

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI (3) (c) of the Constitution of Bosnia and Herzegovina, Article 19 (1) (d), Article 57 (2) (b) and Article 59 (1), (2) and (3) and Article 61 (4) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in Plenary and composed of the following judges:

Mr. Mato Tadić, President

Mr. Miodrag Simović, Vice-President

Mr. Mirsad Ćeman, Vice-President

Ms. Helen Keller, Vice-President

Ms. Valerija Galić,

Ms. Seada Palavrić,

Mr. Zlatko M. Knežević,

Ms. Angelika Nußberger, and

Mr. Ledi Bianku

Having deliberated on the request filed by the **Municipal Court in Zavidovići (Judge Boris Sunarić)**, in the case no. **U-16/21**, at its session held on 26 May 2022, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

In deciding the request filed by the **Municipal Court in Zavidovići (Judge Boris Sunarić)** for the review of constitutionality of Article 21 (2) (4), Article 105 and a portion of Article 75 of the Law on Misdemeanours (*Official Gazette of the Federation of Bosnia and Herzegovina*, 63/14),

it is hereby established that a portion of Article 75 of the Law on Misdemeanours (*Official Gazette of the Federation of Bosnia and Herzegovina*, 63/14), which reads: “When the ruling on misdemeanour has been delivered through postal services, it shall be considered that the delivery has been made upon the expiry of five working days from the day the ruling has been mailed” is not compatible with Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Pursuant to Article 61 (4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Parliament of the Federation of Bosnia and Herzegovina is ordered to harmonize, within a time limit of six months from the day of publication of this Decision in the *Official Gazette of Bosnia and Herzegovina*, the portion of Article 75 of the Law on Misdemeanours), which reads: “When the ruling on misdemeanour has been delivered through postal services, it shall be considered that the delivery has been made upon the expiry of five working days from the day the ruling has been mailed” with Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 of

the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Pursuant to Article 72 (5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Parliament of the Federation of Bosnia and Herzegovina is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within the time limit referred to in the foregoing paragraph, about the measures taken with a view to enforcing this Decision.

It is hereby established that Article 21 (2) (4) of the Law on Misdemeanours (*Official Gazette of the Federation of Bosnia and Herzegovina*, 63/14) is compatible with Article II (3) (d) of the Constitution of Bosnia and Herzegovina, Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The request filed by **the Municipal Court in Zavidovići (Judge Boris Sunarić)** for the review of compatibility of Article 105 of the Law on Misdemeanours (*Official Gazette of the Federation of Bosnia and Herzegovina*, 63/14) with Article II (3) (d) of the Constitution of Bosnia and Herzegovina, Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is rejected as inadmissible, for the reason that it concerns the issue that the Constitutional Court of Bosnia and Herzegovina has already decided,

and it does not follow from the allegations or evidence presented in the request that basis exist for new decision-making to take place.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

R E A S O N I N G

I. Introduction

1. On 24 November 2021, the Municipal Court in Zavidovići (Judge Boris Sunarić; “the applicant”) filed a request with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) for the review of compatibility of Article 21 (2) (4), Article 105 and a part of the provision of Article 75 of the Law on Misdemeanours (*Official Gazette of the Federation of Bosnia and Herzegovina*, 63/14) with the Constitution of Bosnia and Herzegovina and the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention”).

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 (2) of the Rules of the Constitutional Court, the House of Representatives and the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina, and the Government of the Federation of Bosnia and Herzegovina (“the Government of FBiH”) were requested on 6 December 2021 to submit their replies to the request.

3. The Legislative Commission of the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina submitted its reply to the request on 21 January 2022.

4. The Office for Cooperation and Representation before the Constitutional Court of Bosnia and Herzegovina submitted its reply to the request on 22 December 2021.

III. Request

a) Allegations stated in the Request

5. The applicant deems that the provisions of Article 21 (2) (4), Article 105 and a part of the provision of Article 75 of the Law on Misdemeanours are not in conformity with the provisions of Article II (3) (d) and (e) of the Constitution of Bosnia and Herzegovina and Articles 5 and 6 of the European Convention.

6. Regarding the inconformity of the provision of Article 21 (2) (4) of the Law on Misdemeanours, the applicant stated the following: “the following measures may be pronounced as a consequence of liability for the perpetrated misdemeanour: ... the deprivation of liberty for the purpose of collecting the fine”. Afterwards the arguments in support of unconstitutionality of this provision were linked to the provision of Article 105 of the Law on Misdemeanours, which prescribes the “deprivation of liberty for non-payment”, as well as references to the case law of the Constitutional Court of the Republika Srpska in the case no. *U-14/14* of 25 April 2015.

7. Regarding the provision of Article 75 of the Law on Misdemeanours, which pertains to the delivery of the ruling on misdemeanour, the request reads as follows: “When it comes to the provision of Article 75 of the Law on Misdemeanours, for which part the review of constitutionality was requested, this provision prescribes that the court shall deliver a copy of the ruling on misdemeanour in person or by mail to the accused and the competent authority or to the damaged party within three days as of the date the relevant ruling on misdemeanour has been adopted. When the ruling on misdemeanour has been delivered through postal services, it shall be considered that the delivery has been made upon the expiry of five working days from the day the ruling has been mailed. According to the assessment of this court, the part of the mentioned provision (*When the ruling on misdemeanour has been delivered through postal services, it shall be considered that the delivery has been made upon the expiry of five working days from the day the ruling has been mailed*) is in contravention of the provisions of Article II(3) (e) of the Constitution, and Article 6 of the European Convention. This is so because unnecessary legal fiction has been created that says that the delivery is considered to be in order upon the expiry of the five working days period as from the date the ruling has been delivered at the post office, irrespective of the fact whether the ruling on misdemeanour has indeed been delivered to the accused. This is contrary to the guarantees of the right to a fair trial, as this may very easily result in the violation of the right of the accused to an effective legal remedy. This is so because, in a situation where the court has not been returned the delivery note as a proof of delivery of the writ (the ruling on misdemeanour), uncertainty is

created as to whether the accused has received the mentioned writ at all. The legal fiction indicates that even in such a situation, the delivery is considered to be completed, which is the reason why, in the opinion of this court, the mentioned provision in the relevant part does not have the quality of law”.

b) Facts of the case, regarding which the request was filed

8. The Cantonal Administration for Inspection Affairs of the Zenica-Doboj Canton (“the authorised body”) filed with the Municipal Court in Zavidovići a request for the deprivation of liberty for the failure to pay a fine against A.K. (“the punished person”). The fine for BAM 200.00 was imposed on the punished person for the misdemeanour referred to in Article 170, paragraph 2 in connection with paragraph 1 of the Labour Law. The request reads that the misdemeanour order is final and enforceable, that the punished person failed to pay the fine and that the enforcement of the fine is bound to become barred by the statute of limitations. It was proposed for the court to comply with Article 105 of the Law on Misdemeanours, to issue the ruling on the deprivation of liberty of the punished person, as that was the sole “reasonable and efficient” way to force the punished person to pay the fine.

c) Reply to the request

9. The House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina indicated in the reply to the request that the Legislative Commission obtained the opinion of the Committee for Justice and General Administration of the Parliament of the Federation of BiH. After the session held upon the initiative of the applicant, it was concluded that elements existed for the review of constitutionality of Article 21 (2) (4), Article 105 and a part of the provision of Article 75 of the Law on Misdemeanours to take place, and that there was a need to amend the mentioned provisions.

10. The Government of the Federation of BiH submitted its reply to the request through the Office for Cooperation and Representation before the Constitutional Court of BiH. It states that Article 21 (2) (4) of the Law on Misdemeanours prescribes a measure of the deprivation of liberty as a type of sanction and a security measure that may be imposed for the perpetrated misdemeanour.

11. Regarding the unfoundedness of the allegations pointing to the part of Article 75 of the Law on Misdemeanours, which pertains to the delivery of the ruling on misdemeanour through postal services, the following was stated: “Article 93 (2) of the Law on Misdemeanours prescribes that the court will grant a proposal for the reinstatement to a previous condition if the accused person can prove that he was not delivered a copy of the ruling on misdemeanour; the mentioned provision

provides sufficient protection to the accused person in a misdemeanour proceeding in a situation when the delivery has not been orderly.”

12. The proposal was for the request for the review of constitutionality of the provision of Article 21 (2) (4), Article 105 and a part of the provision of Article 75 of the Law on Misdemeanours to be dismissed as ill-founded.

IV. Relevant Law

13. The relevant provisions of the **Constitution of Bosnia and Herzegovina** read as follows:

Article II

Human Rights and Fundamental Freedoms

3. Enumeration of Rights

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

d) The rights to liberty and security of person.

e) The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings.

14. The **European Convention for the Protection of Human Rights and Fundamental Freedoms**, Rome, 4 November 1950 (*Official Gazette of BiH*, 6/99) as amended by Protocol No. 11 (date of entry into force: 1 November 1998), reads in its relevant part as follows:

Article 5

Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. *Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.*

15. The **Law on Misdemeanours** (*Official Gazette of the Federation of BiH, 63/14*), in so far as relevant, reads as follows:

Article 5

Every person accused of having committed a misdemeanour has the right to request that the court decide on his/her liability for the misdemeanour, if he/she requests so within the time limit prescribed by law. Such persons shall be

- 1) presumed innocent until he has been proven guilty in accordance with the law;*
- 2) shall be informed promptly in a language which s/he understands and in detail, of the nature and cause of any charges against them;*
- 3) shall be given adequate time and the facilities to prepare their defence;*
- 4) entitled to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
- 5) entitled to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*

entitled to have the free assistance of an interpreter if he cannot understand the language used in court.

Article 21, paragraph (2)

Types of sanctions

(2) The following measures may be pronounced as a consequence of liability for the perpetrated misdemeanour:

- 1) forfeiture of property gain;*
- 2) obligation to compensate damage;*
- 3) penalty points, and*

- 4) *deprivation of liberty for the purpose of collecting the fine.*

Article 53

Misdemeanour Proceedings

- (1) *Misdemeanour proceedings shall be initiated as follows:*

1. *by issuing a misdemeanour warrant or*
2. *by submitting a request for initiating misdemeanour proceedings to the court which has competence under Article 15, paragraph (2) of this Law.*

- (2) *The request for initiating misdemeanour proceedings shall be submitted only in cases where there are no conditions for issuing a misdemeanour warrant referred to in Article 54 of this Law.*

Article 54

Issuance of a misdemeanour warrant

- (1) *The competent body shall issue a misdemeanour warrant if it establishes that the misdemeanour within its competence has been determined in one of the following manners:*

- 1) *by a direct observation by an authorized official conducting inspection, supervision and control, as well as insight into the official records of the competent authority, as well as other official documents required by the law, which a legal or natural person engaged in an independent business activity - trade is obliged to keep, i.e. to have, in accordance with the law, or official notes or written reports of other authorized bodies;*
- 2) *based on data obtained using monitoring or measuring devices;*
- 3) *by conducting inspection or other supervision, reviewing documentation, premises and goods, or in another lawful manner or in another indirect manner on the basis of performed supervision or reports of another competent body, or*
- 4) *based on the accused's confession on the commission of the misdemeanour before the competent body at the place where the misdemeanour was committed or in some other judicial or other procedure.*

- (2) *A misdemeanour warrant may be issued only in cases where the relevant law or other regulation determine a fixed fine, where the fine can be calculated by a mathematical formula, or where the authorized body decides to impose a minimum fine, i.e. a protective measure of the shortest duration or a protective measure of confiscation of objects, as determined by such law or other regulation.*
- (3) *If the accused commits as committed more than one misdemeanour, then the authorized body may issue a misdemeanour warrant to impose a single fine pursuant to Article 24 of this Law, and if a protective measure is provided for only one of the misdemeanours committed, it may impose that protective measure in the shortest duration.*
- (4) *The authorized body that issued the misdemeanour warrant may at any time correct errors in writing, or other obvious errors ex officio, or upon the motion of the parties to the proceedings.*
- (5) *A special conclusion on the correction of the error in the warrant shall be issued with regard to the correction referred to in paragraph (4) of this Article, in accordance with the provisions of the Law on Administrative Procedure.*

Article 56

Delivery of a misdemeanour order

- (1) *The misdemeanour warrant shall have the original and at least two copies. The original shall be kept by the authorized body in its records. Two copies shall be handed over to the accused.*
- (2) *The misdemeanour warrant may be served on the accused in any of the following ways:*
- 1) in person,*
 - 2) by post, or*
 - 3) by attaching or leaving a misdemeanour warrant in a safe and visible place on a motor vehicle if the misdemeanour committed is related to improper parking of the motor vehicle.*

(3) When the misdemeanour order has been delivered in person, the date of delivery shall be the date when the accused person has received it. When the misdemeanour order has been delivered through postal services, it shall be considered that the delivery has been made upon the expiry of five working days after the authorised body has mailed it. When the misdemeanour order has been left on a motor vehicle, the date of delivery shall be the date on which it has been left on a motor vehicle.

Article 57

Acceptance of Liability

The accused may accept liability for the misdemeanour by paying a fine and all other obligations determined by the misdemeanour warrant within a certain time limit, or notify the authorized body of the acceptance of the sanction specified in the misdemeanour warrant, if the misdemeanour warrant specifies that such notification is an acceptable alternative. Any person who accepts liability in accordance with this Article may not subsequently deny liability, or complain about the amount of the penalty or the type of any sanction or expenses.

Article 59

Proceedings at the request of the accused for decision-making by the court

(1) A accused who receives a misdemeanour warrant and wishes that the court decides the case shall:

- 1) request a court decision by signing a copy of the misdemeanour warrant in the appropriate signature field and submitting it to the court, as specified in the misdemeanour warrant, before the deadline specified in the misdemeanour warrant has expired, and*
- 2) appear before the court on the day and at the time set for the oral hearing under the misdemeanour warrant or, if no date is specified, on the day set by the court for the oral hearing.*

(2) Where the accused requests a court decision, the sanctions specified in the misdemeanour warrant shall be considered null and void. The court may impose any sanction permitted by law, including a more severe sanction than the sanction imposed by the misdemeanour warrant.

*Article 64**Trial*

In misdemeanour proceedings, the trial shall be conducted at an oral hearing conducted by a single judge. Unless there are exceptional circumstances, the misdemeanour proceedings shall be concluded by one oral hearing.

*Article 72**Ruling on Misdemeanour*

(1) The misdemeanour proceedings shall be concluded by the issuance of a ruling on the misdemeanour.

(2) By the ruling on the misdemeanour, the court shall decide:

1) to suspend the misdemeanour proceedings,

2) to hold the accused liable for the failure, or

3) to declare the accused liable for the misdemeanour.

(3) If the accused has been found liable for the failure or liable for the misdemeanour, a sanction shall be imposed on the accused by the ruling on the misdemeanour.

(4) The court that has passed the ruling on the misdemeanour may at any time correct errors in writing or other obvious errors ex officio or upon the proposal of the parties to the proceedings.

*Article 73**Making the ruling*

The court shall orally announce the decision at the end of the trial. In special cases, the court may postpone the issuance of the ruling, but in no case shall the ruling be made after the expiration of the 15-day time limit as of the day on which the oral hearing was concluded.

*Article 75**Delivery of the ruling*

The court shall deliver a copy of the ruling on misdemeanour in person or by mail to the accused and the competent authority or to the damaged party within three days as of the date the relevant ruling on misdemeanour has been adopted. When the ruling on misdemeanour has been delivered through postal services, it shall be considered that the delivery has been made upon the expiry of five working days from the day the ruling has been mailed.

Article 93

(1) The accused person against whom a sanction was imposed for failing to show up in accordance with the provisions of Article 58 of this Law, or concerning whom a ruling on misdemeanour was issued in accordance with Article 78 of this Law, or if he/she missed the time limit for lodging an appeal, may submit a proposal for the reinstatement to the previous condition.

(2) The court will grant the proposal for the reinstatement to the previous condition if the accused person can prove that he/she was not served with the misdemeanour order, or the request for the institution of a misdemeanour proceeding, or the summons to an oral hearing, or a copy of the ruling on misdemeanour, and that the failure to show up or to act in a timely fashion occurred for justified reasons.

(3) The authorised authority, concerning which the ruling to suspend a misdemeanour proceeding was issued in accordance with Article 67 of this Law, may submit a proposal for the reinstatement to the previous condition.

(4) The court will grant such proposal for the reinstatement to the previous condition if the authorised authority can prove that the failure to show up occurred for justified reasons.

Article 94

Time limit for the submission of a proposal for reinstatement into the previous condition

Every proposal for reinstatement into the previous condition has to be submitted to a court within three months from the day when the misdemeanour order became final or enforceable, or from the day of the issuance of a ruling on misdemeanour.

*Article 95**Consequences of the submission of a proposal*

- (1) If the court grants the proposal for the reinstatement to the previous condition, it will set the date and time for an oral hearing and will inform thereof the accused person and the authorised authority.*
- (2) If the court grants the proposal for the reinstatement to the previous condition, the misdemeanour order or the ruling on misdemeanour will be rendered ineffective.*
- (3) If, after the court has granted the proposal for the reinstatement to the previous condition, the accused person fails to show up on the date and at the time set for the oral hearing, the court will dismiss the proposal for the reinstatement to the previous condition and will keep in effect the issued misdemeanour order or the ruling on misdemeanour.*
- (4) If, after the court has granted the proposal for the reinstatement to the previous condition, the accused shows up on the date and at the time set for the oral hearing, and the representative for the authorised authority fails to show up, the court will issue a ruling suspending the misdemeanour proceeding or rendering ineffective the misdemeanour order if the misdemeanour proceeding was instituted by means of a misdemeanour order.*

*Article 102**Entry of data about punishments into the register of fines*

- (1) All fines and costs of proceedings imposed on the basis of the final and enforceable misdemeanour warrant or the legally binding and enforceable decision on misdemeanour will be registered into the Register of Fines and will be recorded as a debt that the punished person owes to the relevant level of authority collecting the fine.*
- (2) After the misdemeanour warrant has become final and enforceable or the decision on misdemeanour has become legally binding and enforceable, the authorized authority or the court will enter the data on the fine and the costs of proceedings into the Register of Fines.*

(3) *The manner and procedure of entry of data about the fine and costs of proceedings into the Register of Fines referred to in paragraph (2) of this Article will be established by the FBiH Ministry of the Interior within three months from the day of entry into force of this Law.*

(4) *The fines and costs of the proceedings will be recorded as a debt in the Register of Fines until the punished person has paid the full amount of the fine and the costs of the proceedings. The fine and the costs of the proceedings will be deleted in any case from the Register of Fines upon the expiry of five years from the day on which the misdemeanour warrant has become final and enforceable, or the decision on misdemeanour has become legally binding and enforceable.*

(5) *The court will render a decision, on the proposal of the authorized authority or ex officio, suspending the procedure of enforcement of fines and costs of proceedings in the event of a death or permanent mental illness of the punished person, whereafter the fine and the costs of the proceedings will be deleted.*

Article 103

Consequences of the registration of the fine in the Register of Fines

Until all fines and costs recorded in the Register of Fines have been paid, the punished person will not be allowed to do the following:

- 1) to register or extend the validity of the registration of a motor vehicle;*
- 2) to be issued or to extend the validity of their driver's license;*
- 3) to participate in a public tender;*
- 4) to register as a legal person, to change the registration of a legal person or the registration of an autonomous business activity – business craft, or*
- 5) to change the ownership of a motor vehicle.*

Article 105

Deprivation of liberty for non-payment

(1) A punished person who does not pay in full or in part the fine imposed on him by the decision on the misdemeanor or by the misdemeanor order will be forced to pay by determination of the deprivation of liberty if the court considers that this is the only reasonable and effective way that will force the punished person to pay the amount to which he is liable. Deprivation of liberty due to non-payment is decided by the court with a decision that can be issued against the punished person only once for the relevant offense. Deprivation of liberty may be determined by the court ex officio or at the proposal of an authorized body or the Tax Administration of the Federation of Bosnia and Herzegovina. The court will inform the petitioner of its decision and of the execution of the deprivation of liberty.

(2) The court may order deprivation of liberty for up to 15 days. The time for which the punished person is deprived of his liberty will not affect the payment of the amount he owes. The punished person will be released immediately after paying the full amount of the fine.

(3) Deprivation of liberty according to the provisions of this article cannot be imposed on a punished person who can prove that he is unable to pay the fine.

(4) Against the decision on deprivation of liberty, the punished person may file an appeal with the second-instance court within eight days of receiving the decision on deprivation of liberty. The first-instance court is obliged to deliver the appeal to the second-instance court within three days of receiving the appeal. The second-instance court must make a decision on the appeal within 15 days of receiving the file. Appeal delays execution.

(5) Before the start of execution of the decision on deprivation of liberty, the punished person may propose to the court to perform work for the general good or work for the good of the local community as a substitute for paying a fine. The court will keep a list of such cases in cooperation with the relevant competent authorities. When deciding on the motion, the court will consider all the circumstances of the case, as well as the financial conditions and the ability of the punished person to pay the fine, as well as the type of offense committed, age, physical and work ability, psychological characteristics, education, inclinations and other special circumstances related to personality of the perpetrator.

(6) If the court approves the proposal referred to in paragraph (5) of this article, it will issue an order for the suspension of deprivation of liberty until the deadline for performing such work expires. If the punished person performs the prescribed work, the deprivation of liberty will not be carried out and the fine will be deleted from the Register of Fines and will not be collected. If the punished person does not perform the work provided for at all, the decision on deprivation of liberty will be carried out, and if he does it only partially, the court will assess whether it is expedient to carry out the decision on deprivation of liberty and issue an appropriate order.

(7) In the event that a court or an authorized body determines that a fine imposed on the basis of a final and enforceable misdemeanor order or final decision on a misdemeanor cannot be enforced, applying the provisions of Art. 103 and 104 of this law and para. (1), (2) and (3) of this article, the court shall, ex officio or at the proposal of an authorized body, pass a decision on the execution of a fine by ordering the punished person to perform certain tasks for the general good or tasks for the good of the local community as a substitute for payment of a fine. If the punished person performs the prescribed work, the fine will be deleted from the Register of fines.

(8) The procedure and conditions for the execution of a court decision on the deprivation of liberty of a punished person due to non-payment of a fine, as well as the procedure and conditions for performing tasks for the general good or tasks for the benefit of the local community and the way of keeping records on the performance of these tasks will be regulated by the federal minister of justice in by-laws in cooperation with the competent cantonal ministries within six months from the date of entry into force of this law.

V. Admissibility

16. In examining the admissibility of the present request, the Constitutional Court invoked the provisions of Article VI (3) (c) of the Constitution of Bosnia and Herzegovina.

Article VI (3) (c) of the Constitution of Bosnia and Herzegovina reads as follows:

c) The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision

depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision.

17. The request for the review of constitutionality was filed by the Municipal Court in Zavidovići (Judge Boris Sunarić), which means that the request was filed by an authorised person under Article VI (3) (c) of the Constitution of Bosnia and Herzegovina (see Constitutional Court, Decision on Admissibility and Merits no. *U-5/10* of 26 November 2010, paras 7-14, published in the *Official Gazette of Bosnia and Herzegovina*, 37/11).

18. The subject-matter of the request is the review of compatibility of the provisions of Article 21 (2) (4), Article 105 and a part of the provision of Article 75 of the Law on Misdemeanours with the provisions of Article II (3) (d) and (e) of the Constitution of Bosnia and Herzegovina and Articles 5 and 6 of the European Convention.

19. In examining the admissibility of the present request in the part seeking the review of compatibility of the provision of Article 105 of the Law on Misdemeanours with Article II (3) (d) and (e) of the Constitution of Bosnia and Herzegovina and Articles 5 and 6 of the European Convention, the Constitutional Court invoked the provisions of Article 19 (1) (d) of the Rules of the Constitutional Court.

20. Article 19 (1) (d) of the Rules of the Constitutional Court reads as follows:

A request shall be inadmissible in any of the following cases:

d) the Constitutional Court has already decided about the issue concerned and the allegations or evidence presented in the request do not provide the basis for a new decision;

21. The Constitutional Court recalls that, in its Decision on Admissibility and Merits no. *U-12/21*, of 24 March 2022, it concluded that the challenged provision of Article 105 of the Law on Misdemeanours is compatible with Article II (3) (d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention. The Constitutional Court concluded that the mentioned provision satisfies the standards of the right to liberty of person, for the reason that it is sufficiently clear and precise from the procedural viewpoint, and, when considered as a whole, it satisfies all the necessary guarantees, which ensure that the deprivation of liberty is not arbitrary. In addition, the challenged provision satisfies the standard of proportionality, as its purpose is not a punishment but a coercion to secure the payment of a fine. Also, the circumstance that, even after the deprivation of

liberty (for up to 15 days), it remains recorded in the Register of Fines, is justified from the aspect of the duration thereof, as it is deleted in any case upon the expiry of the period of five years from the day the decision of a court/ misdemeanour warrant has become legally binding. In the same Decision, the Constitutional Court concluded that the provision of Article 105 of the Law on Misdemeanours is compatible with Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention. It is compatible as it does not raise the issue of establishment of liability for the perpetrated misdemeanour, including, accordingly, the issue of establishment of a criminal charge. It exclusively raises the issue of the deprivation of liberty for the failure to fulfil the obligation, which was established previously. In addition, the challenged provision does not bring into question the principles referred to in Article 6 of the European Convention, such as the right of access to court, the right to defence and the remainder that the applicant pointed out.

22. Considering the fact that the present request challenges the same provision, in relation to the same articles of the Constitution of Bosnia and Herzegovina and the European Convention, bearing in mind the provisions of Article VI (3) (c) of the Constitution of Bosnia and Herzegovina and Article 19 (1) of the Rules of the Constitutional Court, the Constitutional Court deems that, with respect to the review of constitutionality of Article 105 of the Law on Misdemeanours, this concerns a request that the Constitutional Court has already decided, and the allegations presented in the request do not give rise to the basis for new decision-making.

23. Therefore, regarding Article 105 of the Law on Misdemeanours, while bearing in mind the provision of Article 19 (1) (d) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

24. As to Article 21 and a portion of Article 75 of the Law on Misdemeanours, the Constitutional Court deems that the request is admissible as an authorised subject filed it. There is not a single formal reason under Article 19 (1) of the Rules of the Constitutional Court rendering the request inadmissible.

VI. Merits

25. The applicant requested the Constitutional Court to decide, within the meaning of Article VI (3) (c) of the Constitution of Bosnia and Herzegovina, on the compatibility of the provision of Article 21 (2) (4) and a part of the provision of Article 75 of the Law on Misdemeanours with the

provisions of Article II (3) (d) and (e) of the Constitution of Bosnia and Herzegovina and Articles 5 and 6 of the European Convention.

The right to a fair trial

26. The right to a fair trial under Article II (3) (e) of the Constitution of Bosnia and Herzegovina, in its relevant part, reads as follows:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above, these include:

[...]

e) The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings. [...]

27. Article 6, paragraph 1 of the European Convention, in its relevant part, reads as follows:

1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...]

28. The Constitutional Court will examine the allegations of the applicant seeking the review of constitutionality of a part of the provision of Article 75 of the Law on Misdemeanours. It reads: “When the ruling on misdemeanour has been delivered through postal services, it shall be considered that the delivery has been made upon the expiry of five working days from the day the ruling has been mailed”. The applicant claims it is contrary to the right to a fair trial under Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention.

29. Before considering the present request challenging the provision of Article 75 of the Law on Misdemeanours, the part which pertains to the delivery of the ruling on misdemeanour through postal services, the Constitutional Court indicates that the provisions of the Law on Misdemeanours, Article 56 (3) of the Law on Misdemeanours (Delivery of a misdemeanour order) reads as follows: “When the misdemeanour order has been delivered in person, the date of delivery shall be the date when the accused person has received it. When the misdemeanour order has been delivered through postal services, it shall be considered that the delivery has been made upon the expiry of five working days after the authorised body has mailed it. When the misdemeanour order has been left on a motor vehicle, the date of delivery shall be the date on which it has been left on a motor vehicle”. Thus, this concerns two, in the relevant part identical, provisions of the Law on Misdemeanours, which pertain to the delivery, namely Article 56 pertains to the delivery of a

misdemeanour order, while Article 75 pertains to the delivery of the ruling on misdemeanour, whereby the applicant challenged Article 75 of the Law on Misdemeanours. In the opinion of the Constitutional Court, the provisions of Article 56 of the Law on Misdemeanours raise the same issues as the challenged provisions of Article 75 of the Law on Misdemeanours. However, the applicant did not challenge the provision of Article 56 of the Law on Misdemeanours. This is the reason why the Constitutional Court, according to its rules, cannot examine this provision (*ex officio* prohibition of examination).

30. The Constitutional Court will first present its hitherto case law in the relevant appellate cases, which raised the issues where delivery in person had not been made (with a signature of the recipient), as well as the consequences that ensued as a result thereof.

31. In the case no. *AP-2970/16* (see, Decision on Admissibility and Merits no. *AP-2970/16* of 11 October 2018, available: www.ustavnisud.ba) a violation was established of the appellant's right to an effective legal remedy in connection with the right to a fair trial. In this case, the appellant contested the delivery of the ruling via the court's bulletin board, which resulted in the consequence that his appeal against the ruling on the merits was rejected as untimely. The Constitutional Court took into account the particular nature of the circumstances from the said case. The delivery of the ruling via the court's bulletin board was contested despite the fact that the appellant gave his consent for the ruling to be delivered to his home address. The ordinary court should have examined whether the appellant was informed of the adoption of the decision in an effective manner and whether the court had showed diligence to a reasonable extent in an attempt to contact the appellant. In that regard (paragraph 40 of the reasoning for the decision) the following circumstances were indicated: the shipment was returned to the court with a note "that the appellant moved from the given address"; on the basis of the documents attached in the case file and the replies of the ordinary courts it follows that the appellant did not change his address neither did he inform the ordinary court of a possible intention to change the address; the court concluded that the appellant changed the address exclusively on the basis of the statement of the post office official; the statement of the post office official is a rebuttable assumption, which the appellant could indicate solely in the appeal, which he did in the present case; the appellant indicated in the submission which he sent to the court on 21 March 2016 that he did not receive the mentioned ruling and that he learnt in the post office that the said ruling was returned to the court; the court did not examine this circumstance in any way, but it accepted it as correct and concluded, on the basis of that "belief", that the condition for the delivery of the ruling via the court's bulletin board was satisfied.

In that way the Basic Court “set the time limit” for lodging an appeal against the ruling, following which the appellant’s appeal was rejected as untimely, rendering it an ineffective legal remedy.

32. In the case no. *AP-3502/12* (see, Decision on Admissibility and Merits no. *AP-3502/12* of 31 January 2013, available at: www.ustavisud.ba), a violation of the appellant’s right to a fair trial was established, where, among other things, an issue was raised as to the failure to notify the appellant of the existence of a “criminal charge”, of the place and time of an oral hearing, the conduct of a proceeding in the appellant’s absence by claiming that the ruling finding the appellant liable and punishing him with a fine had never been delivered, but that the appellant learnt about its existence when registering the car. In the mentioned decision (paragraph 34), the Constitutional Court stated, among other things, “the challenged ruling was delivered in the manner prescribed by law (...) *in case that a ruling passed in misdemeanour proceedings has been delivered by mail, it will be considered that the ruling has been delivered after the lapse of five working days after it had been deposited at the post office for collection*), however, it is undisputed that the ruling was not delivered in person (physically) to the appellant (as the appellant was no longer living at the address registered in the relevant records), and he was not able to avail himself of a claim for reinstatement within the time limits prescribed by the Law on Misdemeanours. The appellant learnt about the challenged ruling when attempting to renew his car registration and, at the time, all time limits for filing the mentioned legal remedy had already expired. Therefore, the Constitutional Court examined the challenged ruling with regards to the standards of the right to a fair trial under Article 6 (1) of the European Convention in the context of the appellant’s allegations and in the light of the case law of the European Court of Human Rights. Besides, the Constitutional Court recalled that the Committee of Ministers of the Council of Europe adopted Resolution (75) 11 of 21 May 1974 wherein it established the recommendations for the States in relation to the criteria governing proceedings held in the absence of the accused. This resolution recommends a number of minimum rules, which, *inter alia*, include: no person can be tried before being served with a summons and service must be made in an *effective manner* so that the accused has sufficient time to appear and to prepare a defence except if it were established that the accused deliberately intended to evade justice. The summons must include the information on consequences of a failure of the accused to appear in court. Therefore, the emphasis is not on the fact that the accused must appear in court but on the evidence that the accused has been duly notified about the hearing. The Constitutional Court pointed out that in the aforementioned decision, it recalled certain cases from the case law of the European Court of Human Rights (*inter alia*, *Colozza v. Italy*, judgment of 12 February 1985, paragraph 27, Series A,

no. 89), wherein it pointed out the necessity to answer the question as to whether it may be held, in the circumstances of the present case, that the appellant was notified in an effective manner about the existence of the “criminal charge” against him and whether the court showed reasonable diligence in attempting to contact the appellant.

33. In the present case, it is necessary to review the constitutionality of the part of the challenged provision of Article 75 of the Law on Misdemeanours. The Constitutional Court notes that it considers the review of constitutionality, i.e. compatibility of law/provision of law in a general sense (*erga omnes*), and not with regard to the specific case (*inter partes*) that was the reason for filing the request (see Constitutional Court, Decision in the case *U-15/11* of 30 March 2012, paragraph 63). Therefore, the Constitutional Court will not deal with the specific case pending before the Municipal Court in Zavidovići. It will not deal either with the manner in which the ordinary courts and other competent authorities applied the contested provisions of law. The Constitutional Court will review the compatibility of the contested provisions in an abstract manner, bearing in mind the allegations stated in the request.

34. During the review of constitutionality in the cases from within abstract jurisdiction, as well as during the examination of constitutionality solely with respect to the text of the challenged provision, it is very difficult to examine whether a violation of the right to a fair trial has occurred. A compliance with Article 6 of the European Convention, which prescribes in detail a number of procedural guarantees, may be efficiently examined only upon the completion of a proceeding as a whole. The only item that the Constitutional Court may examine, within abstract jurisdiction, is whether the challenged provision contravenes any of the principles contained in Article 6 of the European Convention (see, Constitutional Court, Decision on Admissibility and Merits no. *U-16/18* of 28 March 2019, paragraph 65, available at: www.ustavnisud.ba). In the opinion of the Constitutional Court, the challenged provision of Article 75 of the Law on Misdemeanours raises the issue of respect for the right of access to court under Article 6 (1) of the European Convention.

35. Under Article 6 (1) of the European Convention “everyone is entitled to a fair and public hearing” and is applicable not only to proceedings which the domestic/national authorities claim to be criminal, but also to other proceedings which are determinative of civil rights and obligations as well (such as, misdemeanour, customs, administrative etc.) in accordance with the principles established in the case of *Engel* (see European Court, *Engel v. The Netherlands* (no. 1), judgment of 8 June 1976, Series A, no. 22; *Oztürk*, judgment of 27 May 1984, Series A, no. 73, paras 46-50). In order for the rights guaranteed under Article 6 of the European Convention to not be illusory and theoretical, the elements of the right to a fair trial have been developed, primarily through the case

law of the European Court, which clearly determine the right of every individual to a decision to be adopted by a court in an adversarial proceeding, which is the reason why, although not explicitly prescribed in Article 6 of the European Convention, “the right of access to court of full jurisdiction” was established. Also, the right of access to court implies also the right to use a legal remedy (an appeal against the first instance judgment). The aforementioned is not explicitly prescribed by the guarantees of Article 6 of the European Convention, but if a legal remedy within a proceeding is prescribed by a domestic law, the impossibility to use the given legal remedy leads to a violation of the right of access to court within the scope of the guarantees referred to in Article 6 of the European Convention. Presumptions of fact or of law operate in every legal system, and the Convention does not prohibit such presumptions in principle; however, individuals must be afforded effective judicial safeguards (*Lady S.R.L. v. Republic of Moldova*, no. 39804/06, 23 October 2018, § 27). It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law (see *Salabiaku v. France*, 7 October 1988, § 28, Series A no. 141-A). In the Court’s view, presumptions can *a fortiori* be accepted in the area of company law, where the right to respect for possessions may be at stake. Moreover, there is nothing to indicate that the manner of the application of the relevant burden of proof in the applicant’s case overstepped those limits (*Lekić v. Slovenia*, Grand Chamber, no. 36480/07, 11 December 2018, § 122).

36. The challenged provisions of Article 75 of the Law on Misdemeanours do indeed prescribe a legal fiction (presumption), according to which the delivery of a misdemeanour ruling is considered made “upon the expiry of five working days from the day the ruling has been mailed”. Where the delivery is “through postal services”, the court writ (ruling on misdemeanour) is not delivered in person to the accused. Rather a mail carrier puts the court writ in the mailbox at the address of the accused. The legal presumption is that the post office will deliver the court writ in the mailbox of the accused within five days (counting from the day on which the court mailed the writ), as well as that the accused will open his mailbox (within the mentioned time limit), take the contents thereof and acquaint himself with it.

37. The Law on Misdemeanours gives the right to the accused to claim and prove that he was not delivered any court writ, including, naturally, the ruling on misdemeanour to be delivered in the manner prescribed by the challenged provision of Article 75 of the Law on Misdemeanours. The relevant provisions of Article 93 of the Law on Misdemeanours prescribe a legal remedy “a proposal for the reinstatement to the previous condition” (*restitutio in integrum*), if the accused person can prove that he/she was not served with the misdemeanour order, or the request for the

institution of a misdemeanour proceeding, or the summons to an oral hearing, or a copy of the ruling on misdemeanour, and that the failure to show up or to act in a timely fashion occurred for justified reasons. Bearing in mind the prescribed legal remedy under Article 93 of the Law on Misdemeanours, the Constitutional Court deems that the legal presumption on the delivery referred to in Article 75 of the Law on Misdemeanours, is, in fact, a rebuttable legal presumption. This is so because the accused person can contest that he was served with the ruling on misdemeanour.

38. The challenged provision of Article 75 of the Law on Misdemeanours prescribes a rebuttable legal presumption, which may be challenged through the use of the legal remedy (*restitutio in integrum*) referred to in Article 93 of the Law on Misdemeanours. The mentioned legal remedy is effective, considering the power of the court prescribed under Article 95 (2) of the Law on Misdemeanours (“... If the court grants the proposal for the reinstatement to the previous condition, the ruling on misdemeanour will be rendered ineffective...”). If the challenged provision of Article 75 of the Law on Misdemeanours is examined without taking into account the rest of the provisions of the Law on Misdemeanours, a conclusion could be reached that the relevant part of the provision of Article 75 of the Law on Misdemeanours carries nothing disputable and that no detailed examination is required. Namely, prescribing the legal presumption (fiction) on the delivery of court writs is not, in itself, in contravention of the standards of law prescribed by the Constitution of Bosnia and Herzegovina or the European Convention. In addition, the delivery of court writs through postal services is a usual manner of delivery. Although no delivery in person is prescribed in this case (namely for the mailman to serve the writ to the accused in person and for the accused to sign that he has received the writ) it can, nevertheless, be said that it is the usual manner of delivery, considering an indisputable fact that the majority of mail is sent and delivered in a similar manner. This is much simpler and more cost-efficient than delivery in person. However, it would undoubtedly be safer that certain mail such as court writs or orders are delivered in person. The estimation of five days, within which time limit it is presumed that the post office will deliver a writ in the mailbox of the accused and that the accused will collect the writ from the mailbox and thus learn about the content thereof, is not unreasonable in itself. The delivery made in the manner prescribed under the challenged provision of Article 75 of the Law on Misdemeanours may be challenged by means of an effective legal remedy under Article 93 of the Law on Misdemeanours (*restitutio in integrum*).

39. Nevertheless, if taking into account the time limits set forth in Article 94 of the Law on Misdemeanours, there is a great concern as to whether a legal remedy referred to in Article 93 of the Law on Misdemeanours may be used successfully in real life. Without an effective legal

remedy, or without a reasonable chance to use it effectively, the legal presumption on delivery (in the manner prescribed under the challenged provision of Article 75 of the Law on Misdemeanours) would no longer be a rebuttable legal presumption. This would result in the loss of the right of the accused of access to court under Article 6 (1) of the European Convention. The text of the reasoning that follows will address at length the aforementioned concern.

40. According to the relevant provisions of Article 94 of the Law on Misdemeanours the time limit for submitting a proposal for the reinstatement into the previous condition (*restitutio in integrum*) is three months from the day of adoption of the ruling on misdemeanour. The time limit of three months is imperative given the legal formulation, which reads as follows: *Every proposal for the reinstatement into the previous condition has to be submitted within three months...* The emphasis is that the proposal “has to be submitted within the time limit of...”. Therefore, if the accused fails to file, within three months from the day of adoption of the ruling on misdemeanour, a claim for the reinstatement into the previous condition, the court may not examine the merits of that proposal, irrespective of the seriousness of the reasons adduced by the accused in relation to the fact that he was not served with the ruling on misdemeanour, which was dispatched by mail for the purpose of delivery in the manner prescribed under the challenged provision of Article 75 of the Law on Misdemeanours. The provisions of law under Article 94 of the Law on Misdemeanours, apart from imposing a restriction on the accused (meaning the time limit of three months for the submission of a proposal), also restrict the court from examining the merits of the proposal for reinstatement into the previous condition if the time limit of three months had passed from the day of delivery of the ruling on misdemeanour. As soon as it has established that the time limit of three months had passed, the court will deliver *a priori* a ruling rejecting the proposal for reinstatement into the previous condition. Therefore, in a formal and procedural sense the competent court is prevented from considering *de facto*, whether the service of the ruling on misdemeanour has taken place (or perhaps not so, as claimed by the accused person), on account that the time limit of three months under Article 94 of the Law on Misdemeanours has passed. However, it is possible to have a situation, which will be more elaborated on in the reasoning that follows, where the accused person does not know that the ruling on misdemeanour was dispatched in the way prescribed in the challenged part of the provision of Article 75 of the Law on Misdemeanours.

41. Based on the information from the earlier cases that were resolved in an appellate proceeding, the Constitutional Court observed that the accused persons failed, as a rule, to file a claim within the time limit of three months for the reinstatement into the previous condition. This was for the reason that they were unaware during the mentioned time limit that a ruling on

misdemeanour, which had been adopted earlier, was dispatched. The result of this was that the court was prevented from examining the merits of the proposals submitted beyond the time limit prescribed by law (the courts rejected such proposals as untimely). The consideration of the court in such situations was restricted only to the establishment as to whether a proposal for the reinstatement into the previous condition was submitted within three months, irrespective of, as stated, the seriousness and corroboration of allegations that were presented in the proposal, with the reasoning that Article 94 of the Law on Misdemeanours does not allow the extension of the time limit. Next, the Constitutional Court observed (from such and similar cases) that rulings on misdemeanour (which were delivered in the manner prescribed under the challenged provision of Article 75 of the Law on Misdemeanours) became legally binding, on the ground that the accused did not challenge them, as well as that the information from such legally binding rulings were entered in the Register of Fines referred to in Article 102 of the Law on Misdemeanours. Thus, given that the fines were not paid (and the accused indicated that the fines were not paid for the reason that the ruling was not delivered to them) consequences were suffered by the accused in the form of the loss of certain rights prescribed under Article 103 of the Law on Misdemeanours. In such cases, the accused stated that they learnt about the existence of a fine, corresponding to the existence of the ruling on misdemeanour, only when they wanted to exercise a right, which was denied pursuant to Article 103 of the Law on Misdemeanours. Most frequently, it occurred when applying for the extension of a driving licence or when registering a motor vehicle.

42. In the opinion of the Constitutional Court, the time limit of three months as prescribed in Article 94 of the Law on Misdemeanours, does not ensure an effective access to court to the accused person, if he/she wishes to challenge the presumption of delivery via postal services under Article 75 of the Law on Misdemeanours. The existing time limit of three months applicable from the adoption of the ruling on misdemeanour practically brings into question the issue of a possibility to refute the presumption referred to in Article 75 of the Law on Misdemeanours. The legal remedy becomes “ineffective” if the accused person has not “learnt” within three months about the ruling on misdemeanour and has failed to avail himself/herself of a legal remedy. Therefore, amendments are necessary in such a way as to ensure to the accused person the guarantees of access to court under Article 6 (1) of the European Convention. The refuted provision of Article 75 of the Law on Misdemeanours, which prescribes a rebuttable legal presumption about the serving of the ruling on misdemeanour (five working days from the day of the mailing thereof), because of the restrictions referred to in Article 94 of the Law on Misdemeanours, brings the accused person into a position to be found responsible and sanctioned (by a fine, suspended sentence, reprimand or protective

measures). This would occur although he/she failed to avail himself/herself of the guarantees afforded by way of the legal remedy. The aforementioned constitutes an excessive burden for the accused person when compared to the public interest sought to be achieved (forfeiture of property gain, obligation to compensate damage, penalty points, deprivation of liberty for the purpose of collecting the fine). The challenged provision does not strike a fair balance between the requirement of a general interest of the community and the requirement for the protection of fundamental rights of individuals. Therefore, the principle of proportionality is violated. This is so because the accused is faced with a sanction on account of a ruling on misdemeanour he/she was unaware of, and in a situation where the legal remedy is ineffective. In other words, the rebuttable legal presumption referred to in Article 75 of the Law on Misdemeanours practically becomes an irrefutable presumption, which is contrary to the essence and purpose of the mentioned provision.

43. Therefore, a short time limit and a statutory restriction on the court not to examine the merits of the proposal for the reinstatement into the previous condition if submitted after the time limit, irrespective of the seriousness and corroboration of the reasons for which the accused claimed that the ruling was not served on him, results in the fact that the legal fiction created by Article 75 of the Law on Misdemeanours is no longer a “rebuttable legal presumption”. This is on account of the inability of an accused in certain cases where it is merited to effectively use the legal remedy provided for in Article 93 of the Law on Misdemeanours. This results in the loss of the right of the accused of access to court under Article 6 (1) of the European Convention.

44. Because of all the aforementioned, the Constitutional Court deems that the provision of Article 75 of the Law on Misdemeanours, in the part which reads: *When the ruling on misdemeanour has been delivered through postal services, it shall be considered that the delivery has been made upon the expiry of five working days from the day the ruling has been mailed*, is not compatible with Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 (1) of the European Convention. It is incompatible for the reason that it may result in the loss of the right of access to court.

45. Finally, the Constitutional Court recalls that it was unable to examine the relevant parts of the provision of Article 56 (3) of the Law on Misdemeanours, because they were not challenged. However, attention must be drawn to the competent legislator that the mentioned provisions raise yet more serious issues than the provisions of Article 75 of the Law on Misdemeanours, which the Constitutional Court examined. A misdemeanour warrant referred to in Article 54 of the Law on Misdemeanours (unlike the ruling on misdemeanour) is issued without scheduling an oral hearing. Thus, it is realistically possible that the accused does not even know that he has perpetrated a

misdemeanour (see, for instance, the basis for issuing a misdemeanour warrant as prescribed under Article 54 (1) (2) of the Law on Misdemeanours). Consequently, a misdemeanour warrant could be delivered, among other prescribed ways, in a manner similar to that prescribed by the challenged provision of Article 75 of the Law on Misdemeanours, which the Constitutional Court found to be unconstitutional. Therefore, during future amendments to the Law on Misdemeanours the provision of Article 56 (3) of the Law on Misdemeanours should not be neglected.

Other allegations

46. With regard to the provision of Article 21 (2) (4) of the Law on Misdemeanours, the applicant cited the contents of the mentioned provision, while in the request, as a matter of fact, the applicant presented arguments vis-à-vis Article 105 of the Law on Misdemeanours. The Constitutional Court recalls that according to the constant case law of the Constitutional Court, the applicant had the obligation to specify the request – as to the provisions of the Constitution of Bosnia and Herzegovina or the European Convention concerning which he seeks the review of compatibility, and to substantiate those allegations with appropriate arguments, which would be indicative of a doubt about the compatibility of the legal provision (see Constitutional Court, the Decision no. *U-12/13*, of 5 July 2013). The Constitutional Court emphasises that the applicant specified the request concerning Article 21 (2) (4) of the Law on Misdemeanours in relation to Article II (3) (d) and (e) of the Constitution of Bosnia and Herzegovina, and Articles 5 and 6 of the European Convention. However, he failed to offer any arguments whatsoever that relate to Article 21 of the Law on Misdemeanours, save for the fact that in the remainder of the request he provided full argumentation in relation to Article 105 of the Law on Misdemeanours. Without additional arguments as to why the challenged provision of Article 21 (2) (4) of the Law on Misdemeanours (with *erga omnes* effect) brings into question the respect for constitutional rights pointed to by the applicant, the Constitutional Court may only conclude that the allegations made by the applicant are ill-founded with respect to (un)constitutionality of Article 21 (2) (4) of the Law on Misdemeanours. This particularly being so when bearing in mind the aforementioned conclusion referred to in the Decision of the Constitutional Court no. *U-12/21*, which carries a decision on the request in relation to Article 105 of the Law on Misdemeanours.

47. Therefore, the Constitutional Court concludes that Article 21(2)(4) of the Law on Misdemeanours is compatible with Article II(3)(d) and (e) of the Constitution of Bosnia and Herzegovina and Articles 5 and 6 (1) of the European Convention.

VII. Conclusion

48. The Constitutional Court deems that the provision of Article 75 of the Law on Misdemeanours, in the part which reads: *When the ruling on misdemeanour has been delivered through postal services, it shall be considered that the delivery has been made upon the expiry of five working days from the day the ruling has been mailed*, is not compatible with Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 (1) of the European Convention. It is incompatible for the reason that it may result in the loss of the right of access to court.

49. The Constitutional Court concludes that Article 21(2) (4) of the Law on Misdemeanours is compatible with Article II (3) (d) and (e) of the Constitution of Bosnia and Herzegovina and Articles 5 and 6 (1) of the European Convention.

50. The Constitutional Court concludes with regard to Article 105 of the Law on Misdemeanours that it concerns the issue, which the Constitutional Court of Bosnia and Herzegovina has already decided, while the allegations or evidence presented in the request do not give rise to the basis for new decision-making.

51. Having regard to Article 19 (1) (d), Article 59 (1), (2) and (3) and Article 61 (4) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this Decision.

52. Pursuant to Article VI (5) of the Constitution of Bosnia and Herzegovina, decisions of the Constitutional Court shall be final and binding.

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina