettes (CCDec 2, Reasoning [37]). Consequently, the general statements made during the review of the constitutionality of advertising tobacco products may, as appropriate, influence the assessment of the advertising rules applicable to electronic cigarettes.

[105] 4.4. In the present case, the question to be answered is whether the introduced prohibition qualifies as a limitation on the freedom of expression constitutionally justifiable by the application of Article I (3) of the Fundamental Law.

[106] 4.4.1. With account to the fundamental rights test under Article I (3) of the Fundamental Law, the necessity of the restriction may be justified by the protection of another fundamental right or constitutional value.

[107] Using an electronic cigarette is not prohibited at all under the laws of Hungary. Nevertheless, the distribution of the product is, on the one hand, subject to conditions (for example: the obligation of notification prior to placing on the market, Section 7/D of the ANS), and on the other hand it is restricted [for example: the explicit ban of sales to minors, Section 1 (2) of the ASM: "The retail trade of tobacco products as well as the distribution of electronic cigarettes and electronic devices imitating smoking, smokeless tobacco products and the new categories of tobacco products shall only be carried out in a manner excluding minors. Selling the products specified in paragraph (1) to minors or making such products accessible by them in any other way shall be prohibited."]. Consequently, the challenged provision of the law concerns the commercial speech related to a product, which can be lawfully distributed subject to certain conditions and limitations.

[108] Publishing a commercial communication is not the only element of keeping contacts with the consumers, however, it is an important one, as it influences the knowledge about the product as well as its evaluation, thus, it may significantly influence the volume of consumption. Section 7/E (1) of the ANS covers, in the scope under review, essentially all aspects of commercial communication towards the (potential) consumers, it narrows down extremely the possibility of reaching the consumers and, therefore, it should be regarded as a significant intervention with respect to the person engaged in the economic activity. All the above may also affect the access to information by the consumer on the other end of the channel of communication, as the consumer is entitled to receive objective, not misleading information about the product in question.

[109] It is a fact in the case of all potential or actual consumers that, although using the product is not prohibited, it poses a risk to human health, primarily due to its nicotine content and the threat of developing an addiction. In view of the risk of health damage, restricting the encouragement of use and of the direct or indirect promotion of the product shall serve the purpose of protecting health. Due to the advertising ban, the (potential) consumers shall not encounter with communications motivated by the communicating party's economic interest, encouraging the using of the product (for example: a call on starting or continuing its use, messages that set the using of the product as an example, or, as the case may be, understating its

potential harmful effects), therefore, they have the opportunity to consider their own independent decision of purchasing and consuming an electronic cigarette without being influenced by the advertisements.

[110] Accordingly, the restriction on commercial speech is aimed at repressing the demand (explicitly with regard to the consumers, as the advertising activities addressed to the representatives of the trading profession and not influencing the consumers' demand are not prohibited), and it serves the purpose of the protection of the fundamental rights granted in Article XX (1) and Article XVI (1) of the Fundamental Law (the right to health and the children's right to the protection and care necessary for the proper physical, intellectual and moral development) due to the existence of the health risks related to using the electronic cigarette, furthermore, it is also connected to the performance of the constitutional obligation binding the State with respect to the protection of children enshrined in Article XV (5) of the Fundamental Law.

[111] As a summary: The regulation can be regarded necessary in general for protecting public health, and in particular for the protection of the children's health.

[112] 4.4.2. With regard to proportionality – according to the case law of the Constitutional Court – the existence of an appropriate balance between the importance of the aim to be achieved and the weight of the injury of the fundamental right caused in the interest of the foregoing should be examined. In enacting a limitation, the law-maker is bound to employ the most moderate means suitable for reaching the specified purpose, i.e. the limitation should not exceed the level absolutely necessary for achieving the constitutionally justifiable objective. {See for example: Decision 24/2014. (VII. 22.) AB, Reasoning [135]; Decision 3312/2017. (XI. 30.) AB, Reasoning [43]}. Thus, in the scope of the review of proportionality, the Constitutional Court had to compare the weight of the intervention – the injury of the fundamental right caused – with the aim to be achieved (protection of health).

[113] With respect to the proportionality of the restriction, the Constitutional Court took into account the following.

[114] On the one hand, the law-maker applied differentiation in two respects: primarily, the ban – within the Union market – only applies to communication with the consumers and not with the representatives of the trade profession, thus, the restriction is aligned with the aim of preventing the motivation of consumption; secondly, the advertising ban only covers the products that allow the consumption of nicotine-containing vapour [c.p.: Section 1 *p*) and *q*) of the ANS].

[115] On the other hand, it has been found that the law-maker does not have any tool to effectively counteract the effect of commercial communications on the

consumers and in particular with regard to potential consumers. Targeted awareness campaigns and training on the risks of electronic cigarettes would be necessary, but even by using such tools, the compensation of the consumption motivating effects of commercial communications would require disproportionately huge efforts and funds.

[116] Thirdly, the communication channels affected by the advertising ban in question – information society services, press products (printed and internet-based journals, news portals) and printed publications (brochures, posters etc.) – may potentially reach anyone, including the children, who are in particular sensitive to advertisements and who are more vulnerable in the context of the effects of advertising – being more vulnerable and influenceable due to their age. In the case of both the adults and the children, the restriction of advertising serves the purpose of the protection of health, but while the adult members of the society may be capable of making a free and responsible decision about using the electronic cigarette without being influenced by the advertisements, and possessing other adequate information, children are not necessarily prepared to do so. Therefore, with regard to children, the State has enhanced responsibility in the field of health protection – due to the harmfulness of consuming nicotine and the potential risks of developing an early addiction and the subsequent transfer of the habit to tobacco products. Although, according to the regulations in force, the product cannot be legally sold to minors, they may become subsequent users with a higher probability under the influence of commercial communications that present the use of the product as natural, indeed attractive, and a part of the lifestyle presented as a model to be followed. As compared to adults, children may be on a lower level of consideration and circumspection in their assessments, and they may also be more easily influenced by and perceptive of the messages conveyed by advertisements, which may justify the higher degree of State intervention. It should also be noted in this context, that with regard to the majority of commercial communications, hiding them away from children is not possible at all (posters, journals accessible by anyone etc.).

[117] Fourthly, it is to be pointed out in the context of the Directive, which serves as the basis of the challenged provision (otherwise only applicable to cross-border advertising activity), the Court of Justice of the European Union stated the following in its judgement delivered in the case No. C-477/14: "The prohibition laid down in Article 20 (5) of Directive 2014/40 seeks to ensure that a uniform regime for the trade in electronic cigarettes within the internal market is applied, while ensuring a high level of protection of human health, taking account of the uncertainties surrounding that product and the requirements stemming from the precautionary principle" (Reasoning [111]). The relevant provision of the Directive "means that consumers –

not least young people who are particularly sensitive to advertising – are confronted with fewer commercial inducements to purchase and consume electronic cigarettes with the result that they are less exposed to the identified or potential risks to human health to which those products could give rise.” (Reasoning [113])

[118] Based on the above, a relatively wide scale of ban on advertising may be considered as proportionate in the protection of health, in particular the health of children.

[119] Nevertheless, in assessing the constitutionality of the regulation, another aspect, namely the issue – also referred to by the petitioner – of differentiating between communicating consumption-inducing advertisements and consumers’ information (product information) should also be taken into account. The Constitutional Court has also examined this question.

[120] From the side of the manufacturer (distributor), it is not easy to distinguish between the above two categories, as even a neutral product information, which contains objective data, and which is provided to the (potential) consumer is connected to the primary objective of the manufacturer (distributor), namely selling the product.

[121] However, from the consumer’s side, there is a significant difference between the two cases mentioned above, as for the consumer, receiving neutral product information, distinguishable from advertising, can be a real and justified expectation: with regard to a legally distributed product, the consumer may have a justified need to be able to contact the manufacturer (distributor), and to have access, on the one hand, to information supporting his informed decision about the products offered on the market, and on the other hand, to information about the features of the product purchased or to be purchased (for example: product catalogue).

[122] Accordingly, a neutral product information provided on the consumer’s request about electronic cigarette, as a product, may also be regarded from the manufacturer’s (distributor’s) side as a form of commercial communication, resulting in, as one of its indirect effects, making the product more popular. In the opinion of the Constitutional Court, this communication shall enjoy the protection under Article IX (1) of the Fundamental Law, because these communications may, as appropriate, also support informed decision making based on the aspects of health protection. The consumer shall not be deprived of the opportunity to have access to such information.

[123] According to the overview of the judicial case law related to the advertising of tobacco products, in the individual decisions, the court took into account the informative importance of the communication between the manufacturer (distributor)

and the consumers as well as the consumers' demand for information. For example, the Curia differentiated between "merely informing the consumers" and advertising by requiring in the latter case, for example, that the "environment of the product presents the product in a manner raising attention, or motivating the consumers to use the product". For the realisation of business advertising, the promotion of the sales of the product, in addition to merely informing the consumers, further attention-raising presentation or providing the consumers with additional information compared to the basic information necessary for identifying the product by the consumers shall be required. [...] The mere fact of selling the tobacco product at a place of sale not compliant with the provisions of the law shall not make the presentation of the product a case business advertising and, therefore, it shall not be sanctionable because of prohibited advertising (judgement No. Kfv.III.37.842/2012/3). Similarly, in another decision, the Curia classified the presentation of the product as a case of business advertising, because the challenged communication included a recommendation on using the product, in addition to indicating its price, brand and features (judgement No. Kfv.II.37.233/2009/8.).

[124] Based on these considerations, the interpretation, which is in line with Article IX (1) of the Fundamental Law is the one that allows for the personalised communication between the adult consumer (or a closed group of consumers) and the manufacturer (distributor), on the basis of an advance request, and, as the case may be, via a closed communication channel. Although the law-maker may restrict the inducing of demand, but prohibiting the provision of neutral information to an adult consumer – who is, consequently, entitled to lawfully purchase and use the product –, based on his or her individual decision, would qualify as the disproportionate restriction of Article IX (1) of the Fundamental Law. The wording of Section 7/E (1) of the ANS does not exclude this interpretation – considered to be constitutional –, and neither does any judicial case law referring to the contrary developed until now in connection with the rule under review. Therefore, the challenged provision is not considered to restrict any fundamental right. Consequently, the Constitutional Court has rejected the petition in this respect. In the future, the Constitutional Court might review in an individual procedure of constitutional complaint, whether or not the application of Section 7 (1) of the ANS to concrete facts of a case is in line with the Fundamental Law. {see similarly: Decision 3/2019. (III. 7.) AB, Reasoning [75]}.

[125] 4.5. In the context of the prohibition of commercial communications under Section 7/E (1) of the ANS, the petitioner also alleged the injury of the right to enterprise [Article XII (1) of the Fundamental Law], because, in his opinion, being able to communicate with the potential consumers is one of the preconditions of becoming an entrepreneur. However, the challenged provision is not in a

constitutional connection with this fundamental right, therefore, in this respect, the Constitutional Court rejected the petition.

V.

[126] Due to establishing an omission by the law-maker, the Constitutional Court ordered the publication of this decision in the Hungarian Official Gazette on the basis of the second sentence of Section 44 (1) of the ACC.

Dr. Tamás Sulyok
President of the Constitutional Court

Dr. Tamás Sulyok
President of the Constitutional Court,
on behalf of
Dr. István Balsai
Justice of the Constitutional Court, unable
to sign

Dr. Egon Dienes-Oehm
Justice of the Constitutional Court

Dr. Ildikó Hörcherné dr. Marosi
Rapporteur Justice of the Constitutional
Court

Dr. Béla Pokol
Justice of the Constitutional Court

Dr. Balázs Schanda
Justice of the Constitutional Court

Dr. Péter Szalay
Justice of the Constitutional Court

Dr. András Varga Zs.
Justice of the Constitutional Court

Dr. Ágnes Czine
Justice of the Constitutional Court

Dr. Attila Horváth
Justice of the Constitutional Court

Dr. Tamás Sulyok
President of the Constitutional Court,
on behalf of
Dr. Imre Juhász
Justice of the Constitutional Court, unable
to sign

Dr. László Salamon
Justice of the Constitutional Court

Dr. Marcel Szabó
Justice of the Constitutional Court

Dr. Mária Szívós
Justice of the Constitutional Court

Concurring reasoning by Dr. Marcel Szabó

[127] I agree with the holdings of the decision, but in connection with the reasoning, I hold it important to specifically underline the following statements.

[128] The precautionary principle may be interpreted in the contexts of both the protection of human health and the environment as well as of the right to a healthy environment. According to the core element of this principle, if there is an uncertainty about the existence or the extent of a risk threatening human health and/or the environment, the precautionary principle may justify the action of the law-maker in the form of adopting new restrictive measures. Based on the precautionary principle, stepping back, by virtue of the law, from the existing level of protection shall only be accepted as constitutional, if it is verified that the step-back does not pose a risk on human health and/or the environment, as it is the only case when the State shall be considered to be able to meet its objective obligation of institutional protection according to Article P) (1), Article XX and Article XXI of the Fundamental Law.

[129] The precautionary principle, as a constitutional principle has been laid down in the case law of the Constitutional Court several times {for example: Decision 13/2018. (IX. 4.) AB, in particular: Reasoning [21]–[22]}. In this context, the importance of this decision can be found in the fact that – in contrast with the earlier similar decisions of the Constitutional Court – in the present case, the applicability of the precautionary principle was unanimously acknowledged and approved by the plenary session of the Constitutional Court.

[130] I have fully supported the argumentation of the decision, as it follows directly from the case law of the Constitutional Court. In the case of neglecting the precautionary principle, the Constitutional Court should have established that the regulation under review failed to meet the requirement of necessity according to Article I (3) of the Fundamental Law, thus, its compliance with the Fundamental Law could not have been verifiable.

[131] As a direct consequence of the decision (in full harmony with the former case law of the Constitutional Court), the existence of a potential risk not verified in a scientific way may constitutionally justify a rigorous regulation in the interest of the enforcement of a fundamental right.

[132] The above interpretation of the precautionary principle is also supported by the fact that the minister of human capacities and the minister of national development specifically emphasized in their joint *amicus curiae* opinion: if the potential risks exist, the law-maker has to act according to the precautionary principle (see points 21 and 22 of the *amicus curiae* opinion). In this respect, the *amicus curiae* opinion has explicitly reinforced the standing practice of the Constitutional Court with regard to the precautionary principle.

Budapest, 16 December 2019

Dr. Marcel Szabó

Justice of the Constitutional Court