

Decision 8/2014 (III. 20.) AB

On the interpretation of Article M (2) of the Fundamental Law and, in conjunction therewith, on the interpretation of Article II and Article B (1) of the Fundamental Law

On the basis of a petition submitted by the Minister for Public Administration and Justice on behalf of the Government in the matter of an interpretation of the Fundamental Law, with the concurring reasonings by Justices *dr. Imre Juhász*, *dr. Barnabás Lenkovics* and *dr. László Salamon*, as well as the dissenting opinion by Justice *dr. Béla Pokol*, the Constitutional Court, sitting as the Full Court, passed the following

decision:

I

1. The Constitutional Court holds as follows: The second sentence of Article M (2) of the Fundamental Law imposes an obligation on the State to establish and maintain a system of institutions to protect the interests of consumers, to combat abuse of dominant positions and to enact legislation to guarantee consumers' rights, taking into account the constitutional values enshrined in the Fundamental Law.

2. The Constitutional Court shall be empowered to determine the unconstitutionality by non-conformity with the Fundamental Law of a specific judicial decision on the basis of the Fundamental Law, upon a valid petition. The specific features of a court judgment which would directly give rise to an unconstitutionality in contravention of the Fundamental Law arising from Article M (2) shall not be subject to the competence of constitutional interpretation.

3. The unconstitutionality of a statute in violation of the Fundamental Law may follow directly from Article M (2). In assessing the conformity of a piece of legislation or of a provision thereof with the Fundamental Law, the regulatory context of the provision under scrutiny shall also be taken into account.

II

The Constitutional Court, in construing Article II of the Fundamental Law and the principle of legal certainty enshrined in Article B (1) in conjunction with the second sentence of Article M (2), further holds that a piece of legislation may exceptionally, by virtue of the principle of *clausula rebus sic stantibus*, alter the terms of contracts concluded before its entry into force. As a general rule, the State may, by means of legislation, constitutionally alter the terms of a contract only where the same conditions are met as those required for a judicial amendment to a contract.

The Constitutional Court shall publish this Decision in the Hungarian Official Gazette.

Reasoning

I

[1] 1. Pursuant to Section 38 (1) of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"), the Minister for Public Administration and Justice, on behalf of the Government, has lodged a petition with the Constitutional Court seeking an interpretation of Article M (2), Article II and Article B (1) of the Fundamental Law.

[2] The petition sets out in detail the specific problem which, according to the Government, justifies the interpretation of the Fundamental Law, which arose in connection with the outstanding foreign currency loans.

[3] The petition refers to the fact that the sudden and sharp changes in foreign exchange rates and the increase in the repayment instalments on foreign currency loans, partly as a result of those changes and partly as a result of other factors, are placing a wide section of society in difficulty, making it absolutely indispensable to resolve the problems arising from foreign currency lending once and for all. The situation is further complicated by the fact that the Government does not consider that there is uniformity in the manner in which foreign currency lending and foreign currency loan contracts are judged by the courts.

[4] Therefore, the Government has raised two questions in the petition pertaining to the interpretation of the Fundamental Law.

[5] 1.1 The first question requires the Constitutional Court to interpret "Article M (2) of the Fundamental Law in order to determine whether the unconstitutionality in violation of the Fundamental Law of a contractual term applied on a massive scale and which unilaterally and to the significant detriment of consumers, the court judgement confirming such contractual term and the legal provision on which it is based can be directly derived from the above provision of the Fundamental Law, in particular, in the case of what are known as foreign currency loan contracts, a contractual term of which imposes the exchange rate risk exclusively on the debtor and provides the creditor with a relatively discretionary and wide margin of discretion to increase interest rates unilaterally, and which provides for the application of an exchange rate margin".

[6] 1.2 The second question requires the Constitutional Court to interpret "Article II and Article B (1) of the Fundamental Law from the point of view of what constitutional conditions, and to what extent different from those of the Constitution, may be applied to the amendment of existing contracts by means of legislation."

[7] 2. In connection with both questions, the petition draws attention to further circumstances.

[8] The petition also refers to the fact that the Constitutional Court has already addressed the issue of foreign currency loans and the possibility of State intervention in this area. In its Decision 3048/2013 (II. 28.) AB, the Constitutional Court dismissed the petitions seeking a finding of unconstitutionality in violation of the Fundamental Law with regard to the legal provisions providing for the possibility of final repayment of outstanding foreign currency loan contracts. Pursuant to the reasoning of the decision: "The Constitutional Court considers that

the constitutional conditions for legislative intervention are fulfilled with regard to the contested legislation. The State was compelled to intervene rapidly by certain measures, including the law on final repayment, in the interests of debtors, in order to avoid significant material and social damage threatening the country, because of the development of circumstances which could not reasonably have been foreseen and which went beyond the risk of normal change, the weakening of the Hungarian forint exchange rate, which it could influence only to a limited extent, and the related difficulties of a significant number of foreign currency borrowers, and the general foreign currency indebtedness of the country.” However, given the nature of the petitions and their purpose limitation, the Constitutional Court could not address the constitutionality of the foreign currency loan contracts as such.

[9] 2.1 The Government explained that the previous Constitution did not contain a provision analogous to the second sentence of Article M (2) of the Fundamental Law, and that the Constitutional Court was therefore not in a position to interpret its content. In the view of the Government, the State's obligation of institutional protection undoubtedly follows from the wording, but it is questionable whether, in addition to the above, that is, beyond the establishment and preservation of an institutional system protecting the interests of consumers and the creation of legislation guaranteeing consumers' rights, the provision of the Fundamental Law can also directly imply a form and extent of abuse of dominant position or violation of consumer rights which, even without a specific legal provision prohibiting or restricting it, may be contrary to the Fundamental Law. In the absence of appropriate constitutional court practice, it is particularly questionable whether Article M (2) of the Fundamental Law is directly applicable in cases where a large number of consumers are placed in a dire situation by a type of contract and the courts are inconsistent in their assessment of whether that type of contract meets the statutory conditions.

[10] The Government submits that the question is whether a significant infringement of consumer rights, “in particular, the passing of the exchange rate risk exclusively on the debtor, the unilateral increase in interest rates at the creditor's discretion and on a wide scale, and the creditor's use of the exchange rate margin, may rise to the level at which this type of contract, or the court judgements confirming it, may be held to be contrary to the Fundamental Law”.

[11] 2.2 The Government's submission relates to the fact that the Constitutional Court has previously derived freedom of contract from the provision of Article 9 (1) of the Constitution defining Hungary's economy as a market economy.

[12] 2.2.1 In accordance with the practice of the Constitutional Court based on the rules of the Constitution, freedom of contract is an independent constitutional right, which does not qualify as a fundamental right, but is constitutionally protected as an essential element of the market economy regulated by Article 9 (1) of the Constitution [Decision 13/1990 (VI. 18.) AB, Decision 32/1991 (VI. 6.) AB, Decision 6/1999 (IV. 21.) AB and Decision 109/2009 (XI. 18.) AB]. However, the Constitutional Court also recognised that freedom of contract is not unlimited, and that even in a market economy it is necessary for the State to intervene in the private law relations of the parties and to determine the form or mandatory content of certain types of contract. In its Decision 32/1991 (VI. 6.) AB, the Constitutional Court ruled that, in exceptional cases, the State may determine the content of contracts already concluded. This may be the case, in

particular, in the case of long-term contracts, where there is a risk of economic and social changes unforeseen at the time of the conclusion of the contract which are substantially prejudicial to the interests of one of the parties and of which the parties would not have concluded the contract or would have concluded it with different content. If these changes are of a social scale and thus affect a large number of contracts, the change in circumstances may require the intervention of the State. In this context, the Constitutional Court has held that the content of existing contracts may be determined under the conditions laid down in Section 241 of the Civil Code, that is, the State may, by legislation, change the content of contracts concluded in cases where the Civil Code allows the agreement to be amended by the courts. The Constitutional Court derived the conditions for State interference in existing contracts from Article 9 (1) of the Constitution, which incorporates freedom of contract. Since the entry into force of the Fundamental Law, the Constitutional Court has already addressed the limits and restrictions of the principle of *clausula rebus sic stantibus*, for example in Decision 3048/2013 (II. 28.) AB.

[13] The petition of the Government states that in these decisions the Constitutional Court referred to its earlier decisions, taken in the context of the Constitution, despite the absence of a provision under Article 9 (1) of the Constitution.

[14] The petition states that “without doubting that Hungary’s economic system is a market economy even in the absence of a specific provision in the Fundamental Law, it is questionable what conditions the Fundamental Law imposes on the amendment of the content of existing contracts by legislation and, logically, how much less stringently the Fundamental Law does so in the absence of a rule with the same content as Article 9 (1) of the Constitution.”

[15] 2.2.2. The petitioner also argues that Article II of the Fundamental Law enshrines the fundamental right to human dignity, which the Constitutional Court identified with the general personality right in its landmark Decision 8/1990 (IV. 23.) AB. The practice of the Constitutional Court defines the general personality right as a maternal right to which the courts and the Constitutional Court may refer in any case where none of the fundamental rights referred to is applicable to the facts of the case, in order to protect the autonomy of the individual. Decision 24/1996 (VI. 25.) AB defined freedom to create legal transactions as a form of individual autonomy of action, the right of the individual to decide autonomously, free from the influence of authority, on the creation, content and amendment of private legal transactions. In line with the practice of the Constitutional Court, the general right of action may be limited under conditions similar to those of other fundamental rights, in order to protect another constitutional right or value, to an extent proportionate to the objective to be achieved.

[16] In the view of the Government, “it is not clear, however, to what extent the conditions for restricting the general freedom of action are different in this respect, presumably less stringent, from the conditions for restricting freedom of contract derived from Article 9 (1) of the Constitution.”

[17] 2.2.3 The Government’s submission also refers to the fact that one of the most essential elements of the rule of law is the requirement of legal certainty, which implies that the legislature, in amending the legislative environment, must take into account the confidence of

the persons concerned in the stability of the legal system. This confidence must also be protected in the case of long-term legal relationships, since the conclusion of various contracts is based on the trust that the contract cannot be altered by anyone other than the parties to it. The possibility of amending the terms of existing contracts by means of legislation may therefore also be subject to restrictions on the basis of the requirement of the protection of legitimate expectations arising from legal certainty.

[18] The Government argues that "on the basis of Decision 32/1991 (VI. 6.) AB of the Constitutional Court, freedom of contract is, however, integrated into the substance of Article 9 (1) of the Constitution and is thus part of the rule of law, but the principle of »*clausula rebus sic stantibus*« cannot be derived directly from the requirement of legal certainty. In the light of the above, it is questionable to what extent the principle of legal certainty allows the content of contracts concluded to be determined by law under different conditions from those under the principle of freedom of contract."

[19] 3. The provisions of the Fundamental Law invoked in the petition read as follows:

"Article B (1) Hungary shall be an independent, democratic State governed by the rule of law. [...]"

"Article M (2) Hungary shall ensure the conditions for fair economic competition. Hungary shall act against any abuse of a dominant position, and shall protect the rights of consumers."

"Article II [...] Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception."

II

[20] 1.1 Article 24 (2) (a) to (g) of the Fundamental Law determine the competence of the Constitutional Court. Article 24 of the Fundamental Law does not provide for a Constitutional Court competence to interpret the provisions of the Fundamental Law; however, Article 24 (2) (g) of the Fundamental Law may provide for additional functions and competences by virtue of a cardinal Act.

[21] Chapter II, Title 16 of the Constitutional Court regulates the interpretation of the Fundamental Law. Pursuant to Section 38 (1), "[o]n the petition of Parliament or its standing committee, the President of the Republic or the Government, the Constitutional Court shall provide an interpretation of the provisions of the Fundamental Law regarding a certain constitutional issue, provided that the interpretation can be directly deduced from the Fundamental Law."

[22] Based on the normative text of the Constitutional Court Act, the interpretation of the Fundamental Law may be initiated only by specific organisations (persons) and only in a petition with specific content and under the conditions laid down in the Constitutional Court Act.

[23] The Constitutional Court therefore was required to determine whether the petition

[24] (a) originates from a body or person as defined in Article 38 (1) of the Constitutional Court Act;

[25] (b) concerns the interpretation of a specific provision of the Fundamental Law;

[26] (c) relates to a specific constitutional problem; and finally

[27] (d) the interpretation can be directly derived from the Fundamental Law.

[28] 1.2 (a) The petition was filed by the Minister for Administration and Justice on behalf of the Government, which means that it originates from the rightful party.

[29] (b) The petition concerns the interpretation of Article B (1), Article M (2) and Article II of the Fundamental Law, that is, the interpretation of certain provisions of the Fundamental Law.

[30] (c) The petition raises specific constitutional law issues.

[31] One of the constitutional issues is whether Article M (2) of the Fundamental Law directly, without the interposition of other legislation, implies or can be inferred the unconstitutionality of a contractual term, a court judgement or a statute.

[32] The other issue of constitutional law is what constitutional framework Article B (1) and Article II of the Fundamental Law provide for a law to be enacted in the future which is intended to amend the content of contracts.

[33] (d) Both interpretations can be directly derived from the Fundamental Law.

[34] 1.3 The Government's petition is based on the premise that the issues of interpretation arise in the context of a situation assumed in the petition.

[35] Accordingly, the first question, which is extremely complex in its wording and contains several elements and conditions, is whether the unconstitutionality of "a contractual term applied on a massive scale and which unilaterally and to the significant detriment of consumers, the court judgement confirming such contractual term and the legal provision on which it is based", can be directly deduced from the Fundamental Law.

[36] The Government's first question in this case refers to three cumulative conditions (massive scale, unilateral, substantial detriment) and three objects of inquiry corresponding to those conditions (contractual term, judgement, legislation) as being capable of being directly contrary to the Fundamental Law.

[37] In this first question, what are known as foreign currency loan contracts are mentioned. In particular, it can be said that certain elements of the contracts, "which imposes the exchange rate risk exclusively on the debtor and provides the creditor with a relatively discretionary and wide margin of discretion to increase interest rates unilaterally, and which provides for the application of an exchange rate margin", satisfy the three conditions which, by virtue of their typical elements, apply in combination. The insertion highlights three typical elements of foreign currency loan contracts: (1) the transfer of the exchange rate risk exclusively to the debtor, (2) the possibility for the creditor to unilaterally increase the interest rate, (3) the application of an exchange rate margin. The content of the petition states that all contracts

containing the three typical elements can be said to be “applied on a massive scale, unilateral and to the significant detriment of consumers”.

[38] 1.3.1 The assessment of exchange rate risk in general was decided by Uniformity Decision 6/2013 PJE of the Curia, after the submission of the Government’s petition for interpretation of the Fundamental Law, on 16 December 2013, and no illegality was detected from a civil law perspective. The decision does not contain any constitutional considerations.

[39] As to when the contractual terms allowing unilateral amendment of the contract [in particular the interest (2) and the increase in costs and fees] meet the requirement of transparency, the Council on the Uniformity of Law of the Curia will decide after the preliminary ruling procedure before the Court of Justice of the European Union in case C-26/13 has been completed. On 15 January 2013, in the case pending before it, No Pfv.VII.21.247/2012, the Curia initiated a preliminary ruling procedure concerning the assessment of certain legal issues relating to the non-negotiable contractual clauses determining the conversion rates in the case of a loan debt denominated in a foreign currency but actually paid in the domestic currency and repayable by the consumer exclusively in the domestic currency.

[40] On 4 July 2013, the Curia ruled on the exchange rate margin in its decision No Gfv.VII.30.078/2013/14: in a specific contract challenged on the basis of the exchange rate margin, it declared the loan contract valid on the basis that the difference between the purchase and sale exchange rates of the foreign currency forming part of the contract was 1% (+/-0.5% of the average exchange rate) as a cost.

[41] In a case of principle, in its decision No Pfv.I.20 .728/2013 of 4 February 2014, the Curia also ruled that a consumer loan agreement is null and void pursuant to Section 213 (1) (e) of Act CXII of 1996 on Credit Institutions and Financial Enterprises (hereinafter referred to as the “Act on Credit Institutions and Financial Enterprises”) if it does not contain the number and amount of the loan instalments and if these cannot be determined by judicial discretion (in other words, the nullity cannot be remedied). The judgement held that the invalidity of a loan agreement also entails the invalidity of the contract securing an option to purchase, and therefore the execution for the evacuation of the property based on it is rendered groundless and its termination is justified.

[42] 1.3.2 What is referred to in the Government’s petition as “foreign currency loan contracts” is a generic term, a collective name for a number of contracts differing in subject, purpose, content and duration. They include mortgage loans for housing, also for investment housing, consumer loans, non-mortgage loans, car loan contracts, etc.

[43] The constitutional issue raised by the foreign currency loan contracts has its origins in the repeal of the rules on exchange controls as of 1 January 2002 by Act XCIII of 2001 on the Removal of Foreign Exchange Restrictions and the Amendment of Certain Related Acts. The removal of foreign exchange restrictions was part of the EU accession process and is linked to the principle of free movement of capital. Under the concept of the Act, all foreign exchange restrictions related to transactions carried out in Hungary were abolished. As a general rule, the law decreed that legal transactions and acts concluded in foreign currency, currency and

Hungarian forints could be carried out freely, free of any restrictions and notification requirements.

[44] [This does not contradict Article K of the Constitution: Article K is the constitutional basis for the monetary system. The Hungarian forint has been our national currency since 1 August 1946. The Prime Minister's Decree on the introduction of the forint, Decree 9000/1946 (VII. 28.) ME of 28 July 1946 on the establishment of the forint value and related provisions, provided that all State and other public cash offices must accept coins in forint denominations as payment. It stipulated that as of 1 August 1946 all State, municipal and communal revenues and expenditures must be determined in forints, and the accounts of all State, municipal and communal treasuries and offices must be kept in forints, and the amount of money in public documents must be determined in forints. The Fundamental Law itself states that "[t]he official currency of Hungary shall be the forint."]

[45] The financial crisis of autumn 2008, the subsequent change in the exchange rate of the Hungarian forint against foreign currencies, and the evolution of the labour market situation led to social problems, which prompted the State to introduce legislation.

[46] Decision 775/B/2009 AB (ABH 2010, 2125) reviewed an Act which established a State guarantee for certain bridging loans for housing loans for persons whose employment had been terminated.

[47] A number of laws contain measures to assist foreign currency borrowers, which are embodied in legislation.

- Act XCVI of 2010 on the Amendment of Certain Financial Laws Necessary to Assist Housing Loan Borrowers in Difficult Circumstances [application of MNB (National Bank of Hungary) foreign exchange rates, restriction of unilateral contract amendment).

- Act LXXV of 2011 on the Fixing of Repayment Rates for Foreign Currency Loans and the Regulation on the Compulsory Sale of Residential Real Estate (Exchange Rate Fixing Act, omnibus account credit).

- Act CXVI of 2011 on the Amendment to Act LXXV of 2011 on the Fixing of the Repayment Rates of Foreign Currency Loans and the Regulation on the Compulsory Sale of Residential Real Estate (omnibus account credit - clarification of certain provisions).

- Act XVI of 2012 on the Amendment to Act LXXV of 2011 on the Fixing of the Repayment Rate of Foreign Currency Loans and the Regulation on the Compulsory Sale of Residential Real Estate (exchange rate cap- amendment to certain provisions).

- Act CXXI of 2011 on the Amendment to Certain Acts Relating to Home Protection (Final Repayment Act, fixed-rate final repayment).

- Act CXXX of 2011 on the Amendment to Act CXII of 1996 on Credit Institutions and Financial Enterprises (clarification of certain provisions) in connection with the extension of home protection measures.

- Act CXLVII of 2011 on the Amendment to Certain Acts on Home Protection Measures (extension of the possibility of fixed-rate final repayment to financial leasing contracts).

[48] The Constitutional Court, in its Decision 3048/2013 (II. 28.) AB of 11 February 2013, dismissed the petitions challenging Act CXXI of 2011 on the Amendment of Certain Acts on Home Protection and Section 200/B of Act CXII of 1996 on Credit Institutions and Financial Enterprises (final repayment).

[49] It can also be concluded from the legislative interventions to date that the legislation on what are known as foreign currency loan contracts not only concerns social issues, but also private law and financial market issues.

III

[50] The Constitutional Court is exercising its competence to interpret the Constitution in the abstract, which necessarily leads to general findings. The interpretation is linked to the specific constitutional problem giving rise to the petition, but this does not mean that a single legislative task with a specific content follows from the constitutional interpretation. The interpreted constitutional law may be consistent with a number of solutions to the issue giving rise to the petition, and it is for the legislator to choose therefrom. In this respect, the Constitutional Court's task begins when, in the course of assessing petitions for review of a rule, a constitutional complaint or, as a legal consequence, a violation of the Constitution by omission, it has to rule on the specific question of whether the legislation selected by the legislature or the interpretation of the law followed in the application of the law is constitutionally satisfactory in terms of content.

[51] The Constitutional Court is required to address the two questions of constitutional interpretation separately (points 1 and 2). Since each question raises several problems of interpretation in its own right, the Constitutional Court must address the separate and separable elements of each question individually.

[52] 1. As regards the first question, the Constitutional Court's competence to interpret the Fundamental Law is limited to determining whether the unconstitutionality of a contractual term (point 1.1) or of a judgement of a court confirming it (point 1.2) and of the legal provision on which it is based (point 1.3) may be inferred directly from Article M (2) of the Fundamental Law.

[53] 1.1 In its petition, the Government alleges that a private law contract is directly contrary to the Fundamental Law. With regard to the terms of the contract, it may be noted that there is a scholarly debate as to the role of a constitutional Act in private law relationships, directly or indirectly.

[54] 1.1.1 The Fundamental Law of our country is the basis of Hungary's legal system. The passage following the Closing Provisions of the Fundamental Law, at the very end of the Fundamental Law, speaks of "the first unified Fundamental Law of Hungary", declaring the primacy of the Fundamental Law in the legal system. The Fundamental Law and the laws are binding on all.

[55] The Fundamental Law must permeate the entire legal system and its norms must prevail throughout the legal system. This validity is different in public law and in private law. Whereas in public law the Fundamental Law is generally directly enforced, in private law it is enforced indirectly, through the permeation of the fundamental rights and constitutional values contained in the Fundamental Law [Article I (1) and (3)], by means of the interpretation of private law rules.

[56] 1.1.2 The debate on whether fundamental rights and State objectives have an impact on private law is now limited to the issue of how constitutional Act affects private law. That is, the methods and intensity of the impact are the subject of debate. Under the doctrine of indirect effect, however, civil relations remain civil even after the constitutional Act has been enforced. The rights enshrined in the Constitutional Act are able to seep into the private legal system through the general rules of private law. Thus, where even the application of a general rule is not possible, constitutional rights cannot have a direct effect in private law.

[57] 1.1.3 Article M of the Fundamental Law is not in the section entitled "Freedom and Responsibility", in other words, it is not placed among the fundamental rights. The subject of both sentences of Article M (2) is "Hungary", and not "everyone" or "Hungarian citizens", as is usually the case with fundamental rights. However, the second sentence of Article M (2) states that "Hungary [...] shall protect the rights of consumers." This phrase, namely "Hungary shall protect", occurs in seven places in the Fundamental Law: It states that Hungary shall protect the Hungarian language and sign language, the institution of marriage, consumer rights, freedom and diversity of the press, scientific and artistic freedom, families, children, women, the elderly and the disabled. Three of the seven occurrences are found in the fundamental rights chapter.

[58] It may also be established that Article M (2) refers in general terms, as a generic term, without specifically mentioning consumer rights, to a plural number of "rights" of consumers as the objects of protection and which the State action must aim to protect. On the other hand, Article M (2) refers to "consumers" and not to the rights of "the consumer", the plural being used to refer to collective consumer rights, collective consumer redress mechanisms.

[59] On the basis of the preceding considerations, Article M (2) may be interpreted as meaning that consumer rights which are formulated as fundamental rights in the constitutions of other countries (typically the right to good quality goods and services, the right to information and to be informed, the right to the protection of health, safety and economic interests, and the right to compensation) cannot be enforced directly by individuals in contractual relations under Article M (2) of the Fundamental Law, but only through the interposition of other legislation.

[60] In any event, the Fundamental Law does not recognise the legal institution of an independent determination of the unconstitutionality of a contract. There is no procedure to this end, no body vested with competence, and no rule for determining the legal consequences. Pursuant to Article T (3) of the Fundamental Law, a statute may not be contrary to the Fundamental Law. Although a general rule on the illegality of a contract must be interpreted in accordance with the Fundamental Law, this requirement cannot justify an interpretation contrary to the wording of the law.

[61] The second sentence of Article M (2) generally implies an obligation on the State to establish and maintain a system of institutions to protect consumers' interests, to combat abuses of dominant positions, and to enact legislation to safeguard consumers' rights, taking into account the constitutional values enshrined in the Fundamental Law. This obligation is not identical to the State's obligation of institutional protection of fundamental rights. It cannot be deduced from the Fundamental Law, within the scope of constitutional interpretation, that a certain form or degree of abuse of a dominant position or infringement of consumer rights, or a certain type of contract or one of its terms could be directly contrary to Article M (2) of the Fundamental Law.

[62] In the Constitutional Court's view, both the definition of the "rights of consumers" and the list of State tasks related to combating abuse of dominant position and consumer protection can be done by legislative means, but neither of them can be the task of abstract constitutional interpretation. Several concepts can be equally constitutional, the choice between them is not a task for a constitutional court.

[63] The Constitutional Court has already stated in a case that "Article M (2) of the Fundamental Law created the constitutional basis for the restriction of economic competition through contracts as a legal framework for the purpose of consumer protection, without, however, formulating specific consumer rights. Both the protection of economic competition and the protection of consumer rights are obligations of the State to which specific fundamental rights are assigned [e.g. the right to enterprise (Article XII of the Fundamental Law), protection of property (Article XIII of the Fundamental Law)]. It is therefore not possible to deduce from this provision alone how rights and obligations in a contractual relationship are to be allocated between the consumer and the party contracting with the consumer, or how the interests of the consumer are to be protected." {Decision 3175/2013 (X. 9.) AB, Reasoning [10]}

[64] 1.1.4 With regard to foreign exchange contracts, it can be stated that the issue of horizontal scope, as interpreted by the Constitutional Court of Hungary, is not whether certain contracts may be directly contrary to the Fundamental Law, but whether the court has taken the provisions of the Fundamental Law into account in its application and interpretation of the law. These can be fundamental rights, State objectives or constitutional values. Obviously, the general court must take all provisions into account in its judgement in an appropriate and differentiated manner. Thus, for example, no substantive rights follow from Article M, as stated above. Article 28 of the Fundamental Law expressly states that the courts, in the application of the law, shall interpret the wording of the law primarily in accordance with its purpose and in conformity with the Fundamental Law. The intensity with which the general court, in considering the totality of the circumstances of a particular case, relies on certain elements of Article M (2) in interpreting the general rules of civil law in a particular dispute is primarily a matter for the general court, but the interpretation must not lead to a result contrary to the wording of the law (competition law, consumer protection, financial market provisions).

[65] 1.2 Article 24 (2) (d) of the Fundamental Law empowers the Constitutional Court to determine whether a judgement of a court is in conflict with the Fundamental Law.

[66] This competence was created by the Fundamental Law. Prior to the entry into force of the Fundamental Law, there had been no possibility of reviewing a judicial decision by the Constitutional Court. The constitutionality of a judicial decision can be reviewed on the basis of the Constitutional Act. Such an assessment is possible on the basis of a constitutional complaint, provided that the judicial decision infringes the petitioner's "right enshrined in the Fundamental Law".

[67] Although Article M is not located in the Fundamental Rights chapter of the Fundamental Law, the Fundamental Law and the Constitutional Court Act do not only allow for a constitutional complaint to invoke the violation of a fundamental right, but also of a right enshrined in the Fundamental Law. What rights are to be understood by a "right enshrined in the Fundamental Law" is a matter to be determined by the practice of the Constitutional Court.

[68] Exceptionally, the Constitutional Court may derive a right guaranteed by the Fundamental Law from a rule of the Fundamental Law which is not to be found in a chapter on fundamental rights, on the basis of a relevant petition. [In answer to the Government's second question in this Decision, such a right is freedom of contract under Article M (1) to (2) of the Fundamental Law.]

[69] In the present case, the Government's first question and the reasons given for that question do not refer to such a right.

[70] The unconstitutionality in violation of the Fundamental Law of a judicial decision may arise from the interpretation and application of a rule of law which is not in conformity with the Fundamental Law or from the application of a rule of law which is contrary to the Fundamental Law. The Constitutional Court has the competence to find a specific judicial decision to be inconsistent with the Fundamental Law, on the basis of a relevant petition.

[71] In the view of the Constitutional Court, the specific features of a court judgement which would directly give rise to unconstitutionality by non-conformity with the Fundamental Law under Article M (2) cannot be established by the competence to interpret the Fundamental Law.

[72] 1.3 As regards the legislation, it may be concluded that the legal protection which may be invoked against measures of legislative power (including the power of the National Assembly to enact legislation) is exceptional. Its rules appear in the Fundamental Law and in other laws based on it (see, for example, the right to initiate abstract and specific norm control, the constitutional complaint and the right of the Curia to review the legality of municipal decrees).

[73] A particular issue arises where the absence of a statute is claimed to be prejudicial. The Constitutional Court must determine on a case-by-case basis, in a procedure initiated by petition, whether such prejudice justifies a finding of unconstitutionality by omission manifested in non-conformity with the Fundamental Law as a legal consequence.

[74] The assessment of the unconstitutionality of a statute manifested in violation of the Fundamental Law, the body responsible, its procedure and the legal consequences are governed by the Fundamental Law and the Constitutional Court Act. It follows from such

provisions that until the Constitutional Court has established that a statute is contrary to the Fundamental Law, the statute must be deemed to be in conformity with the Fundamental Law.

[75] It cannot be excluded that a case may arise in which the unconstitutionality of a statute follows directly from any rule of fundamental law, including Article M (2). This depends, however, not only on the interpretation of Article M (2), but also on the content of the statute concerned. The question of when and under what conditions such a case exists, that is, what conditions must be fulfilled in order to establish unconstitutionality by non-conformity with the Fundamental Law, cannot be formulated more specifically than the Fundamental Law itself does, for example, in Article I (3) with regard to the restriction of fundamental rights. In assessing the conformity of a law or a provision of a law with the Fundamental Law, account must also be taken of the regulatory context of the provision in question. This is particularly the case where the right in question is not a fundamental right, as in Article M (2), but the fulfilment of State obligations by means of legislation.

[76] 2. As regards the second question of constitutional interpretation, it is necessary to consider the conditions under which existing contracts may be amended by legislation. In order to answer the second question of constitutional interpretation, the first step is to determine whether freedom of contract, which is not included in the wording of the Fundamental Law, either in the chapter on fundamental rights or in the principles, can be derived from the Fundamental Law (Reasoning [77] to [86]) and, if so, under what conditions this right can be restricted (Reasoning [87] to [95]).

[77] 2.1 The petition expressly refers to the fact that these questions have already been decided by an early decision of the Constitutional Court under the previous Constitution, albeit not in a constitutional interpretation competence.

[78] 2.1.1 At the time when the previous Constitution recognised and promoted the right to enterprise and freedom of competition, it also established that Hungary's economy was a market economy.

[79] The Constitutional Court has been consistent in finding unconstitutional violations of market economy, freedom of competition and other similar State objectives only in extreme cases where State interference is, conceptually and manifestly, contrary to the State's objectives. (Decision 818/B/1997 AB, ABH 1998, 759, 761) [See also Decision 21/1994 (IV. 16.) AB, ABH 1994, 117, 120, Decision 35/1994 (VI. 24.) AB, ABH 1994, 197, 200] The Constitutional Court has also stated that "the mere fact that freedom of competition is not a fundamental right does not in itself imply that it is not subject to the prohibition on restricting the essential content of fundamental rights contained in Article 8 (2) of the Constitution." (Decision 782/B/1998 AB, ABH 2002, 854, 856)

[80] 2.1.2 The constitution is the highest source of law in States with a written constitution, which defines and ensures the legal and institutional framework within which all economic actors and the State operate. Constitutions generally lay down the most important and fundamental framework for the functioning of the economy, the rights of economic operators, the limits of State intervention and the obligations of the State vis-à-vis economic operators.

[81] The term “economic constitution” is used with different meanings.

[82] In a narrower sense, an economic constitution is defined as the rules of the economic order deriving from the constitution. This includes certain fundamental rights (freedom of work, free choice of occupation, the right to enterprise, protection of property), public finance, but also the social role of the State, the latter as an expression of social solidarity in the Fundamental Law. The economic constitution, in other words, is an umbrella term whose elements can basically be grouped into three main categories: (a) recognition of economic rights, protection of property (Article XIII), free choice of employment and occupation, right to enterprise (Article XII), and, in conjunction with these, protection of competition (Article M), (b) public finance (taxation, budget, public debt, monetary system), and (c) provision of social security (Article XIX).

[83] Although the previous Constitution had previously declared that Hungary is a market economy (as a rejection of the planned economy), the Fundamental Law does not contain a similar decision on the economic system. However, the rules of the Foundation [Article M] state that in our country business is free and the State shall ensure conditions of competition and that everyone has the right to property [Article XIII (1)].

[84] Freedom of enterprise, the guarantee of conditions of fair economic competition, and the regulation of property as a fundamental right, even without declaring a market economy, imply that Hungary's economy is a market economy.

[85] The Constitutional Court pointed out in its Decision 3192/2012 (VII. 26.) AB that although the Fundamental Law, in contrast to the previous Constitution, does not specifically mention the requirement of a market economy, the Constitutional Court's practice shows that it does include two of its vital elements, namely freedom of enterprise and freedom of competition (Reasoning [19]). The Court further explained that “freedom of contract is an indispensable condition for the functioning of the market economy and thus for freedom of enterprise and competition, which is protected by Article M of the Fundamental Law, and which therefore also enjoys the protection of the Fundamental Law. This is also confirmed by the guarantee rules of contractual freedom contained in the Civil Code.” (Reasoning [21])

[86] In the present case, the Constitutional Court saw no reason to depart from that interpretation.

[87] 2.2 The Government's submission is based on the premise that the Constitution would impose more lenient conditions for the amendment of the content of existing contracts by legislation than could be interpreted under the Constitution in force until 2012. It is also to be expected from the Government's submission that the conditions for restricting freedom of contract in the public interest and in a proportionate manner have also been relaxed. The contracts at issue in the present case are contracts which have been concluded; their amendment by statute is subject to a different, that is, stricter, constitutional treatment than the rules which, before the conclusion of the contract, determine the mandatory content of the contract.

[88] The Constitutional Court has already ruled on several occasions, even after the entry into force of the Fundamental Law, on how contracts can be amended by law.

[89] After the entry into force of the Fourth Amendment to the Fundamental Law of Hungary (25 March 2013), the Constitutional Court has ruled in connection with point 5 of the Closing and Miscellaneous Provisions that "it may use the arguments, legal principles and constitutional contexts developed in its previous decisions in connection with constitutional issues to be determined in new cases, if the content of the relevant section of the Fundamental Law is in conformity with the Constitution, the contextual consistency of the Fundamental Law in its entirety, the consideration of the rules of interpretation of the Fundamental Law and the applicability of the findings on the basis of the specific case do not constitute an obstacle and it is deemed necessary to include them in the reasoning of the decision to be taken" {Decision 13/2013 (VI. 17.) AB, Reasoning [32]}.

[90] 2.2.1 The Constitutional Court pointed out in its Decision 32/1991 (VI. 6.) AB (ABH 1991, 146, 166, hereinafter referred to as the "1991 Court Decision") that significant economic and possibly political, financial and other social changes obviously have a considerable impact and substantial influence on contractual legal relationships that have existed for many years. Circumstances unforeseen at the time of the conclusion of the contract may substantially alter the situation of the contracting parties, the relationship between rights and obligations, and make it extremely burdensome or even impossible for one of them to maintain the contract unchanged or to perform it. In these cases of extraordinary change, the law allows the court to interfere with each individual legal relationship and to amend the original content of durable long-term contracts to adapt them to the changed circumstances. The Constitutional Court has also ruled that, where changes of a social scale affect a large number of contracts, it is justified, and not constitutionally objectionable, for the legislature to devise a general solution for changing or amending legal relationships. However, the State may, by means of legislation, constitutionally amend or alter the content of existing contracts only if the same conditions are met as those required for a judicial amendment of the contract. In other words, the formation by law of a continuing legal relationship may be effected by the application of the principle of *clausula rebus sic stantibus*. Accordingly, the legislature, similarly to the courts, is entitled to amend existing and continuing contractual relationships if, as a result of a circumstance arising after the conclusion of the contract, the maintenance of the contract without amendment would be prejudicial to the material legitimate interests of one of the parties, if the change in circumstances was not reasonably foreseeable and if it goes beyond the risk of a normal change. A further condition for legislative intervention is that the material change of circumstances must be of a social scale, that is, it must affect a large number of contracts. It is for the legislator to determine, and at the same time to decide, the areas in which intervention is already a legislative requirement. And it is up to the legislator to prove whether the conditions for intervention are constitutional. In the event of a dispute, the Constitutional Court has the authority to decide on the constitutionality of the intervention, in the same manner as the court acts on a case-by-case basis in specific contracts, on the basis of Section 241 of the Civil Code, and amends the content of the contracts if the conditions are met.

[91] In the view of the Constitutional Court, the principles set out in the 1991 Court Decision do not mean that the Civil Code would become the constitutional standard for judging State interference in contracts, but only that the requirements of legal certainty, freedom of contract and confidence in the performance of the contract concluded would prevail if the legislator cannot deviate from the conditions for amending individual contracts by judicial means in amending a large number of contracts. Private law and lasting legal relationships may be shaped by the application of the principle of *clausula rebus sic stantibus*. Judicial amendment of contracts is a means of rebalancing the divergent interests of private parties by weighing up all the circumstances of the case. A judicial amendment of a contract must also take account, as far as possible, of the equitable interests of each party, that is to say, such an amendment must also seek to achieve a balance of interests in the changed circumstances.

[92] 2.2.2 The constitutional rule of the Fundamental Law containing the right to the protection of human dignity and the rule of law is equivalent to the identical rule of the previous Constitution as regards the constitutional issue to be decided in the present case.

[93] The violation of the right to the protection of human dignity, as mentioned in the petition, can only be invoked if no other fundamental right is available. It is submitted in the petition that Decision 24/1996 (VI. 25.) AB defined freedom to create legal transactions as a form of individual autonomy of action, the right of the individual to decide independently, free from the influence of authority, on the creation, content and amendment of private legal transactions.

[94] The Constitutional Court, in interpreting the relationship between freedom of contract and "the general freedom of action", stated that "[t]he fact that the right to freedom of contract is ultimately inferable from the right to human dignity does not mean that it is also protected as a fundamental right. The Constitutional Court does not identify freedom of contract with freedom to conclude agreements affecting the innermost sphere of the individual, but protects it more narrowly as a right which ensures the participation of the individual in economic life, and stresses that freedom of contract is an important condition for the functioning of the market and economic competition. It follows from the above that, in the practice of the Constitutional Court, freedom of contract is considered to be an essential element of the market economy guaranteed by Article 9 (1) of the Constitution and a constitutional right (but not a fundamental right) in its own right." [Decision 7/2006 (II. 22.) AB, ABH 2006, 181, 198-199]

[95] In Decision 3048/2013 (II. 28.) AB, also referred to in the petition, in which the Constitutional Court was called upon to expressly take a position on the constitutional requirements against State interference in private legal relations on the basis of the constitutional complaints considered in the case, the panel of the Constitutional Court unanimously found applicable the principles set out in the 1991 Court Decision concerning the amendment of contracts (Reasoning [34] to [36]). In the case at hand, in the context of the final repayment of a loan, the issue was one of legislative intervention in a significant, exceptional and serious situation in Hungary in the context of an international crisis.

[96] 2.3 With regard to contracts which have been concluded, due regard must also be had to the general principle that a country may consider it essential to the public interest, such as the preservation of its political, social or economic order, to require the application of certain rules (imperative provisions) to a situation; in considering whether those provisions should be given effect, account must be taken of their nature and purpose and of the consequences of their application or non-application. [The principle is reflected in Article 9 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)]

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Budapest, on 17 March 2014

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