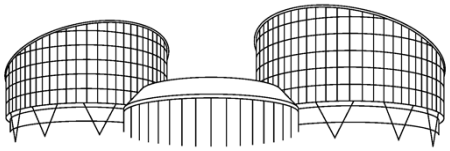

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF RUTAR AND RUTAR MARKETING D.O.O.
v. SLOVENIA

(Application no. 21164/20)

JUDGMENT

Art 6 § 1 • Fair hearing • Domestic court's failure to provide reasons for refusal to accede to applicant's request to seek a preliminary ruling from the Court of Justice of the European Union

STRASBOURG

15 December 2022

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Rutar and Rutar Marketing d.o.o. v. Slovenia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Péter Paczolay*, President*,
Marko Bošnjak,
Krzysztof Wojtyczek,
Alena Poláčková,
Ivana Jelić,
Erik Wennerström,
Raffaele Sabato*, judges*,
and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 21164/20) against the Republic of Slovenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Mr Gregor Rutar and the company Rutar Marketing d.o.o. ("the applicants", or the "applicant" and "the applicant company" respectively), on 11 May 2020;

the decision to give notice to the Slovenian Government ("the Government") of the application;

the parties' observations;

the indication by the Austrian Government that they did not wish to exercise their right to intervene in the proceedings in accordance with Article 36 § 1 of the Convention and Rule 44 § 1 of the Rules of Court;

Having deliberated in private on 22 November 2022,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns minor offence proceedings for the violation of the Consumer Protection Act, during which the domestic courts allegedly ignored a request from the applicants that a preliminary ruling be sought from the Court of Justice of the European Union (the CJEU).

THE FACTS

2. The applicant was born in 1986 and lives in Klagenfurt, Austria. He was a marketing director at the applicant company, which has its headquarters in Ljubljana, Slovenia, and whose business includes, among other things, home furnishing stores. The applicant and the applicant company were represented by Dr Grilc, Mr Vouk, Dr Škof and Ms Erman, lawyers practising in Ljubljana.

3. The Government were represented by their Agent, Ms N. Pintar Gosenca, Senior State Attorney.

4. The facts of the case may be summarised as follows.

5. In March 2018 the Market Inspectorate instituted minor offence proceedings and administrative proceedings against the applicants. They concerned certain promotional materials of the applicant company. The administrative proceedings were later discontinued based on the finding that the applicant company had brought its commercial activities into compliance with the legislation. However, the Market Inspectorate continued the minor offence proceedings.

6. On 6 and 9 July 2018 the applicant company and the applicant, respectively, were informed of the proceedings and invited to provide statements concerning the facts and circumstances of the alleged offence within five days.

7. On 20 July 2018 the Market Inspectorate issued a decision. It referred to the applicant company's statement given in the related administrative proceedings (see paragraph 5 above). In that statement the applicant company referred to Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council, and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ("the Unfair Commercial Practices Directive"); argued that its clients had been offered special "opening prices" at a shop which had been newly opened; and maintained that the prices recommended by the suppliers could have been checked at any time and that the practice was in line with the jurisprudence of comparable European countries.

8. The Market Inspectorate, relying on sections 4(1) and 5(1) of the Consumer Protection Against Unfair Commercial Practices Act, found that the applicants had engaged in a misleading commercial practice regarding the advertised price advantage. It imposed a fine of 3,000 euros (EUR) on the applicant company and EUR 300 on the applicant. It also ordered them to pay court fees. The Market Inspectorate noted that the items in the applicant company's promotional catalogue (such as glasses, dishes, and a kitchen) had been advertised with promotional prices which were compared to the prices recommended by suppliers. However, the items had never been sold at the latter prices by the applicant company. The Market Inspectorate further found that the comparison was made by printing the promotional price in red in a font that was up to three times larger than the recommended price, which was struck through. The Market Inspectorate concluded that the price comparison, which was a method of presenting the price advantage, misled, or could have misled, the average consumer into thinking that he or she was buying the items during a limited promotional period for a price that was lower than usual.

9. The above decision of the Market Inspectorate relied on certain Slovenian case-law pursuant to which a comparison of promotional prices

with the prices recommended by suppliers could constitute misleading advertising, as well as the case-law of the CJEU pursuant to which an advertisement was considered to be misleading if it concealed information or provided it in an unclear, unintelligible or ambiguous manner, which might cause the average consumer to take a decision on a purchase that they would not have taken otherwise.

10. On 30 July 2018 the applicants lodged a request for judicial protection. They submitted, *inter alia*, the following arguments:

- Referring to decisions of the Austrian and German courts, they argued that the case-law of courts in comparable member States of the European Union (EU) showed that the prices at which the products were being sold could be compared to "recommended prices" as long as this was clearly indicated. The mere fact that the recommended prices had not been actually applied in the past could not mean that they were incorrect; such advertising was permitted in other EU member States and by the CJEU's case-law.

- The requirement that price comparisons should be limited to comparisons of promotional prices and actual past prices was unjustified and incompatible with EU law.

- Consumers had had enough time to study the offer, including by searching the Internet; according to the CJEU's case-law, the average consumer is a reasonably critical person who is circumspect in their economic behaviour.

- The CJEU's case-law permitted the comparison of prices, provided that it was clearly stated which prices were being compared.

11. The applicants further requested that the Nova Gorica Local Court seek a preliminary ruling from the CJEU as to whether a comparison of promotional prices with the prices recommended by suppliers or producers was in accordance with the provisions of the Unfair Commercial Practices Directive, taking into account Article 6 of this directive. In support they argued that the issues at stake should have been harmonised across the EU in line with the objective of the aforementioned directive. They referred to specific decisions of the Austrian and German courts which, in their view, showed that comparisons between recommended and actual prices were permissible.

12. On 26 August 2019, a judge at the Nova Gorica Local Court gave a judgment dismissing the applicants' request for judicial protection, after summarising their arguments. The judge did not in any way address the applicants' request for a preliminary ruling from the CJEU. The reasoning of the Nova Gorica Local Court, except for the part concerning court fees, reads as follows:

> "The court examined the submissions of the perpetrators [set out] in their request for judicial protection together with the annexes, as well as the submissions of the minor offence authority [set out] in the decision on the minor offence, inspected and read the minutes from the inspection review ... with annexes, [and] the notice and invitations to

provide a statement served on the perpetrators ... as demonstrated by the proof of service.

After examining the foregoing the court found that, in the decision about the minor offence [issued] by the minor offence authority, all the decisive facts based on the collected evidence had been reliably and comprehensibly established and that in the minor offence proceedings before the minor offence authority there had been no violation of section 62a of the Minor Offences Act, which should be reviewed by the court of its own motion, and the perpetrators were given the prescribed fine. The court did not assess the new facts and circumstances put forward by the perpetrators in the request for judicial review, because it found that the perpetrators, after being notified of the offence and invited to provide comments regarding the facts and circumstances of the minor offence, had not provided comments, although the minor offence authority had correctly warned them that they should put forward in their written statement all facts and circumstance in their favour or else in the minor offence proceedings they would no longer be able to rely on them (section 55(2) of the Minor Offences Act).

In view of the above, the court, based on section 65(1) of the Minor Offences Act dismissed the request for judicial protection against the decision on the minor offence [issued] by the minor offence authority as unfounded."

13. On 30 October 2019, the applicants filed a constitutional complaint against the above judgment, invoking their constitutional right to equal protection of rights and Article 6 of the Convention. They argued, *inter alia*, that the Nova Gorica Local Court had not provided sufficient reasoning in its judgment of 26 August 2019. In particular, it had not at all addressed the applicants' request that it seek a preliminary ruling from the CJEU, which had been elaborated and supported by appropriate arguments, and there was no indication in the judgment that this argument had been considered by the domestic court. They repeated that the requirement that the comparison could be made only between the actual and promotional prices was entirely without basis and incompatible with the comparative jurisprudence of other EU States. They moreover argued that the domestic court was required by EU law to submit the question for a preliminary ruling to the CJEU. Referring to the Constitutional Court's case-law and to the Court's judgments in *Harisch v. Germany* (no. 50053/16, 11 April 2019); *Ullens de Schooten and Rezabek v. Belgium* (nos. 3989/07 and 38353/07, 20 September 2011); *Taxquet v. Belgium* ([GC], no. 926/05, ECHR 2010); and *Dhahbi v. Italy* (no. 17120/09, 8 April 2014), they argued that the judgment in their case was in breach of Article 6 of the Convention. Lastly, the applicants requested the Constitutional Court to accept the constitutional complaint for consideration and quash the impugned judgment.

14. By a decision of 24 December 2019, which was notified to the applicants on 15 January 2020, the Constitutional Court decided to reject (*zavreči*) the constitutional complaint because "the applicants had not made a reasoned proposal for exceptional consideration of an otherwise inadmissible constitutional complaint". It relied on section 55.a(1), the fourth indent of section 55.a(2) and section 55.a(3) as well as the third indent of

55.b(1) in connection with the fourth indent of section 55.a(2) of the Constitutional Court Act.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNINON

15. For the text of Article 267 of the Treaty on the Functioning of the European Union (TFEU) and the related material see *Sanofi Pasteur v. France*, no. 25137/16, §§ 33-37, 13 February 2020.

II. CONSTITUTIONAL COMPLAINTS

A. The Constitutional Court Act

16. The relevant provisions of the Constitutional Court Act (Official Gazette no. 15/1994 with amendments) read as follows:

Section 53

"(1) A constitutional complaint shall state the following:

- the decision which is challenged, the authority which issued it, its reference number, and the date it was issued;

- the human rights or fundamental freedoms allegedly violated;

- reasons in support of the alleged violations;

- the date on which the complainant was notified of the decision which he or she challenges;

- if the complainant is a natural person, the full name of the complainant and the address of his or her permanent or temporary residence, or, if the complainant is a legal entity, State authority, bearer of public authority, or other legal subject, its name and where it is based, as well as the name and title or position of its representative;

- other information determined by the Rules of Procedure of the Constitutional Court.

(2) The constitutional complaint must be submitted in writing. A copy of the challenged decision and all other decisions that were issued in connection with the challenged decision in proceedings before the competent authorities in the case, as well as the relevant documents on which the constitutional complaint is based, must be enclosed with the complaint."

Section 55.a

"(1) A constitutional complaint shall not be admissible if the violation of human rights or fundamental freedoms in question did not have serious consequences for the complainant.

(2) It is deemed that there has been no violation of human rights or fundamental freedoms which had serious consequences for the complainant with regard to individual acts:

- issued in small claims disputes ...;

- if only a decision on the costs of proceedings is challenged by the constitutional complaint;

- issued in trespass to property disputes;

- issued in minor offence cases.

(3) Irrespective of the preceding paragraph, in especially well-founded cases the Constitutional Court may exceptionally decide on a constitutional complaint against the individual acts referred to in the preceding paragraph. An instance of an especially well-founded case is a decision that concerns an important constitutional question which exceeds the importance of the concrete case."

Section 55.b

"(1) A constitutional complaint shall be rejected:

...

- if it is not admissible, except in the instance referred to in the third paragraph of the preceding section;

...

(2) A constitutional complaint shall be accepted for consideration:

- if there is a violation of human rights or fundamental freedoms which had serious consequences for the complainant; or

- if it concerns an important constitutional question which exceeds the importance of the concrete case.

..."

B. The Constitutional Court's case-law

17. The Government submitted extensive case-law concerning the application of the "important constitutional question" criterion. They relied on decision no. Up-1131/12 of 30 September 2013, in which the Constitutional Court had held that the complainants should have demonstrated that their case was of such importance as to warrant consideration under section 55.a(3) of the Constitutional Court Act. There was an indication in that decision that the complainant had not put forward an explicit proposal as to why his case should have been considered to raise an important constitutional question. The Constitutional Court considered that some of his submissions could nevertheless be taken as pointing to such questions. His constitutional complaint was ultimately declared inadmissible as he had failed to exhaust legal remedies. The relevant parts of the decision read as follows:

"... the fulfilment of conditions for a constitutional complaint to be accepted for consideration must be demonstrated (*izkazati*) by the complainant (section 53(1) of the Constitutional Court Act). Under section 55.a(2) of the Constitutional Court Act, the violation of human rights and fundamental freedoms (even if demonstrated) in cases such as the case in question are deemed to have no serious consequences for the

complainant. In a constitutional complaint against an individual act the complainant must thus provide more than just a claim that human rights and fundamental freedoms have been violated (indent 2 of paragraph one of section 53 of the Constitutional Court Act) and a statement of the reasons supporting the existence of the violation (indent 3 of paragraph one of section 53 of the Constitutional Court Act). In order for a constitutional complaint to be accepted for consideration, the complainant must demonstrate (*izkazati)* that the condition referred to in paragraph three of section 55.a of the Constitutional Court Act is fulfilled, namely that the circumstances of the case concerned give rise to a constitutional question that goes beyond the complainant's individual interest in the outcome of the proceedings and is important for the protection of human rights in general.

... The constitutional complaint would ... in the present case be admissible under section 55.a (3) of the Constitutional Court Act only exceptionally, should it require a decision about an important constitutional question which exceeds the importance of the concrete complaint. The complainant does not claim that explicitly. However, having regard to the substance of the constitutional complaint, some allegations could indicate that this case is [exceptional].

... From the perspective of section 55.a (3) of the Constitutional Court Act it could be a constitutionally relevant argument that the decision was given in the first-instance proceedings by a judge who was supposedly a target of defamation, and that thus the complainant was deprived of his right to an impartial court ... However, the complainant did not pursue this argument in his appeal against the decision of the first-instance court. Since the requirement to exhaust remedies in substance is thus not fulfilled with respect to these submissions, the Constitutional Court was unable to take them into account when considering whether the conditions for exceptional consideration of this constitutional complaint were fulfilled.

... The complainant also raises questions regarding the role of the representative in the criminal proceedings from the perspective of the right to freedom of expression ... The Constitutional Court has already decided such questions. However, it is particularly important in the present case that the complainant did not put forward this grievance in his appeal against the decision of the first-instance court, therefore in this part to the requirement to exhaust remedies in substance is not fulfilled."

18. The Government further referred to decision no. U-I-97/16, Up-445/16 of 21 May 2018, which in so far as relevant reads as follows:

"The complainant proposes exceptional consideration of an inadmissible constitutional complaint under paragraph three of Article 55.a of the Constitutional Court Act. However, the proposal is ill-founded because the complainant did not demonstrate (*izkazati*) that his case would be precedential with regard to the standards of human rights protection. Considering the reasoning of the contested judgment, the case in question does not directly raise the allegedly important constitutional questions put forward in the constitutional complaint."

19. The Government also referred to several decisions of the Constitutional Court in which constitutional complaints, which would in principle have been considered inadmissible under section 55.a (2), were accepted for consideration. The relevant parts read as follows:

"The Constitutional Court panel considers that the question of which act should be applied in the case concerned, which is, *inter alia*, revealed in the constitutional complaint (*izpostavlja ustavna pritožba*), is an important constitutional question that

goes beyond the importance of the case itself, and has therefore accepted the constitutional complaint for consideration. The Constitutional Court will decide on its merits and establish whether the impugned judgment violated the human rights of the complainant ...” (Decision no. Up-150/19 of 20 March 2019)

“It is therefore an inadmissible constitutional complaint ... Nevertheless, the Constitutional Court accepted it for consideration by way of panel Decision no. Up-593/16 of 19 November 2018 as it had established that the case gave rise to (*zadeva odpira*) an important constitutional question going beyond the importance of the specific case, namely the question of whether the Supreme Court’s position on the inadmissibility of an appeal against its own decision on a fine gave the legal provisions of the Administrative Dispute Act a meaning that is inconsistent with the right to a legal remedy referred to in Article 25 of the Constitution.” (Decision no. Up-593/16 of 7 February 2019)

“The Constitutional Court panel considers that the question of the arbitrariness of the position regarding a judge being bound by the implementing regulation, which, *inter alia*, arises from the constitutional complaint (*odpira ustavna pritožba*), is an important constitutional question that goes beyond the importance of the specific case. Therefore, it accepted the constitutional complaint for consideration and decided to consider it as an absolute priority. The Constitutional Court will decide on its merits and establish whether the contested judgment violated the human rights and fundamental freedoms of the complainants ...” (Decision no. Up-1167/18 of 11 July 2019)

“By way of Order no. Up-1544/10 of 10 October 2011, the Constitutional Court panel accepted the constitutional complaint for consideration, as it gave rise (*odpira*) to an important constitutional question that goes beyond the importance of the case concerned.” (Decision no. Up-1544/10 of 21 June 2012)

“The panel of the Constitutional Court has accepted on that basis [section 55.a (3) of the Constitutional Court Act] the constitutional complaint for consideration ... This exceptional acceptance of the constitutional complaint for consideration was dictated by the question of whether, by imposing the sanction of driving licence revocation in the manner indicated in its judgment, the second-instance court violated the prohibition of an amendment to the detriment of the appellant ... and thus interfered with any of the complainant’s constitutional rights. The Constitutional Court limited its consideration to this question, as the constitutional complaint does not give rise (*ne odpira*) to any other important constitutional questions going beyond the importance of the case concerned.” (Decision no. Up-953/07 of 9 April 2009)

20. In the above decisions nos. Up-953/07 of 9 April 2009, Up 1544/10 of 21 June 2012, and Up-593/16 of 7 February 2019, the complainants alleged violations of their constitutional rights but there is no indication that they put forward an explicit proposal as to why their cases should have been considered to raise an important constitutional question.

21. It moreover follows from the Constitutional Court decisions nos. Up-965/11 of 9 May 2013, Up-578/16 of 20 April 2017 and Up-854/14 of 20 April 2017, in which the complainants were successful with their constitutional complaints, that, as a general rule, if a position of the Constitutional Court on the important constitutional question already exists, the condition referred to in section 55.a(3) of the Constitutional Court Act is not fulfilled, except when the Constitutional Court establishes that this is necessary to ensure the compliance with the decisions it has already issued

and with the constitutional rights of individuals in minor offence proceedings. Decision no. Up-578/16 of 20 April 2017 indicates that the complainant requested exceptional consideration by alleging that a fine of 250 euros had serious financial consequence for him; decisions nos. Up-965/11 of 9 May 2013 and Up-854/14 of 20 April 2017 indicate that the complainants alleged that there had been a violation of their constitutional rights, but there is no indication that a well-reasoned proposal for the exceptional consideration of the case was put forward by those complainants.

22. In more recent cases relied on by the Government, the Constitutional Court rejected the constitutional complaints finding that the proposal for the exceptional consideration for inadmissible complaint was not well-founded (U-I-189/16, Up-876/16 of 20 February 2020; U-I-139/16, Up-671/16 of 14 February 2020; and U-I-132/19, Up-467/19 of 9 September 2019) or that the conditions under section 55.a (3) had not been fulfilled (U-I-11/17, Up-60/17 of 10 January 2020, and U-I-34/16, Up-126/16 of 12 September 2019).

23. In the recent cases below, the constitutional complaints were rejected because the complainants did not claim that their case warranted exceptional consideration under section 55.a (3) of the Constitutional Court Act. The relevant parts read as follows:

> "The complainant's submission does not indicate that he is aware (*da bi se zavedal*) that he is filing an inadmissible constitutional complaint and thus he does not claim (*zatrjuje*) that the matter (*primer*) is especially well-founded and goes beyond the importance of the specific case (section 55.a(3) of the Constitutional Court Act). The fact that the complainant is also filing a petition to initiate the procedure for review of constitutionality ... does not in itself justify exceptional consideration. Since the constitutional complaint is inadmissible, the Constitutional Court rejected it ..." (Decisions nos. U-I-24/19, Up-138/19 of 14 February 2020, and U-I-208/19, Up-958/19 of 6 February 2020)

> "The complainant does not claim, that [his constitutional complaint concerns] an especially well-founded case, which exceeds the importance of the concrete complaint. A mere reference to the provision governing the conditions for the exceptional consideration of inadmissible constitutional complaints (paragraph three of Article 55.a of the Constitutional Court Act) cannot be considered as a proposal for exceptional consideration of the constitutional complaint concerned, as the complainant is a lawyer and thus a party skilled in law...." (Decisions nos. U-I-125/16, Up-612/16 of 20 February 2020)

III. CONSUMER PROTECTION

24. Section 4(1) of the Act on the Protection of Consumers against Unfair Commercial Practices (Official Gazette no. 53/07) prohibits unfair business-to-consumer commercial practices before, during and after a commercial transaction in relation to the purchase of a product. Section 5 of this Act corresponds to Article 6 of the Unfair Commercial Practices Directive, which sets out the criteria for the commercial practice to be

regarded as misleading. This directive was adopted with a view to harmonising EU member States' legislation on unfair commercial practices, including unfair advertising, which directly harms consumers' economic interests and thereby indirectly harms the economic interests of legitimate competitors.

IV. JUDICIAL PROTECTION IN MINOR OFFENCE PROCEEDINGS

25. Section 55(2) of the Minor Offences Act (Official Gazette no. 29/11 with relevant amendments) stipulates that in an expedited procedure, before issuing a decision on the minor offence, the minor offence authority must notify the alleged perpetrator of the minor offence and, *inter alia*, invite them to state all facts and evidence to their benefit, as otherwise they will not be able to rely on those facts and evidence during the proceedings.

26. A request for judicial protection against the minor offence authority's decision may be filed with the competent court on the usual grounds of appeal (violation of substantive or procedural law, an erroneous or incomplete determination of facts, or to contest the sanction imposed). Indent 3 of Section 62 of the Minor Offences Act provides that when the request for judicial protection is made on the grounds of an erroneous or incomplete determination of the facts, new evidence may only be proposed if the applicant making the request plausibly demonstrates that they were unable to rely on these facts and evidence in the expedited procedure through no fault of their own. Section 62.a of the Minor Offences Act sets out the issues that need, by virtue of law, to be examined by the court, which include compliance with the substantive provisions of that Act or the law which governs the offence in question.

THE LAW

V. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

27. The applicants complained that the Nova Gorica Local Court's failure to consider their request to seek a preliminary ruling from the CJEU had violated their right to a fair trial as provided for in Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

1. The parties' arguments

28. The Government raised an objection of non-exhaustion of domestic remedies on the grounds that the applicants had failed to petition the public prosecutor to lodge a request for the protection of legality with the Supreme Court. They submitted that the Supreme Court had, on several occasions, on the basis of such a request, considered issues relating to proceedings under the consumer protection legislation.

29. Furthermore, the Government argued that the applicants, who had been represented by lawyers, had failed to submit as part of their constitutional complaint a proposal for exceptional consideration of an inadmissible constitutional complaint in accordance with section 55.a(3) of the Constitutional Court Act. They had therefore failed to comply with the statutory requirements for the submission of a constitutional complaint in cases such as this one. The Government referred to the Constitutional Court's case-law which is summarised in paragraphs 17 to 23 and argued that the applicants had failed to show that their case concerned an important constitutional question which went beyond the importance of their specific case. They further submitted that the objective of the legislative provisions in question was to ensure the effective functioning of the Constitutional Court. In their opinion, the Constitutional Court was not supposed to consider constitutional complaints concerning less important cases, except when necessary to provide answers to the most important constitutional questions with the aim of developing and directing case-law in order to ensure human rights protection.

30. The Government moreover argued that the applicants had not claimed or proved that the criteria for exceptional consideration of an inadmissible constitutional complaint were such as to impair the accessibility and effectiveness of a constitutional complaint in practice. In support of this argument, they pointed out that the Constitutional Court, albeit not in minor offence proceedings, had previously considered that the failure to refer a question to the CJEU for a preliminary ruling had violated the complainant's constitutional right to the equal protection of rights.

31. In their further observations, the Government submitted that the applicants had stated in their constitutional complaint which constitutional questions had arisen from the circumstances of their case but had not stated or explained why a Constitutional Court decision would have relevance beyond their individual interest. They argued that, contrary to what had been suggested by the applicants, the Constitutional Court had rejected their constitutional complaint for this reason and not for the reason that they had not submitted a specially formulated formal proposal. The Government also disagreed with the applicants' argument that the decision about whether the issues raised went beyond the importance of their specific case fell within the

Constitutional Court's discretion. In this connection, they submitted that the Constitutional Court would decide on a motion for exceptional consideration only if the complainant filed a proposal in accordance with section 55.a(3) of the Constitutional Court Act. Lastly, they pointed out that a constitutional complaint must be filed in accordance with national laws and the case-law of national courts, which might change over time.

32. The applicants argued that a petition to the public prosecutor was not an effective remedy. They would not have had direct access to the Supreme Court, and it would have been for the public prosecutor to decide whether to lodge a request for the protection of legality, which was an extraordinary remedy to be used at the public prosecutor's discretion.

33. As regards the constitutional complaint, the applicants argued that by lodging it they had acted in line with the Court's case-law, which required that applicants use that remedy. They furthermore argued that they had lodged their constitutional complaint in compliance with the formal criteria and had raised, in substance, an important constitutional issue concerning alleged violations of their rights by the local court's unreasoned refusal to refer their request to the CJEU and its failure to interpret the EU law in question coherently. They argued that while they had put forward all the relevant circumstances it had been ultimately for the Constitutional Court to decide, within its discretionary power, whether their case concerned a legal question which went beyond the importance of their case. In their view, section 55.a(3) of the Constitutional Court Act clearly did not provide that the complainants should put forward a formal proposal for a decision to be taken on an otherwise inadmissible complaint.

2. The Court's assessment

34. The Court observes that the Government raised two objections with respect to the exhaustion of domestic remedies and they will be examined in turn. Before proceeding to examine them, the Court would note that it has recapitulated the relevant principles concerning the rule of exhaustion of domestic remedies in *Vučković and Others v. Serbia* ([GC], no. 17153/11, §§ 69 -77, 25 March 2014). It finds it appropriate to reiterate here those principles which are most relevant to the present case.

(a) Relevant applicable principles

35. It is a fundamental feature of the machinery of protection established by the Convention that it is subsidiary to the national systems safeguarding human rights. The Court should not take on the role of Contracting States, whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level (*Vučković and Others*, cited above, § 69). States are dispensed from answering before an international body for their acts before they have had an

opportunity to put matters right through their own legal system, and those who wish to invoke the supervisory jurisdiction of the Court in respect of complaints against a State are thus obliged to use first the remedies provided by the national legal system (ibid. § 70).

36. The obligation to exhaust domestic remedies therefore requires that the complaints intended to be made subsequently in Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used (ibid., § 72). However, there is no obligation to have recourse to remedies which are inadequate or ineffective. In addition, according to the "generally recognised rules of international law" there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his or her disposal. The rule is also inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective (ibid., § 73).

37. To be effective, a remedy must be capable of remedying directly the impugned state of affairs and must offer reasonable prospects of success. However, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress (ibid., § 74).

(b) The applicant's alleged failure to petition the public prosecutor to lodge a request for the protection of legality

38. The Government argued that the applicant should have requested the public prosecutor to initiate – by way of a request for the protection of legality – proceedings before the Supreme Court. However, the Court notes, and the Government did not dispute, that the applicants had been unable to approach the Supreme Court directly but would have had to rely on the exercise of the public prosecutor's discretion. The Court therefore finds that this remedy was not directly accessible to the applicants and cannot be considered effective (see, *mutatis mutandis*, *Tănase v. Moldova* [GC], no. 7/08, § 122, ECHR 2010; *Mandić and Jović v. Slovenia*, nos. 5774/10 and 5985/10, § 110, 20 October 2011; and *Gurepka v. Ukraine*, no. 61406/00, § 60, 6 September 2005). It accordingly dismisses this first objection by the Government.

(c) The applicants' alleged failure to set out an important constitutional question in their constitutional complaint

(i) General principles and the Court's case-law regarding Slovenia

39. The Court observes that, in cases against Slovenia, applicants are in principle required to lodge a constitutional complaint before applying to the

Court (see *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 296, ECHR 2012 (extracts), and *Lekić v. Slovenia* [GC], no. 36480/07, § 67, 11 December 2018).

40. The Court has addressed in a number of cases against Slovenia the question of the effectiveness of constitutional complaints relating to cases falling under section 55.a(2) of the Constitutional Court Act. This provision has introduced four categories of cases in which there is a presumption that no significant consequences have been incurred by the alleged victim of human rights violations and which thus render such constitutional complaints inadmissible. These categories concern small claims disputes, costs-only proceedings, property trespass disputes and minor offence cases. Section 55.a(3) of the Constitutional Court Act provides for an exception which allows the Constitutional Court to decide on cases falling into the aforementioned four categories if they are "especially well-founded". It further provides that "an instance of an especially well-founded case is a decision that concerns an important constitutional question which exceeds the importance of the concrete case" (hereinafter "an important constitutional question").

41. In *Flisar v. Slovenia* (no. 3127/09, 29 September 2011), concerning a complaint of a lack of a hearing in relation to minor offence proceedings, the Court dealt with the Government's objection of non-exhaustion of domestic remedies. It noted that the applicant, in line with the procedural rules, had made the complaints to the Constitutional Court which he had subsequently brought before the Court. As regards the Government's argument in that case that the applicant should have advanced relevant arguments in his constitutional complaint indicating that his case had been of constitutional importance, the Court found that section 53 of the Constitutional Court Act did not list such a requirement and dismissed the Government's objection (ibid., § 27). The Court rejected a similar objection on the same grounds in *Berdajs v. Slovenia* ((dec.), no. 10390/09, 27 March 2012).

42. In *Bradeško and Rutar Marketing d.o.o. v. Slovenia* ((dec.), no. 6781/09, 7 May 2013), which also concerned the lack of an oral hearing in minor offence proceedings, the Court examined whether the applicants, for the purposes of exhausting domestic remedies, should have lodged a complaint with the Constitutional Court. It noted that the domestic law gave the Constitutional Court wide discretion as regards the consideration of cases falling under section 55.a(2) of the Constitutional Court Act. The accessibility and effectiveness of the constitutional complaint in these cases would therefore be dependent on whether the interpretation and application of the "important constitutional question" criterion preclude, in practice, such complaints from being examined on the merits. In this connection the Court observed that the Constitutional Court had on several occasions regarded various aspects of the right to a fair hearing in minor offences proceedings as important constitutional questions to be decided on the merits and concluded

that the applicants could and should have been aware of the fact that the constitutional complaint offered them reasonable prospects of success (ibid., §§ 30-38).

43. In the case of *Rutar Marketing d.o.o. v. Slovenia* (see, for illustrative purposes, (dec.) [Committee], no. 62020/11, 15 April 2014) the Court, sitting as a committee, dealt with a complaint about the right of access to the Constitutional Court in minor offence proceedings. It noted that the Constitutional Court, albeit not in a case concerning minor offences, had considered on the merits the type of complaints raised by the applicant, namely the failure of a court to lodge a reference for a preliminary ruling with the CJEU (ibid., § 22). The Court went on to note that in that case the applicant company had indicated neither the grounds for the alleged incompatibility of domestic law with the European legislation, nor the reasons for the alleged necessity of the preliminary ruling. It moreover noted that the constitutional complaint contained no indication as to which important constitutional questions ought to be clarified by the Constitutional Court. The Court concluded that the criterion of an important constitutional question, as applied in the applicant company's case, had not impaired the essence of its right of access to a court (ibid.).

44. In *Kneževič and Others v. Slovenia* ((dec.), no. 51388/13, 19 September 2017) the Court, relying on *Bradeško and Rutar Marketing d.o.o.* (cited above), found, on the basis of the case-law submitted by the Government, that the Constitutional Court had not adopted a blanket approach in declaring inadmissible constitutional complaints against decisions given in cases falling under the categories set out in section 55.a(2) of the Constitutional Court Act, including small claims disputes. It observed that the Constitutional Court had interpreted the important constitutional question criterion enshrined in section 55.a(3) of the Constitutional Court Act on a case-by-case basis and had had regard to arguments put forward by complainants (*Kneževič and Others,* cited above, § 30). The Court found that the applicants had not argued, let alone shown, that the issues raised by their case had been previously considered consistently as not being capable of raising an important constitutional question. Since the applicants had failed to lodge a constitutional complaint, the Court dismissed the relevant complaint before the Court as inadmissible (ibid., § 32).

(ii) Assessment of the present case

45. It follows from the case-law set out above that this is not the first time the Court has been called upon to examine the requirements relating to the use of constitutional complaints in cases which are presumed, by virtue of section 55.a(2) of the Constitutional Court Act, not to have significant consequences for the complainant. The Court has taken the view that the domestic law and practice have shown that the limitation of the Constitutional Court's jurisdiction to important constitutional questions has not been such

as to entirely prevent applicants' complaints from being examined on the merits by the Constitutional Court in such cases. Having regard to the importance of the subsidiarity of the Convention system, the Court has thus far required applicants to use a constitutional complaint even in cases that fall within the aforementioned section 55.a(2). However, the Court has given certain indications that it could depart from this requirement if an applicant showed that the issues raised by his or her case had previously been consistently considered by the Constitutional Court as not being capable of raising an important constitutional question (see *Kneževič and Others*, cited above, § 31).

46. In the present case it has not been argued that in the period before the applicants lodged their constitutional complaint the Constitutional Court had already taken a clear position that the issue at stake was not such as to raise an important constitutional question. The Court thus accepts that the applicants were required to lodge a constitutional complaint. It remains for it to ascertain whether the applicants failed to lodge their constitutional complaint in line with the domestic legal requirements because they did not set out "a reasoned proposal for the exceptional consideration of an otherwise inadmissible complaint". It takes note of the Government's explanation that such proposal would not need to be formulated in any specific manner but would nevertheless have to state reasons as to why the decision in their case would be of an importance going beyond their particular interest. Failure to do so, in their view, would prevent the Constitutional Court from reviewing such a complaint (see paragraph 31 above).

47. The Court, when considering the admissibility of complaints, has previously dismissed the respondent Government's objection that it was for the complainants to advance in their constitutional complaints the reasons as to why their case might be of particular constitutional importance. The Court found in *Flisar* (cited above, § 27) and *Berdajs* (cited above) that section 53 of the Constitutional Court Act did not include such a requirement. It is true that in a later case, namely *Rutar Marketing d.o.o.* (cited above), the Court, sitting as a Committee, took into account the fact that the constitutional complaint contained no indication as to which important constitutional questions ought to be clarified by the Constitutional Court. However, this element was considered, among other elements, in the context of the applicant company's allegation of a violation of access to a court and cannot therefore be taken as implying that the applicant company was in that case required, as a matter of domestic procedural or admissibility requirement, to set out an important constitutional question and thereby a proposal for exceptional consideration of the case by the Constitutional Court.

48. In the present case, the Government relied on the Constitutional Court's case-law which has been adopted after the judgment in *Flisar* and the decision in *Berdajs* (both cited above). This case-law shows that with respect to specific categories of cases (section 55.a(2) of the Constitutional Court

Act) the Constitutional Court has accepted or rejected constitutional complaints depending on whether they raised important constitutional questions (see paragraphs 17 to 23 above). None of the decisions relied on by the Government gives a sufficiently clear indication that, at the time the applicants lodged their constitutional complaint, the failure of a complainant to explicitly set out a proposal in favour of there being an important constitutional question would prevent the Constitutional Court from considering whether, in substance, the conditions for exceptional consideration of the case had been met (see paragraphs 17 to 21 above). Rather, the decisions relied on by the Government (see paragraphs 17 to 21 above) support the view that when the arguments of the complainants were relevant to the decision of the Constitutional Court the latter enjoyed discretion as regards the consideration of the cases falling under section 55.a(2) of the Constitutional Court Act (see also *Bradeško and Rutar Marketing d.o.o.*, cited above).

49. It is not the Court's role to consider whether in the circumstances of the present case the applicants' constitutional complaint required a decision on the merits by the Constitutional Court. However, in view of the above findings, the Court cannot accept that the applicants failed to exhaust domestic remedies because they did not explicitly state reasons showing the jurisprudential value of their case. Such requirement cannot be found in the Constitutional Court Act (see sections 53 and 55.a(3) cited in paragraph 16 above) nor can it be discerned from the case-law submitted by the Government. The Court also notes that the applicants in their constitutional complaint invoked violations of constitutional as well as Convention rights and argued that the lack of any reasons for the rejection of their request to seek a preliminary ruling from the CJEU was inconsistent with the Constitutional Court's and the Court's case-law (see paragraph 13 above).

50. Lastly, the Court takes note of the Constitutional Court decisions nos. U-I-208/19, Up-958/19 of 6 February 2020, U-I-24/19, Up-138/19 of 14 February 2020 and U-I-125/16, Up-612/16 of 20 February 2020, relied on by the Government (see paragraph 23 above). These decisions, like the decision in the present case, could be understood as establishing a procedural or admissibility requirement that the complainants submit specific reasons supporting not merely the alleged violations of their human rights but also the jurisprudential value of their case. In the present instance, the Court does not need to consider the implications of this recent development in the Constitutional Court's case-law for the requirement that the applicants in cases against Slovenia should, as a general rule, avail themselves of a constitutional complaint. While having certain doubts about the sufficient accessibility of the content of the aforementioned three decisions, which can be found by reference to the case numbers on the Constitutional Court's website but were apparently not published in the Official Gazette, the Court observes that, in any event, they were adopted after the applicants had lodged

their constitutional complaint. They therefore cannot be taken as a proof of a foreseeable requirement developed through the Constitutional Court's case-law of which the applicants should have been aware.

51. Having regard to the above, the Court also dismisses this second objection by the Government.

(d) Conclusion

52. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' arguments

53. The applicants submitted that the reasons for the rejection of their request for judicial protection had been limited to a couple of sentences and that the Nova Gorica Local Court had not in any way addressed their request to seek a preliminary ruling from the CJEU.

54. The applicants next argued that their request to obtain a preliminary ruling had been properly substantiated and supported by extensive argument and references to EU law and practice. Contrary to the Government's claims, they had submitted to the Nova Gorica Local Court certified translations of the relevant parts of the foreign decisions relied on. The applicants also alleged that given the nature of the Constitutional Court's jurisdiction in such cases and the lack of any other remedy, there was an obligation on the local court to refer a preliminary question to the CJEU as requested by them.

55. The applicants also argued that they had collaborated with the Market Inspectorate and, contrary to the Government's allegations, had submitted their arguments and relevant documents to it. In any event, even if the facts had been properly established by the Market Inspectorate, that would have not justified the local court's failure to consider their request. According to the applicants' submissions, the Government's arguments regarding the Market Inspectorate's decision were irrelevant to the issue before the Court.

56. The Government argued that there had been no violation of Article 6 §1 of the Convention because the reasoning of the Nova Gorica Local Court's judgment and, in particular, the Market Inspectorate's decision, had allowed the applicants to understand why a reference to the CJEU for a preliminary ruling had not been necessary or reasonable. The Government observed that the Nova Gorica Local Court had established that the Market Inspectorate had correctly determined all material facts and consequently it had been able to decide on the request for judicial protection without seeking a preliminary ruling from the CJEU. They submitted in this connection that the Nova Gorica Local Court had not overlooked the applicants' request for

a preliminary ruling but had not addressed it primarily because the applicants had not put forward their views on the circumstances of the alleged offence in the proceedings before the Market Inspectorate. Given the established facts, the Nova Gorica Local Court had not been in any doubt as to whether the Market Inspectorate had applied EU law correctly.

57. Furthermore, the Government considered that the applicants' request to seek a preliminary ruling had been unfounded and unnecessary because the Market Inspectorate's conclusion that the applicants had employed misleading commercial practice had not been based solely on the comparison between the promotional prices and the prices recommended by suppliers, but also on a number of other circumstances which had not been disputed by the applicants in a timely manner. Lastly, in the Government's view, the request to seek a preliminary ruling had not been properly substantiated because it had referred to certain decisions predating the Unfair Commercial Practices Directive and had not been supported by the translation of the case-law relied on by the applicants.

2. The Court's assessment

58. The Court has summarised the principles concerning refusals by domestic courts to refer a preliminary question to the CJEU in *Baydar v. the Netherlands* (no. 55385/14, §§ 39-44, 24 April 2018), and more recently in *Sanofi Pasteur* (cited above, §§ 67-70). It reiterates, in particular, that Article 6 § 1 requires the domestic courts to give reasons for any decision refusing to refer a request for a preliminary ruling, especially where the applicable law allows for such a refusal only on an exceptional basis. The Court has inferred from this that when it hears a complaint alleging a violation of Article 6 § 1 on these grounds, its task is to ensure that the impugned refusal has been duly accompanied by such reasoning (see *Sanofi Pasteur,* cited above, § 68). The Court points out in this connection that the question of whether or not a domestic court has failed to fulfil the obligation to provide reasons − deriving from Article 6 of the Convention − can only be determined in the light of the circumstances of the case (see *Baydar*, cited above, § 40).

59. In the present case the applicants requested that the Nova Gorica Local Court seek a preliminary ruling from the CJEU on the question of whether the commercial practice of comparing promotional prices with the prices recommended by suppliers or producers was in accordance with the provisions of the Unfair Commercial Practices Directive. The request was clearly formulated and supported by argument (see paragraph 11 above). It related to at least one of the grounds on which the minor offence was based, that is the comparison of the promotional prices with recommended prices which had not been used in practice by the seller (see paragraphs 7 to 9 above).

60. The Court observes that the applicants' request was not prima facie redundant. It notes moreover that the arguments put forward by the

Government as to why the request should be considered irrelevant or unnecessary cannot be substituted for the reasoning of the domestic court, which was, by virtue of Article 6 § 1, obliged to provide the applicants with a fair hearing. However, the reasons given in the judgment at issue shed no light on the grounds relied upon by the Nova Gorica Local Court to dismiss the applicants' request to seek a preliminary ruling and in fact leave open the possibility that this request was simply disregarded (see paragraph 12 above, compare *Dhahbi v. Italy*, no. 17120/09, § 33, 8 April 2014).

61. The Court moreover notes that, in fact, the Nova Gorica Local Court, which was the first-instance court and the only one to decide the case on the merits, addressed none of the applicants' arguments. It takes note of the Nova Gorica Local Court's finding that the applicants had not been in a position to dispute the facts, because they had failed to do so in the proceedings before the Market Inspectorate. However, the Court sees no basis for the conclusion that that fact in itself necessarily rendered the applicants' legal arguments, including those related to their request to seek a preliminary ruling from the CJEU, irrelevant or redundant.

62. The Court emphasises in this connection that the right to a reasoned decision serves the general rule enshrined in the Convention which protects the individual from arbitrariness by demonstrating to the parties that they have been heard and obliges the courts to base their decision on objective reasons (see *Ullens de Schooten and Rezabek*, cited above, §§ 54-59). As the Court has often noted, the rule of law and the avoidance of arbitrary power are principles underlying the Convention (see, among many other authorities, *Baydar*, cited above, § 39). In the judicial sphere, those principles serve to foster public confidence in an objective and transparent justice system, one of the foundations of a democratic society (see ibid., and *Taxquet*, cited above, § 90).

63. Lastly, the Court notes that the Government did not argue that a complaint before the Constitutional Court, which had jurisdiction to decide cases such as the present one only on an exceptional basis, should be regarded as the judicial remedy under national law for the purposes of Article 267 of the Treaty on the Functioning of the European Union (see paragraph 15 above). It would thus follow that the Nova Gorica Local Court was under a duty to give reasons for its refusal to request a preliminary ruling in the light of the exceptions provided for by the case-law of the CJEU (*Dhahbi*, cited above, § 32, and *Sanofi Pasteur*, cited above, § 67). Be that as it may, the Court notes that neither the Nova Gorica Local Court nor the Constitutional Court addressed in any way the applicants' request to seek a preliminary ruling, nor any other of their legal arguments.

64. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 6 § 1 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

65. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

66. The applicants did not make any claim in respect of pecuniary or non-pecuniary damage.

B. Costs and expenses

67. The applicants claimed 6,888 euros (EUR) for the costs and expenses incurred before the domestic authorities and for those incurred before the Court.

68. The Government argued that the applicants were not entitled to any reimbursement since their application was unfounded.

69. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 5,000 covering costs under all heads, plus any tax that may be chargeable to the applicants.

C. Default interest

70. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*

   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with

Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 15 December 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener Registrar	Péter Paczolay President