

Decision 9/2022 (V. 25.) AB

on establishing a default in the context of section 810 of the Act XC of 2017 on the Criminal Procedure

The plenary session of the Constitutional Court in the subject of a judicial initiative aimed at establishing a conflict with the Fundamental Law of a law – with concurring reasoning by Justice *dr. Ágnes Czine* and with dissenting opinions by Justices *dr. Tünde Handó*, *dr. Ildikó Hörcherné dr. Marosi*, *dr. Imre Juhász*, *dr. Zoltán Márki* and *dr. Mária Szívós* – adopted the following

decision:

1. The Constitutional Court found *ex officio* that the Parliament had caused an infringement of the Fundamental Law by failing to regulate in section 810 of the Act XC of 2017 on the Criminal Procedure the legal consequence of the substitute private prosecutor's failure to provide for their legal representation in the second instance proceedings within the deadline set, in accordance with the consequences stemming from legal certainty enshrined in Article B (1) of the Fundamental Law.

The Constitutional Court therefore calls upon Parliament to meet its legislative duty by 31 December 2022.

2. The Constitutional Court rejects the judicial initiative aimed at establishing that the term "due to dropping charges by the substitute private prosecutor" in section 813 (4) and (2) of the Act XC of 2017 on the Criminal Procedure is in conflict with the Fundamental Law and at its annulment.

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

Reasoning

I

[1] 1 The judicial panel of the Nyíregyháza Regional Court as the court of second instance (hereinafter: "petitioner"), with its ruling No. 3.Bf.162 /2021/9, on the basis of section 25 (1) of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC), filed a motion for a declaration of a conflict with the Fundamental Law by the term "due to dropping charges by the substitute private prosecutor" in section 813 (4) and (2) of the Act XC of 2017 on the Criminal Procedure (hereinafter: "Criminal Procedure Act") and for a declaration of a conflict with the Fundamental Law by paragraph (4) and their annulment with *ex nunc* effect as well as the exclusion of their application in the case pending before the petitioner.

[2] 2 In the case underlying the judicial initiative, the Nyíregyháza District Court, in a procedure of substitute private prosecution, acquitted the accused of the charge of causing bodily harm [section 164 (1) and (9) (a) of the Act C of 2012 on the Criminal Code (hereinafter: "Criminal Code")] by its judgement No. 11.B.425/2020/11 of 18 February 2021. The substitute private prosecutor appealed against the judgement in order to establish the criminal responsibility of the accused, and his legal representative appealed against in order to have the sentence "aggravated".

[3] Pursuant to section 599 (1) of the Criminal Procedure Act, the petitioner scheduled a public hearing for 18 May 2021 in the pending second instance proceedings before the court, at which the duly summoned substitute private prosecutor failed to appear, and his failure to appear was justified by his legal representative on the grounds of his deteriorated health due to a skull injury suffered in the meantime. The petitioner postponed the public hearing to 18 June 2021. However, on 3 June 2021, the legal representative of the substitute private prosecutor reported that he was still unable to comply with the obligation to appear in person due to his health condition. At the same time, the legal representative of the substitute private prosecutor also reported that he would no longer represent the substitute private prosecutor. In view of this, the petitioning court called upon the substitute private prosecutor to provide legal representation within fifteen days and informed him of the consequences of the failure to do so. According to this, if he is unable to comply with his obligation to attend in person because of a serious and persistent illness, he can be replaced by a statutory representative or a proxy. Upon the proper service of the notice, the legal representative without the right of representation informed the regional court on 7 July 2021 that the substitute private prosecutor had been placed in a general practitioner's quarantine for epidemiological surveillance due to suspected

coronavirus infection, therefore the substitute private prosecutor could not comply with the notice and would subsequently excuse his failure to do so. However, this had not been done by the date of filing the judicial initiative on 27 September 2021.

[4] The petitioner suspended the proceedings pending before the court by the ruling No.3.Bf.162/2021/9 of 14 September 2021, and turned to the Constitutional Court with a judicial initiative under section 25 (1) of the ACC, in which it invoked the violation of the clarity of norms enshrined in Article B (1) of the Fundamental Law and the equality before the law guaranteed in Article XV (1). On this basis, the petitioner requested the establishment of a conflict with the Fundamental Law and the *ex nunc* annulment of the wording “due to dropping charges by the substitute private prosecutor” in section 813 (2) of the Criminal Procedure Act, as well as the prohibition of its application in the case pending before the petitioner.

[5] The essence of the argument put forward by the petitioner in the reasoning of the initiative is as follows. Pursuant to section 788 (1) of the Criminal Procedure Act, the legal representation of the victim is mandatory in the proceedings of a substitute private prosecution. According to section 803 (5) of the Criminal Procedure Act, in force at the time of the submission of the petition, “if the legal representation of the substitute private prosecutor ceases in the proceedings, the court shall, within eight days of becoming aware of this, call upon the substitute private prosecutor to provide for his legal representation within fifteen days. If the substitute private prosecutor fails to provide legal representation within the time limit, the proceedings shall be terminated. The substitute private prosecutor shall be warned of this.”

[6] The cited provision is included among the rules on first instance proceedings in Chapter CV of the Criminal Procedure Act regulating the procedure for substitute private prosecution. The law-maker did not regulate the legal consequences of the same omission of the substitute private prosecutor in the second instance proceedings with substitute private prosecution. However, the application of the first-instance rule under section 803 (5) of the Criminal Procedure Act is problematic in the second-instance proceedings, because at the second-instance stage it is not sufficient for the court to rule on the termination of the proceedings – as provided for in section 803 (5) of the Criminal Procedure Act – but it must also rule on the first-instance decision adjudicating on the merits of the case. However, the law-maker has not given any guidance on this in the rules governing the second instance procedure.

[7] The petitioner was also aware of the fact that pursuant to section 787 (1) of the Criminal Procedure Act, the general rules of the Criminal Procedure Act shall be applied in the proceedings with substitute private prosecution, with the exceptions set out in Chapter CV. After reviewing these general rules, the petitioner came to the following conclusion. In the proceedings at second instance, the court terminates the proceedings and sets aside the judgement of the court of first instance pursuant to section 607 (1) of the Criminal Procedure Act. Section 607 (1) of the Criminal Procedure Act refers back to the cases set out in section 567 (1) and (2) among the first instance rules. However, in the present case, in the petitioner's view, none of the grounds for termination listed therein can be established and, therefore, along with terminating the proceedings, there is no legal possibility to set aside the judgement of first instance. At the same time, the petitioner may not declare the judgement of the first instance to have become final either, because according to section 458 (b) of the Criminal Procedure Act, this can only be done if the appeal is withdrawn. Section 810 (1a) and (1b) of the Criminal Procedure Act do not consider the default of compliance with the request for legal representation as a presumed withdrawal of the appeal.

[8] In the petitioner's view, the general procedural rules do not provide guidance to the courts in the case where the legal representation of the substitute private prosecutor ceases in the second instance proceedings and the substitute private prosecutor fails to provide for their subsequent legal representation despite the call of the court of second instance to do so. The law-maker's failure to provide for the procedural consequences of this omission on the part of the substitute private prosecutor, according to the petitioner, makes the outcome of the proceedings unpredictable for the participants in the substitute private prosecution proceedings, which leads to a violation of the requirements of the clarity of norms as one of the principles of legal certainty laid down in Article B (1) of the Fundamental Law.

[9] Moreover, according to the petitioner, the application of section 803 (5) of the Criminal Procedure Act in the second instance substitute private prosecution proceedings is also contrary to Article XV (1) of the Fundamental Law for the following reasons. The petitioner must also decide on the criminal costs in the case of the termination of the proceedings pending before it in the second instance proceedings based on section 803 (5) of the Criminal Procedure Act. The rule in section 813 (4) of the Criminal Procedure Act provides guidance on this.

[10] According to section 813 (4) of the Criminal Procedure Act: "The court of second instance shall oblige the substitute private prosecutor to bear the criminal costs, and the fee and costs specified in paragraph (2), that were incurred in the second instance proceeding if only the substitute private prosecutor filed an appeal against the decision of the court of first instance, and the court of second instance upholds the decision"

[11] According to section 813 (2) of the Criminal Procedure Act, "if a substitute private prosecutor represented the prosecution and the accused was acquitted, in a situation other than that specified in section 566 (3), or the proceedings against the accused were terminated by the court due to dropping charges by the substitute private prosecutor, the substitute private prosecutor shall reimburse the fee and costs of the authorised defence counsel of the accused that were incurred after the substitute private prosecutor took action, up to the amount specified by law, within one month after the decision adjudicating the merits of the case becomes final and binding."

[12] In the petitioner's view, if the court terminated the proceedings in the case pending before it by acting pursuant to section 803 (5) of the Criminal Procedure Act, the substitute private prosecutor could not be ordered on the basis of this provision to pay the fees and costs of the defence counsel. Thus, if the proceedings were terminated for such a reason, the substitute private prosecutor who did not take care of the conditions required for the enforcement of the criminal claim despite the court's call would be in a more favourable position than the substitute private prosecutor who had fully complied with their procedural obligations but had to bear all the costs due to the acquittal of the accused.

[13] According to the petitioner, these provisions violate the right to equality before the law of the accused in the criminal proceedings, as enshrined in Article XV (1) of the Fundamental Law. The costs incurred by the accused in defending themselves in the event of the termination of the proceedings because of such a failure on the part of the substitute private prosecutor are not recovered as a result of the wording of the provision at issue, even though "the defence of the accused in proceedings based on the charge represented by a substitute private prosecutor is a pressing reason for the accused to select of a suitable defence counsel" {Decision 15/2016. (IX. 21.) AB, Reasoning [61]}

[14] 3 In the context of the contested provision of the law, the Constitutional Court filed a request with the Minister of Justice in order to obtain the reasons of the law-maker, asking her to state her position.

[15] 4 In considering the petition, the Constitutional Court also took into account that on 14 December 2021, the Parliament adopted the Act CXXXIV of 2021 on Amending Certain Acts on Criminal Law and Other Connected Acts (hereinafter: "Amending Act"), section 203 (o) of which replaced in section 803 (5) of the Criminal Procedure Act the words [if the substitute private prosecutor fails to provide legal representation within the time limit set] "the proceedings shall be terminated" with the words [if the substitute private prosecutor fails to provide legal representation] "the substitute private prosecutor shall be deemed to have dropped charges and at the same time the proceedings shall be terminated". The amendment to the statutory provision entered into force on 1 March 2022 [see section 223 (4) of the Amending Act].

II

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

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

"Article XV (1) Everyone shall be equal before the law. Every human being shall have legal capacity."

[17] 2 The text of the Criminal Procedure Act in force until 28 February 2022:

"Section 803 (5) If the legal representation of the substitute private prosecutor ceases in the proceedings, the court shall, within eight days of becoming aware of this, call upon the substitute private prosecutor to provide for his legal representation within fifteen days. If the substitute private prosecutor fails to provide legal representation within the time limit, the proceedings shall be terminated. The substitute private prosecutor shall be warned of this."

[18] 3 The text of the Criminal Procedure Act in as of 1 March 2022:

"Section 803 (5) If the legal representation of the substitute private prosecutor ceases in the proceedings, the court shall, within eight days of becoming aware of this, call upon the substitute private prosecutor to provide for his legal representation within fifteen days. If the substitute private prosecutor fails to provide legal representation within the time limit set, the substitute private prosecutor shall be deemed to have dropped charges and at the same time the proceedings shall be terminated. The substitute private prosecutor shall be warned of this."

"Section 806 (1) The substitute private prosecutor may drop charges at any time. The substitute private prosecutor is not obliged to provide reasons for dropping charges.

(2) The court shall terminate the proceedings if the substitute private prosecutor has dropped charges or their default is to be deemed as dropping charges. [...]"

"Section 810 (1) The court of second instance shall summon the substitute private prosecutor and their legal representative to the hearing. (1a) If the substitute private prosecutor

(a) fails to appear at the hearing and to produce without delay a valid advance excuse with due ground for not appearing, or the substitute private prosecutor could not be summoned because they have not provided notice of a change of address, or

(b) appears at the hearing, through fault of their own, in such a state that they cannot be heard, are unable to fulfil their procedural obligations or leave the procedural act without permission, the substitute private prosecutor shall be deemed to have withdrawn their appeal. The substitute private prosecutor shall be warned of this in the summons.

(1b) The substitute private prosecutor may not be expelled or removed from the hearing even in the case of causing repeated or serious disorder. If the substitute private prosecutor fails to desist from the disorderly conduct, thereby making it impossible for the trial to be continued in their presence, they shall be deemed to have withdrawn the appeal. [...]"

"Section 813 (2) If a substitute private prosecutor represented the prosecution and the accused was acquitted, in a situation other than that specified in section 566 (3), or the proceedings against the accused were terminated by the court due to dropping charges by the substitute private prosecutor, the substitute private prosecutor shall reimburse the fee and costs of the authorised defence counsel of the accused that were incurred after the substitute private prosecutor took action, up to the amount specified by law, within one month after the decision adjudicating the merits of the case becomes final and binding.

[...]

(4) The court of second instance shall oblige the substitute private prosecutor to bear the criminal costs, and the fee and costs specified in paragraph (2), that were incurred in the second instance proceeding if only the substitute private prosecutor filed an appeal against the decision of the court of first instance, and the court of second instance upholds the decision."

III

[19] 1 First of all, the Constitutional Court examined whether the judicial initiative complies with the criteria set forth by the law.

[20] According to section 25(1) of ACC, the judge may – in addition to suspending the court proceedings – initiate the Constitutional Court to declare a law or a provision of the law to be contrary to the Fundamental Law or to exclude the application of a law or provision of the law that is contrary to the Fundamental Law, on the basis of Article 24 (2) (b) of the Fundamental Law, if in the course of the adjudication of an individual case pending before the court, a law is to be applied, the conflict of which with the Fundamental Law has been detected by the judge or has already been established by the Constitutional Court.

[21] The petition initiating the individual normative review procedure shall contain an explicit request within the meaning of section 52 (1) of the ACC. The request shall be held explicit if it indicates a reference to the competence of the Constitutional Court to adjudicate the petition, and establishes that the entity has the right to submit petitions, indicates the essence of the injury of rights granted in the Fundamental Law, the provisions of the Fundamental Law that are violated, and it contains appropriate reasoning. In addition, it identifies the contested provision of the law and expressly requests that it be annulled together with establishing its conflict with the Fundamental Law as well as the prohibition of applying the law which is in conflict with the Fundamental Law {Ruling 3058/2015. (III. 31.) AB, Reasoning [21]}.

[22] 2 The Constitutional Court has stated that the petitioner is obliged to make provision for the payment of criminal costs in the proceedings with substitute private prosecution pending before the court, and therefore section 813 (2) and (4) of the Criminal Procedure Act are applicable. The judicial motion contains a reference to the competence of the Constitutional Court and the petitioner's eligibility [section 25 (1) of the ACC], indicates the essence of the violation of the rights guaranteed by the Fundamental Law and the articles of the Fundamental Law alleged to be violated [Article B (1), Article XV (1) of the Fundamental Law], and contains adequate reasons as to why the provision of the law in question is contrary to the provisions of the

Fundamental Law. The petition sets out the petitioner's request for a declaration that the contested text is contrary to the Fundamental Law and for its annulment, as well as for a declaration that the law in conflict with the Fundamental Law is not applicable.

[23] The Constitutional Court has stated that the judicial motion complies with the provisions laid down in section 25 and section 52 (1b) (a) to (f) of the ACC.

IV

[24] The judicial motion is in part well-founded, for the reasons set out hereunder.

[25] 1 In the judicial motion, the petitioner initiated the establishment of a conflict with the Fundamental Law and the *ex nunc* annulment of the wording "due to dropping charges by the substitute private prosecutor" in section 813 (2) and section 813 (4) of the Criminal Procedure Act, as well as the prohibition of its application in the case pending before the petitioner. The petitioner grounded its constitutional concerns on the requirement of legal certainty under Article B (1) of the Fundamental Law and on the equality before the law under Article XV (1).

[26] According to the petitioner's primary objection, in the light of Article B (1) of the Fundamental Law, it is unclear how the conduct of the substitute private prosecutor, who did not appear in the second instance proceedings and did not appoint a new representative within the deadline set after his legal representative had resigned, should be assessed in the second instance proceedings from the point of view of the legal consequences. Section 803 (5) of the Criminal Procedure Act provides only in relation to the first instance substitute private prosecution proceedings that if the substitute private prosecutor fails to provide for his ceased legal representation within the time limit set, the proceedings has to be terminated. However, in the context the second instance proceedings, the Criminal Procedure Act did not regulate the legal consequences of this omission of the substitute private prosecutor. In the absence of such an express rule, the petitioning court attempted to apply in the second instance proceedings the first instance rule under section 803 of the Criminal Procedure Act, but in the course of the proceedings it encountered several obstacles which, according to the petition, led to situations that were contrary to the Fundamental Law. On the one hand, in the proceedings at second instance it is not sufficient for the court of second instance to order the termination of the proceedings, but it must also decide about the decision of the court of first instance adjudicating on the merits of the case, which it cannot do by applying section 803 (5) of the Criminal Procedure Act. On the other hand, the application of the first-instance rule under section 803 (5) of the Criminal Procedure Act in the context of the provision on the bearing of criminal costs in the second-instance proceedings with substitute private prosecution would lead to the result that the substitute private prosecutor responsible for the default could not be ordered to bear the criminal costs or the fees and costs of the defence under section 813 (4) of the Criminal Procedure Act. According to the petitioner's interpretation, this constituted an unjustified distinction between the accused persons. In the event of the acquittal of the accused, the substitute private prosecutor acting properly should be ordered to pay all costs, while a substitute private prosecutor who fails to appoint a representative could only be ordered to pay the fees of the authorised representative in the second instance proceedings if the provision did not contain the words "due to dropping charges by the substitute private prosecutor". This is why the petitioner requested the deletion of the words "due to dropping charges by the substitute private prosecutor" from section 813 (2) of the Criminal Procedure Act. Thus, in his view, in the event of any termination of the proceedings, the substitute private prosecutor could be ordered to pay the portion of the fees and costs of the authorised defence counsel incurred after taking action by the substitute private prosecutor.

[27] 2 Among the petitioner's objections, the Constitutional Court first examined in the context of the challenged legal provisions the enforcement of the requirements applicable regarding the content of norms as part of legal certainty arising from the rule of law under Article B (1) of the Fundamental Law. In the framework of this examination, the Constitutional Court took into account that although the petitioner alleged that the wording "due to dropping charges by the substitute private prosecutor" in section 813 (2) and section 813 (4) of the Criminal Procedure Act were unconstitutional, the petitioner derived this from the application by analogy of the rule of section 803 (5) of the Criminal Procedure Act, which governs the first instance proceedings under substitute private prosecution. The petitioner considered the application of this analogy justified because it was unable to identify a provision governing the procedural situation in question in 810 of the Criminal Procedure Act, among the rules governing the second instance proceedings under substitute

private prosecution. The Constitutional Court also attached significance to the fact that the law-maker itself pointed out in the reasoning of the Amending Act when amending the rule in section 803 (5) of the Criminal Procedure Act: "This provision affects the provisions under section 813 (2), since in the light of this provision the substitute private prosecutor is also liable to pay the fees and costs of the authorised defence counsel incurred after taking action by the substitute private prosecutor, since they are obliged to pay them in case of termination of the proceedings on the grounds of dropping charges." The Constitutional Court therefore found that the rules under section 803 (5) and section 810 of the of the Criminal Procedure Act are closely related in content to the provisions of the legislation requested to be reviewed, and therefore included these provisions of the law as well in the constitutionality review.

[28] 2.1 In Decision 20/2020 (VIII.4.) AB, the Constitutional Court summarised its case-law in relation to the rule of law under Article B (1) of the Fundamental Law: "legal certainty is an essential criterion of the rule of law enshrined in Article B (1) of the Fundamental Law. Legal certainty requires the State, and primarily the law-maker, that the law as a whole, its specific parts and particular provisions be clear, unambiguous, interpretable and suitable for following by those to whom the norms are addressed (Reasoning [116], [120])" (Reasoning [67]). The law-maker is not only expected to ensure the grammatical correctness of the sentences, the logical coherence of the norm and its comprehensibility – since this is the basis of its applicability – but also to ensure the clarity of the norm as a constitutional requirement {Decision 3047/2013. (II. 28.) AB, Reasoning [13] and [16]}. Subjects of the law shall be given an effective opportunity to adapt their conduct to the requirements of the law [Decision 25/1992 (IV. 30.) AB, ABH 1992, 131, 132]. To this end, the text of the legal regulation shall contain a normative content that is recognisable in the application of the law [Decision 26/1992 (IV. 30.) AB, ABH 1992, 135, 142]. A rule "causing legal uncertainty by way of its uninterpretability" does not comply with the requirement applicable to the content of norms "as its effects cannot be foreseen and predicted by the addressed parties" {Decision 42/1997. (VII. 1.) AB, ABH 1997, 299, 301, most recently e.g. Decision 31/2021. (XII.1.) AB, Reasoning [67]}. Furthermore, according to the interpretation of the Constitutional Court, the violation of legal certainty can be established if the internal contradiction inherent in the rule cannot be eliminated by way of interpretation necessary during the application of the law [Decision 1/1999 (II. 24.) AB, ABH 1999, 25, 46]. The Constitutional Court also pointed out that a differentiated approach shall be adopted when examining the existence or absence of legal certainty. In determining whether the manner of regulation and the content of the rules infringe legal certainty, the purpose of the regulation and the scope of the addressed parties shall always be taken into account (Decision 125/B/2003 AB, ABH 2005, 1127, 1137). The constitutional standards of the clarity of norms and legal certainty are different if the addressed parties are expected to have some specific expertise necessary for interpretation or if they affect the subjects of the law in general (Decision 395/2010 AB, ABH 2011, 2090, 2096) (Reasoning [67] to [68]).

[29] 2.2 The Constitutional Court first reviewed the relevant rules of substitute private prosecution in relation to the substitute private prosecutor's failure to act at issue.

[30] The legal representation of the victim (substitute private prosecutor) is mandatory in the proceedings with substitute private prosecution [Section 788 (1) of the Criminal Procedure Act]. The presence of the substitute private prosecutor and their legal representative is mandatory at the hearing [Section 803 (1) of the Criminal Procedure Act]. In order to provide for these obligations, the Criminal Procedure Act attaches different legal consequences to certain omissions and disorderly conduct of the substitute private prosecutor, depending on the stages of the criminal proceedings. The assessment according to the stages of the criminal proceedings is already apparent from the rules laid down in section 54 (2) to (3) of the Criminal Procedure Act. Section 54 (2) of the Criminal Procedure Act provides that "if the substitute private prosecutor is unable to comply with the obligation to appear in person because of a serious and persistent illness, they may be replaced by their statutory or authorised representative". Paragraph 3 further provides that: "If, in the case provided for in paragraph 2, no representative replaces the substitute private prosecutor and the substitute private prosecutor fails to comply with the obligation to appear in person despite of being summoned to do so, they shall be deemed to have withdrawn the reporting of the crime, to have dropped charges or to have withdrawn the appeal."

[31] Accordingly, the legal consequence of certain omissions of the substitute private prosecutor in the trial preparation phase and in the first instance proceedings is that they are to be considered as if the charges had been dropped [section 801 (3) to (3a), section 803 (4), section 804 (1) of the Criminal Procedure Act], while in the second instance proceedings these omissions are considered as withdrawal of the appeal [section 810 (1a) to (1b) of the Criminal Procedure Act].

[32] In the first instance under substitute private prosecution, the substitute private prosecutor can therefore drop charges in two ways:

- by an express statement without stating the reasons [section 806 (1) of the Criminal Procedure Act], or
- by engaging in conduct which is to be considered as dropping charges (hereinafter: "implied dropping of charges") [section 801 (3) to (3a), section 803 (4), section 804 (1) of the Criminal Procedure Act, after 1 March 2022 also section 803 (5) of the Criminal Procedure Act]. The law-maker applies the concept of dropping charges as a legal consequence, as a procedural sanction, in these cases of substitute private prosecution proceedings.

[33] The rules of dropping charges can be derived from the principles of the prosecutor's monopoly of the prosecution, the disposal of the prosecution. Section 539 (1) of the Private Proceedings Act regulates the dropping of charges by the prosecutor. The prosecutor may drop the charges by means of an express statement until a decision is made on the merits of the case and must state the reasons for dropping the charges [section 539 (2) of the Criminal Procedure Act]. Pursuant to section 539 (1) of the Criminal Procedure Act, the prosecutor shall drop the charges if he is convinced on the basis of the evidence that (a) the act charged is not a criminal offence, (b) the criminal offence was not committed by the accused person or c) the criminal offence is not to be prosecuted under public prosecution. The court is obliged to act in line with the dropping of charges, in the instance concerned to issue a ruling on the merits of the case, which has the same legal force as a judgement [Section 567 (1) (c) of the Criminal Procedure Act]. The prosecutor cannot therefore drop the charges by implied conduct, as they shall give reasons for dropping charges, and cannot do so at any time during the criminal proceedings, only until adopting the first instance decision on the merits of the case [section 539 (2) of the Criminal Procedure Act].

[34] Dropping charges is an expression of the prosecutor's conviction that the criminal offence is not to be prosecuted under public prosecution or that committing a criminal offence or the guiltiness of the accused person cannot be substantiated. In practice, dropping charges by the prosecutor does not always mean the termination of the proceedings, provided that the law provides allows the victim to act as a substitute private prosecutor, private prosecutor the proceedings may continue [section 796 (1) of the Criminal Procedure Act].

[35] Among the rules applicable to the first instance proceedings with substitute private prosecution, the Criminal Procedure Act stipulates that the substitute private prosecutor may drop the charges at any time, but – unlike the prosecutor – is not obliged to give reasons for dropping charges. The court shall terminate the proceedings if the substitute private prosecutor has dropped charges or their default is to be considered as dropping charges [section 806 (1) to (2) of the Criminal Procedure Act]. The substitute private prosecutor may also come to the conclusion during the taking of evidence that the charge they have brought is not a criminal offence or that it was not committed by the person charged. In this case, they may drop the charges by means of an express statement, without giving reasons.

[36] However, the Criminal Procedure Act defines certain omissions and conduct of the substitute private prosecutor, which, if they occur, are considered – essentially as a sanction – as dropping charges, which entails the termination of the first instance proceedings. Such an implied dropping of charges include a failure to appear at the preparatory sitting and the hearing at first instance with a failure to excuse oneself immediately and with good reason in advance, the impossibility of summoning the substitute private prosecutor because of their failure to report a change of address, or they appear at the hearing, through fault of their own, in such a state that they are unable to fulfil their procedural obligations or leave the procedural act without permission [section 801 (3), 803 (4) of the Criminal Procedure Act]. The substitute private prosecutor may not be expelled or removed from the preparatory sitting and the hearing at first instance even in the case of causing repeated or serious disorder, however, if the substitute private prosecutor fails to desist from the disorderly conduct, thereby making it impossible for the preparatory sitting or the hearing at first instance to be continued in their presence, they shall be deemed to have dropped the charges [section 801 (3a), section 804 (1) of the Criminal Procedure Act].

[37] It is clear from the above that the dropping of charges is based primarily on the conviction of the prosecutor or the substitute private prosecutor that the act is not a criminal offence or that it was not committed by the accused person. The so-called implied dropping of charges by the substitute private prosecutor, on the other hand, is not an expression of this conviction of the prosecutor, but a sanction applied because of the procedural omission or disorderly conduct of the substitute private prosecutor, which broadens the interpretation of the legal instrument from a doctrinal point of view.

[38] Among the provisions of the Criminal Procedure Act in force until 28 February 2022, there was only one

omission by a substitute private prosecutor in the first instance proceedings, which was connected to the termination of the proceedings, but it did not constitute a drop of charges until the entry into force of the Amending Act. I was section 803 (5) of the Criminal Procedure Act sanctioning the default when the legal representation of the substitute private prosecutor ceased to be mandatory but the substitute private prosecutor failed to appoint a new legal representative despite of being called upon to do so. The amendment which entered into force on 1 March 2022 by virtue of section 203 (o) of the Amending Act, by filling this gap, also classifies this conduct of the substitute private prosecutor as dropping charges. This is in line with the doctrine of the implied dropping of charges, according to which certain omissions and disorderly conducts by the substitute private prosecutor in the first instance proceedings constitute implied dropping of charges. However, in line with this logic, the amendment continues to provide guidance only for first instance proceedings by establishing a first instance rule of substitute private prosecution.

[39] The Constitutional Court refers to the reasoning attached to the amendment, in which the law-maker itself stated that "in the course of the application of the law, a question of interpretation of the law arose in connection with a detailed issue of substitute private prosecution procedure, which led to the initiation of a procedure of individual normative review. In the interests of the clarity of norms and predictability, it would seem appropriate to clarify in the text of the norm that if legal representation ceases in the proceedings with substitute private prosecution and the substitute private prosecutor fails to provide legal representation within the time limit set, the substitute private prosecutor is deemed to have dropped the charges and at the same time the proceedings are to be terminated. This provision affects the provisions under section 813 (2), since in the light of this provision the substitute private prosecutor is also liable to pay the fees and costs of the authorised defence counsel incurred after taking action by the substitute private prosecutor, since they are obliged to pay them in case of termination of the proceedings on the grounds of dropping charges."

[40] 2.3 The Constitutional Court – also in the light of the provisions of the Amending Act – found the following with regard to the violation of Article B (1) of the Fundamental Law.

[41] With regard to the applicability of section 803 (5) of the Criminal Procedure Act in second instance substitute private prosecution proceedings, the Constitutional Court considered it necessary to highlight two elements of the regulation.

[42] One is that in the regulatory concept of the Criminal Procedure Act, second instance procedure is fundamentally different from the first instance procedure in that while in the first instance procedure the court has to decide on the charge, in the second instance procedure the court has to decide on the first instance judgement. As a consequence, according to section 604 (1) of the Criminal Procedure Act, the court of second instance upholds, alters or annuls the first instance judgement. Annulment is necessarily accompanied by a further provision on the procedure: the termination of the proceedings or a decision ordering the court of first instance to start new proceedings. The basis for an order for starting new proceedings may be a procedural irregularity under section 608 (1) of the Criminal Procedure Act. The annulment of the first instance judgement and the termination of the proceedings are governed by the general rules of the Criminal Procedure Act in section 607 (1), which refers back to section 567 (1) and (2), stating that in the cases listed therein, the criminal proceedings shall not only be terminated, but the first instance judgement shall be annulled. The general grounds for terminating the proceedings are set out in section 567 of the Criminal Procedure Act. The court shall decide on this by means of a ruling delivered on the merits of the case in the cases under paragraph (1) of the statutory provision and by means of a ruling not delivered on the merits of the case in cases under paragraph (2).

[43] Among the grounds for terminating the proceedings provided for in section 567 (1) of the Criminal Procedure Act, only dropping charges by the prosecution is mentioned in the scope of dropping charges. As a legal consequence of dropping charges by the substitute private prosecutor, the termination of proceedings as a governing rule in a special, particular procedure is naturally not included in the general provisions of the Criminal Procedure Act in section 567 (1) to (2), but among the rules applicable to the substitute private prosecution procedure [in section 806 (2) and in the amended section 803 (5) of the Criminal Procedure Act].

[44] A further regulatory peculiarity of the substitute private prosecution procedure is that the conducts of the substitute private prosecutor which constitute a so-called implied dropping of charges in the first instance proceedings (e.g. unexcused absence, appearing due to own fault in a state unsuitable for questioning) is considered as a withdrawal of the appeal in the second instance proceedings [section 810 (1a) to (1b) of the Criminal Procedure Act]. In these situations, in the absence of a special rule, the court will draw the necessary consequences on the basis of the general provisions. The withdrawal of the appeals in accordance with section

587 of the Criminal Procedure Act in the second instance proceedings pursuant to section 458 (1) (b) of the Criminal Procedure Act results in the decision of the court of first instance becoming the final court decision. The withdrawal of the appeal by the substitute private prosecutor thus results in the first instance judgement becoming final, if no other appeal has been lodged.

[45] However, pursuant to section 803 (5) of the Criminal Procedure Act, the legislation does not attach such a legal consequence to the default, examined in the present procedure, which can be committed in the first instance proceedings. Thus, if the substitute private prosecutor fails to arrange for legal representation in the second instance proceedings within the time-limit set, despite being called by the court to do so, there is no provision in section 810 of the Criminal Procedure Act governing the second instance proceedings on the basis of which the default could be considered as a withdrawal of the appeal. This omission is, in the view of the Constitutional Court, the source of the regulatory inconsistency.

[46] Therefore, the Constitutional Court also examined whether the first instance rule of implied dropping of charges [section 803 (5) of the Criminal Procedure Act], which sanctions the failure of the substitute private prosecutor to appoint a legal representative with the termination of the proceedings, can be interpreted by way of analogy as applicable to the second instance proceedings on the basis of the legislation in force.

[47] It is laid down among the rules of the first-instance substitute private prosecution procedure that the substitute private prosecutor may drop charges at any time [section 806 (1) of the Criminal Procedure Act]. According to the Constitutional Court, this rule is inapplicable in the second-instance substitute private prosecution procedure not only because the law-maker expressly placed it among the rules of the first-instance substitute private prosecution procedure. It is also inapplicable also because not even the prosecutor is allowed drop charges in the second instance proceedings [section 539 (2) of the Criminal Procedure Act], and that is because the court of second instance no longer decides on the charges but on the judgement of the court of first instance.

[48] In accordance with this regulatory concept, the law-maker has provided that in the second instance proceedings other defaults of the substitute private prosecutor shall be considered as withdrawal of the appeal [section 810 (1a) to (1b) of the Criminal Procedure Act].

[49] According to the Constitutional Court, as a consequence, the substitute private prosecutor can only drop the charges until delivering the decision of the first instance, and only until that time can their failure to appear be considered as dropping the charges.

[50] The Constitutional Court further notes that if the default of the substitute private prosecutor in the context of representation in the proceedings at second instance would entail the annulment of the first instance judgement, in addition to the termination of the proceedings, this would annul a first instance judgement delivered in a regular, lawful first instance procedure in which all parties to the proceedings fulfilled their obligations under the Criminal Procedure Act. By contrast, the substitute private prosecutor, too, only fell in default in the second instance proceedings, and therefore the proceedings are fair if this default is sanctioned by the court at the relevant stage of the proceedings, as is the case with other defaults of the substitute private prosecutor.

[51] In view of the above, the Constitutional Court held that the rule contained in section 803 (5) of the Criminal Procedure Act is not applicable by way of analogy in the second instance substitute private prosecution proceedings. The Constitutional Court also found that in the absence of this, there is no other provision of the Criminal Procedure Act in force that the court could invoke in order to continue the proceedings in connection with the omission of the substitute private prosecutor in the specific case. This makes the legal consequences of the substitute private prosecutor's failure to act uncertain, and the procedure itself unpredictable for those involved.

[52] The Constitutional Court points out that further constitutional concerns may arise in the event that the substitute private prosecutor fails to appoint a legal representative in a second instance proceeding in which not only the substitute private prosecutor but also the accused appealed against the first instance judgement. The Constitutional Court further notes that neither section 811 of the Criminal Procedure Act, which governs third-instance proceedings for a substitute private prosecution contain any provision which the court could regard as governing a similar default by the substitute private prosecutor, and therefore this regulatory problem also exists in third-instance proceedings.

[53] Thus, according to the Constitutional Court, the regulation does not contain a clearly recognisable normative content for the judiciary and does not effectively enable the subjects of the law to adapt their conduct to the requirements of the law.

[54] In these circumstances, the Constitutional Court does not consider the regulation presented to be in conformity with the requirements stemming from Article B (1) of the Fundamental Law.

[55] 2.4 The Constitutional Court held, however, that the consistency of the regulation and legal certainty can be remedied without annulling the contested provision of the law, by applying other legal consequences available to the Constitutional Court. Indeed, the breach of legal certainty does not stem from the legislation but from its incompleteness.

[56] Section 46 (1) of the ACC empowers the Constitutional Court to call upon the body that committed an omission to fulfil its duty, together with specifying the time limit, if, in the course of its proceedings in the exercise of its powers, it finds an infringement of the Fundamental Law caused by the law-maker's omission. According to paragraph (2) (c) of the relevant statutory regulation, the omission of the law-maker's tasks may be established when the essential content of the legal regulation that can be derived from the Fundamental Law is incomplete.

[57] According to the Constitutional Court, in the case of the provision of criminal procedure examined in the present proceedings, it is possible to act in accordance with the powers granted to it under section 46 of the ACC, in a manner that saves the law in force. The Constitutional Court found that the legislation is contrary to the Fundamental Law because the law-maker had not been sufficiently careful in determining the legal consequences of the default of the substitute private prosecutor to appoint a legal representative. It has not ensured that the Criminal Procedure Act provides the trial court and the parties to the proceedings with clear guidance, in accordance with the doctrinal requirements of the criminal procedure, as to the consequences of the relevant default in the substitute private prosecution proceedings at the second instance.

[58] For this reason the Constitutional Court held that the restitution of compliance with the Fundamental Law requires the supplementing of the text in force rather than the annulment of the contested provision. In this way, the foreseeable, predictable application of the appropriate legal consequences in the event of a specific omission by the substitute private prosecutor can be ensured.

[59] The Constitutional Court therefore established by acting *ex officio* on the basis of section 46 (2) (c) of the ACC: the Parliament had caused an infringement of the Fundamental Law by failing to regulate in section 810 of the Criminal Procedure Act the legal consequence of the substitute private prosecutor's failure to provide for their legal representation in the second instance proceedings within the deadline set, in accordance with the consequences stemming from legal certainty enshrined in Article B (1) of the Fundamental Law. The Constitutional Court therefore called upon Parliament to meet its legislative duty by 31 December 2022.

[60] 3 The Constitutional Court examined in the light of all these circumstances the constitutional arguments submitted by the petitioner on the conflict with the Fundamental Law regarding the regulation of the criminal costs.

[61] The rules on the bearing of criminal costs are aligned with the content of the decision delivered by the court. The structure of section 813 of the Criminal Procedure Act on criminal costs follows the individual stages of the procedure. Paragraphs (1) to (3) contain different provisions on the bearing of costs in substitute private prosecution proceedings at first instance as compared to the general rules.

[62] Pursuant to section 813 (1) of the Criminal Procedure Act, if the court acquits the accused or terminates the proceedings against the accused, the substitute private prosecutor shall bear the criminal costs incurred after taking action by them, i.e.

- the costs referred to in section 145 (1) of the Criminal Procedure Act (costs and fees advanced by the State, costs and fees of the accused, the victim, proprietary and other interested parties, the appointed defence counsel, the legal representative and the authorised representative),

- the criminal costs specified in section 576 (1) (b) (costs of a person who is hearing impaired, blind, deaf-blind, speech impaired, member of a nationality or does not speak the Hungarian language).

[63] The costs and fees of the accused person's authorised defence counsel are subject to a special provision. According to section 813 (2) of the Criminal Procedure Act, "if a substitute private prosecutor represented the prosecution and the accused was acquitted, in a situation other than that specified in section 566 (3) (see ordering the forced medical treatment of the accused person), or the proceedings against the accused were terminated by the court due to dropping charges by the substitute private prosecutor, the substitute private prosecutor shall reimburse the fee and costs of the authorised defence counsel of the accused that were incurred after the substitute private prosecutor took action, up to the amount specified by law, within one month after the decision adjudicating the merits of the case becomes final and binding." That paragraph contains the provision challenged by the petitioner, from which it proposed to annul the words "due to

dropping charges by the substitute private prosecutor” as laid down in paragraph 2. [Paragraph (3) deals with the apportionment of costs to be paid by the substitute private prosecutor.]

[64] The different rules on the costs applicable to the second instance proceedings are set out in section 813 (4) of the Criminal Procedure Act, according to which “the court of second instance shall oblige the substitute private prosecutor to bear the criminal costs, and the fee and costs specified in paragraph (2), that were incurred in the second instance proceeding if only the substitute private prosecutor filed an appeal against the decision of the court of first instance, and the court of second instance upholds the decision”. This provision refers back to the provision applicable in proceedings at first instance terminated due to dropping charges by the substitute private prosecutor, according to which the fees of the authorised defence counsel must also be reimbursed by the substitute private prosecutor in respect of the period after the date of taking action by them. Under this rule of the second instance procedure, such costs incurred in the second instance proceedings must be reimbursed if the substitute private prosecutor has lodged an appeal but the court of second instance upholds the first instance decision.

[65] The petitioner's constitutional concerns were related to the application of section 803 (5) of the Criminal Procedure Act by way of analogy in the second instance substitute private prosecution proceedings. According to the petitioner's interpretation, the application of section 813 (4) of the Criminal Procedure Act in the case pending before the court is of concern because it makes the substitute private prosecutor liable for costs only if the court upholds the first instance decision. However, the latter cannot take place in the case of the application of section 803 (5) of the Criminal Procedure Act, since the provision invoked requires the termination of the proceedings. At the same time, in the case of termination of the proceedings, bearing the costs by the substitute private prosecutor cannot be ordered under section 813 (2) of the Criminal Procedure Act, which is also challenged, if the termination is due to dropping charges by the substitute private prosecutor.

[66] According to the petitioner, the regulation makes an unjustified distinction between the substitute private prosecutor who does not provide for the condition required for the enforcement of the criminal claim despite being called upon by the court to do so and the one who fully fulfils their obligations, putting the latter in an unjustifiably less favourable position. This, according to the petition, infringes the right to equality before the law enshrined in Article XV (1) of the Fundamental Law.

[67] Therefore, the petitioner requested the annulment of the wording “due to dropping charges by the substitute private prosecutor” in section 813 of the Criminal Procedure Act in order to allow the court to order the substitute private prosecutor who provided the basis for the termination of the proceedings in the second instance to pay the fees and costs of the authorised defence counsel.

[68] At the same time, the Constitutional Court found above that the rule under section 803 (5) of the Criminal Procedure Act cannot be applied by way of analogy in the second instance proceedings of substitute private prosecution, thus there is no place for the termination of the second instance proceedings in the case of the failure of the substitute private prosecutor to provide legal representation.

[69] Furthermore, the Constitutional Court points out that the question of the remedying of the legislative deficiency detailed in the present decision, i.e. the regulation of the consequences of the failure of the substitute private prosecutor to provide legal representation, is a preliminary question from the point of view of settling criminal costs. The bearing of costs may be determined on the basis of the content and type of the decision of the court of second instance determining the legal consequences of the default by the substitute private prosecutor and thus providing for the future of the proceedings. The law-maker should therefore, in the context of remedying the regulatory deficiency identified in the proceedings at second instance, also adapt the rules on bearing the costs to the determination of the legal consequence of the default of the substitute private prosecutor.

[70] Furthermore, according to the Constitutional Court, the annulment of section 813 (4) of the Criminal Procedure Act would lead to a regulatory deficiency, while the annulment of the contested wording of section 813 (2) of the Criminal Procedure Act – in light of the causes of termination under section 567, which are generally not attributable to the substitute private prosecutor's default, e.g. statutes of limitation, death, pardon, the act has been finally adjudicated – would lead to the court imposing on the substitute private prosecutor costs which are not attributable to any conduct for which they are responsible.

[71] In view of this, the Constitutional Court rejected the judicial initiative aimed at declaring the wording “due to dropping charges by the substitute private prosecutor” in section 813 (2) and paragraph (4) of the Criminal Procedure Act to be contrary to the Fundamental Law and its annulment.

[72] The Constitutional Court did not grant the petitioner's request to prohibit the application of the

contested provisions in the pending proceedings because of the rejection of the judicial initiative.

[73] 4 The publication of the decision in the Hungarian Official Gazette is based on the second sentence of section 44 (1) of the ACC.

Budapest, 03 May 2022.

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

Dr. Balázs Schanda
Justice of the Constitutional Court

Dr. Péter Szalay
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