Decision 26/2020 (XII. 2.) AB of the Constitutional Court

On the dismissal of the petition seeking a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of the judgement of the Curia in Case No Pfv.III.22.500/2017/7

In the matter of a constitutional complaint, with the concurring reasoning by Dr. Ágnes Czine, Dr. Egon Dienes-Oehm and Dr. Ildikó Hörcher-Marosi, and the dissenting opinions by Dr. Béla Pokol, Dr. László Salamon and Dr. Imre Juhász, Justices of the Constitutional Court, the Constitutional Court, sitting as the Full Court, has adopted the following

decision:

The Constitutional Court hereby dismisses the petition seeking a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of the judgement of the Curia No Pfv.III.22.500/2017/7.

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

Reasoning

I

[1] 1. The petitioner business company (represented by Andreas Köhler, attorney at law) filed a constitutional complaint pursuant to Section 27 of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"). The petitioner requested the Constitutional Court to declare that the judgement of the Curia in Case Pfv.III.22.500/2017/7 was contrary to the Fundamental Law and to annul the said judgement on the grounds of infringement of Article XV (1) and Article XXVIII (1) of the Fundamental Law.

[2] 2. The case on which the constitutional complaint is based can be summarised as follows. The petitioner's Hungarian branch won a public procurement procedure as a member of a consortium. Two of the consortium's subcontractors went into liquidation and the registration of the creditors' claims filed by the petitioner during the liquidation proceedings was refused by the joint liquidator. Following objections by the petitioner, the creditors' claims were registered but the petitioner's costs were only partially recovered. The liquidator failed to pay the difference between the costs awarded by the court and the costs incurred by the petitioner, despite a request to do so, and the petitioner therefore brought an action for damages against the liquidator, invoking the special compensation form of Act XLIX of 1991 on Bankruptcy and Liquidation Proceedings and the general compensation for damages form of Act IV of 1959 on

the Civil Code (hereinafter referred to as the "former Civil Code"). The court dismissed the action at first instance and on appeal, holding that the liquidator's liability for damages could not be established in the absence of damage. The petitioner applied for a preliminary ruling before both courts, invoking Article 267 (3) of the Treaty on the Functioning of the European Union (hereinafter referred to as 'TFEU') in the appellate proceedings. The court of appeal dismissed the application. The court of second instance held that the issues were irrelevant to the resolution of the dispute because the basis for the claim for damages, namely the damage, was lacking. The court of appeal also pointed out that some of the questions raised by the petitioner concerned the assessment of the compatibility of the Hungarian court's interpretation of the law with EU law or principles, which cannot be the subject of a preliminary ruling procedure.

[3] The petitioner then filed an action for damages against Budapest-Capital Regional Court, which was the court of second instance in the main action, primarily on the basis of the former Civil Code and directly on the basis of EU law. The petitioner submits that the court disregarded EU law on freedom of establishment and freedom to conduct a business (freedom of enterprise) and on effective legal remedies, because a measure of a Member State which prevents a Hungarian branch of an undertaking resident in another Member State from recovering the costs of the legal remedy sought by it as a creditor against the liquidator as damages because of the unlawful conduct of the liquidator violates Article 49 TFEU, and the court's action is contrary to the relevant judicial practice and case law. The Court of First Instance dismissed the petitioner's action, stating in its judgement that the civil form of damage caused by a judicial act is not a suitable remedy for a judgement which is considered unlawful, and that an error of law can give rise to liability for damages only if the error of law is manifestly serious, which, in the Court of First Instance's view, is not the case. The court of second instance upheld the judgement of the Court of First Instance, stating in its judgement that, in the absence of relevant EU law, it did not see any need to interpret and apply EU law. The legal question to be decided in the case was whether costs not recovered in legal proceedings constitute costs of avoiding or mitigating the damage under the former Civil Code which can be recovered with effect in an action for damages brought separately after the conclusion of the prior proceedings. The court of second instance held that there was neither EU law nor a judgement of the Court of Justice of the European Union (hereinafter referred to as the 'Court of Justice') on the relationship between legal costs and damages, and that Article 49 TFEU was irrelevant because the mere fact that the petitioner's branch, registered in Hungary, was in dispute with another company, a liquidator or a court was not a question of freedom of establishment. The court also explained that there was no substantive difference between the principles of EU law invoked by the petitioner and the conditions under the former Civil Code's compensation scheme. In relation to the main action, the court of second instance held that the fee as consideration under the contract of engagement does not automatically constitute damage in the form of costs under the former Civil Code. The content and conclusion of the agency contracts were decided by the petitioner as claimant, and the costs arising therefrom can only be claimed if they are justified and necessary to remedy the damage. According to the court of second instance, a party has no substantive right to a fixed amount of legal costs, since the law leaves the determination of the costs of proceedings to the discretion of the

court, within certain limits, and the petitioner must therefore have been aware at the time of concluding the contract that the recovery of the fees was uncertain and that he could therefore bear the costs at his own risk.

[4] The Curia, acting in the review proceedings, upheld the final decision. In the grounds of the judgement challenged by the constitutional complaint, the Curia explained that the petitioner was not subject to any restriction in the exercise of its right of establishment under the TFEU, nor did the petitioner rely on any factual circumstances that would have restricted or impeded the provision of the service. The relevant articles of the TFEU do not guarantee that a legal entity of the Union cannot be in dispute with other operators in the economic sphere when providing services after its establishment in another Member State. The provisions of the TFEU relied on by the petitioner do not contain any provisions relating to the settlement of such disputes, the procedure for obtaining a judgement, the method of obtaining a judgement in the event of recourse to the courts and, in particular, the payment of costs. In the case of Gerard Köbler v Austria (C-224/01, EU:C:2003:513, hereinafter referred to as the 'Köbler case'), referred to by the petitioner, the Curia also analysed the conditions of the former Civil Code in relation to the former Civil Code and found that, in addition to the similarities, the compensation form of the former Civil Code contained more favourable conditions for the petitioner than those in the Köbler case. The Curia also found, on the basis of its analysis of Case C-331/05 of the Court of Justice, that it did not follow from the reasoning of the decision relied on by the petitioner that the costs of enforcement could be recovered in a separate procedure under EU law. The Curia shared the findings of the court of appeal on the issue of the recovery of the underlying costs. The Curia also found that the case under review did not raise any issue that would justify the initiation of a preliminary ruling procedure under Article 267 TFEU, as there was no EU factual element and, in the absence of such an element, no relevant question of interpretation of EU law that would have been necessary to reach a decision on the merits arose in the case.

[5] 3. The petitioner then filed his constitutional complaint. The constitutional complaint exhaustively contains the petitioner's submissions and statements made in previous court proceedings, as well as the reasons for the decisions of the courts hearing the case. According to the petitioner, the review decision of the Curia upholding the decision of Budapest-Capital Regional Court of Appeal violates Article XV (1) of the Fundamental Law, pursuant to which everyone is equal before the law. Furthermore, the decision of the Curia violates the petitioner's right to a fair trial under Article XXVIII (1) of the Fundamental Law.

[6] According to the petitioner, the interpretation of the law by the Curia, in accordance with which, despite the fact that the petitioner is a Hungarian branch of a German-based company with legal personality, EU law does not apply to its disputes, results in a violation of Article XV (1) of the Fundamental Law. In its detailed EU law case law submission, the petitioner argued that the German nationality of the parent company was in itself a ground for judging his claim for damages under the EU law damages regime. The Curia restricted the interpretation of the freedom of establishment and the freedom to provide services in an manner contrary to the Fundamental Law, because, in the petitioner's view, the interpretation of the law applying national law to damages instead of the EU law rules on damages constitutes a restriction for a company resident in another Member State. In the petitioner's view, this is an arbitrary

misinterpretation of the EU law governing the facts and of the case law of the Court of Justice. The petitioner also claims that Article XV (1) of the Basic Law is violated by the interpretation of the judicial practice of the Curia, which does not apply the EU case law governing the case, despite the fact that this contradicts the opinion of the Curia's case law analysis group on the subject matter of the case (the petitioner refers to the opinion of the Curia's case law analysis group on the "Application of European Union law: experience in initiating preliminary ruling proceedings"), and the court did not apply the conditions set out in the Köbler case governing the case, but applied Sections 349 (1) and 339 (1) of the former Civil Code. Finally, the petitioner submits that the interpretation of the law by the Curia violates the principle of full compensation, because the Curia arbitrarily and without any acceptable reasoning stated that the litigation costs cannot be claimed as damages.

[7] According to the petitioner, the judgement of the Curia also violates Article XXVIII (1) of the Fundamental Law, because the court in charge did not comply with the request for a preliminary ruling initiated several times. According to the petitioner, the Curia was obliged to initiate the preliminary ruling procedure under Article 267 (3) TFEU, because EU law should undoubtedly have been applied to the facts of the case and the interpretation of the law on damages by the courts hearing the case is not in accordance with EU law and case law. The petitioner referred to several relevant Court of Justice decisions and analysed in detail their relevance to the case. By failing to initiate a preliminary ruling procedure, the courts seized the petitioner from his lawful judge. Furthermore, the fact that the Curia, without any reasoning, reached a result which infringed the principle of full compensation in relation to the liability of the liquidator, which, in the petitioner's view, is untenable, since it constitutes an objectively erroneous and arbitrary application of the law, also constitutes a breach of the principle of a fair trial.

[8] In a subsequent supplement to the petition, the petitioner drew attention to the fact that the decision of the Curia is not in line with the decision of the Court of Justice in the preliminary ruling procedure, following the filing of the constitutional complaint, Judgement C-620/17, which, in the petitioner's view, explicitly states that the exclusion of the procedural legal costs he seeks to recover from the damages to be compensated is contrary to EU law.

II

[9] 1. The relevant provisions of the Fundamental Law read as follows:

"Article E (1) In order to enhance the liberty, well-being and security of the people of Europe, Hungary shall contribute to the creation of European unity.

(2) With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. Exercise of competences under this paragraph shall comply with the

fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and State structure."

"Article XXVIII (1) Everyone shall have the right to have any indictment brought against him or her, or his or her rights and obligations in any court action, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act."

[10] 2. The relevant provision of the TFEU reads as follows:

"Article 267 The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

III

[11] In accordance with Section 56 (1) of the Constitutional Court Act, the Constitutional Court shall first decide on the admissibility of the constitutional complaint, in the course of which it shall examine whether the petition meets the statutory conditions, both formal and substantive, for the admissibility of the constitutional complaint.

[12] The petitioners filed the constitutional complaint within the sixty-day time limit set by Section 30 (1) of the Constitutional Court Act. The contested decision is a Curia judgement on the merits of the case, which cannot be challenged by ordinary legal remedy and was rendered in a judicial procedure. The petitioner has the right to lodge a constitutional complaint as a petitioner, is concerned by the fact that he was a claimant in the proceedings closed by the judgement under review, and alleges a violation of the rights guaranteed by the Fundamental Law.

[13] The petition partially meets the requirements of being explicit listed in Section 52 (1b) of the Constitutional Court Act, as it contains the statutory provision establishing the competence

of the Constitutional Court to rule on the petition, the provision establishing the petitioners' entitlement to file the petition (Section 27 of the Constitutional Court Act); the grounds for initiating the proceedings (the procedure and decision of the courts caused a violation of fundamental rights), the essence of the violation of the right guaranteed by the Constitutional Court Act; the court decision to be reviewed by the Constitutional Court (the decision of the Curia No Pfv.III.22.500/2017/7); and the provisions of the Fundamental Law allegedly infringed [Article XV (1), Article XXVIII (1)]. The petition contains detailed reasons as to why the challenged court decision is, in the petitioners' view, contrary to the provisions of the Fundamental Law. In this connection, the Constitutional Court notes that, in the petitioner's view, the Curia infringed his right to a fair trial under Article XXVIII (1) of the Fundamental Law by failing to comply with the request for a preliminary ruling, thereby depriving the petitioner of his right to a lawful judge and by manifestly applying the wrong law to the case.

[14] In the petitioner's view, the failure to apply EU law infringed his right to equality before the law under Article XV (1) of the Fundamental Law. In essence, the petitioner alleged the violation of the right to equality before the law in relation to the reasoning of the Curia's judgement, in the petitioner's view, the Curia arbitrarily and impermissibly and unlawfully interpreted the applicable EU legislation narrowly, which ultimately violated Article XV (1) of the Fundamental Law. The Constitutional Court finds that the petitioner did not provide a constitutionally assessable, independent statement of reasons for the violation of Article XV (1), but essentially alleged the violation of Article XV (1) of the Fundamental Law through Article XXVIII (1) of the Fundamental Law. Finally, the petition expressly requests the Constitutional Court to declare that the contested court decision is contrary to the Fundamental Law and to annul the said court decision. Section 29 of the Constitutional Court Act lays down as a substantive condition for admissibility that a constitutional complaint which satisfies the other statutory conditions must raise a constitutional law issue of fundamental importance or refer to an infringement of the Fundamental Law which materially affects the judicial decision. It is for the Constitutional Court to assess whether these conditions are met. The two conditions are of an alternative nature, the existence of either of them being grounds for the admission of the complaint {Decision 3/2013 (II. 14.) AB, Reasoning [30] and Decision 34/2013 (XI. 22.) AB, Reasoning [18]}.

[15] In the Constitutional Court's view, the petitioner's arguments raise a constitutional law issue of fundamental importance, because the Constitutional Court has already faced the issue of the relationship between the preliminary ruling procedure and the right to a lawful judge on several occasions [see for example: Order 3110/2014 (IV. 17.) AB, Order 3050/2015 (III. 2.) AB, Order 3082/2016 (IV. 18.) AB, Order 3250/2016 (XI. 28.) AB, Decision 3257/2020 (VII. 3.) AB]. The constitutional complaint at issue, as well as the different approach taken by the panel in the case in relation to the national law and the EU law implications invoked by the case [Decision 11/2020 (VI. 3.) AB], have shed new light on the institutionalised cooperation of the courts. Therefore, in the present proceedings, the Constitutional Court has assessed the relationship between the preliminary ruling procedure and the two component rights of the right to a fair trial, the right to a reasoned decision and the right to a lawful judge, as a constitutional law issue of fundamental importance.

[16] On the basis of the above, the Constitutional Court reviewed the merits of the constitutional complaint, applying Section 31 (6) of the Rules of Procedure, without conducting the admission procedure.

IV

[17] The constitutional complaint is unfounded as follows.

[18] In its consideration of the merits of the petition, the Constitutional Court first reviewed the main constitutional rules on the right to a lawful judge and the Constitutional Court's practice on the preliminary ruling reference, which it finally compared with the constitutional complaint.

[19] The Constitutional Court assesses the right to a fair trial on the basis of the quality of the proceedings as a whole: a fair trial is "quality factor that may only be judged by taking into account the whole of the procedure and all of its circumstances. Therefore, despite the absence of some details, as well as the observance of all the rules of detail, a procedure may be "inequitable", "unjust" or "unfair"" {Decision 6/1998 (III. 11.) AB, ABH 1998, 91, 95; Decision 3128/2020 (V. 15.) AB, Reasoning [44]}

[20] The Constitutional Court summarised the most important statements of principle made by it in relation to the right to a court established by law (also known as the right to a lawful judge) in its Decision 21/2014 (VII. 15.) AB, in view of the principles and practice of international law, for example in Decision 36/2013 (XII. 5) AB. As recorded therein, the Constitutional Court held in Decision 993/B/2008 AB that the prohibition of deprivation of the right to a lawful judge in the exercise of his or her functions "is a safeguard for the participants in the proceedings against arbitrary assignment of cases, of which the system of rostering based on the rules of the Courts Organisation Act is only one element. In assessing who is to be regarded as the lawful judge of a particular case, the other provisions of the Code of Procedure relating, inter alia, to material and territorial competence, the rules of appeal and the requirement of a fair trial are to be given the same weight. And it is precisely in the interests of equality before the law that those provisions guarantee to all persons the assistance of a judge who can be clearly expected to give an objective adjudication of the case". {See Decision 36/2013 (XII. 5.), Reasoning [33]; Decision 3128/2020 (V. 15.), Reasoning [38]}

In accordance with Article XXVIII (1) of the Fundamental Law, everyone has the right to have his case heard by a court established by law. The requirement of a court established by law includes the right to a lawful judge at law, that is to say, to have a court which has jurisdiction in a particular case pursuant to the general rules of material and territorial competence laid down in the procedural laws. This constitutional principle is set out in the [...] Courts Organisation Act in its part on the Basic Principles, which states that no one may be deprived of his or her lawful judge [Section 8 (1)]. In addition, the Courts Organisation Act recognises the concept of a lawful judge, who is a judge appointed in accordance with the rules of procedure in a court having material and territorial competence and operating on the basis of predetermined criteria for the assignment of cases [Section 8 (2)]. In order to ensure objectivity

and impersonality, and to exclude arbitrariness, the criteria for the assignment of cases are established by the president of the court in the previous year, which may be changed in the current year only for reasons of service interest or for important reasons affecting the functioning of the court [Section 9 (1)] {Decision 36/2013 (XII. 5.) AB, Reasoning [32]}." {Decision 21/2014 (VII. 15.) AB, Reasoning [75] and [76]; Decision 3128/2020 (V. 15.) AB, Reasoning [38]} In substance, the petition considers the reasoning of the judgement of the court seised of the matter to be, for various reasons, contrary to the Fundamental Law.

[21] The Constitutional Court refers to the main principles of its practice with regard to the right to a reasoned decision, which it summarised in its Decision 7/2013 (III. 1.) AB. Accordingly, the right to a reasoned judicial decision is part of the constitutional requirements of a fair trial under Article XXVIII (1) of the Fundamental Law. In the first place, the constitutional requirement may oblige the court to state the reasons on which its decision is based, as provided for in the procedural laws. It follows that the Constitutional Court will always read this rule of the Constitution in conjunction with the specific procedural rules determined by the nature of the dispute and the type of case. Thus, unlike general courts, the Constitutional Court does not review the fulfilment of the obligation of the courts to state reasons from the point of view of the suitability for review, and refrains from taking a position on the relevance or legality of questions of legal doctrine or solely on problems of interpretation of the law {Decision 3127/2019 (VI. 5.) AB, Reasoning [29]}. According to the consistent practice of the Constitutional Court, the obligation of the courts to state reasons does not entail "the obligation to rebut each and every argument raised by the parties, in particular not to present a system of arguments of sufficient depth to satisfy their subjective expectations" {Decision 3169/2019 (VII. 10.) AB, Reasoning [32], cf. Decision 3107/2016 (V. 24.) AB, Reasoning [38]; Decision 30/2014 (IX. 30.) AB, Reasoning [89]}. The obligation to state reasons merely requires the court to state reasons for its decision on the issues relevant to the merits of the case and not on every detail {Decision 3169/2019 (VII. 10.) AB, Reasoning [32]; Decision 3159/2018 (V. 16.) AB, Reasoning [31]}.

[22] The petitioner saw a violation of the right to a fair trial in the fact that the court in charge did not fulfil its obligation to initiate the preliminary ruling procedure. The Constitutional Court has already assessed the characteristics of the preliminary ruling procedure in its previous practice. In Decision 26/2015 (VII. 21.) AB (hereinafter referred to as the 2015 Court Decision), the Constitutional Court held that the Hungarian court's obligation to issue a preliminary ruling "derives from Article 5 of the Treaty on European Union and, on the other hand, from Article E (2) of the Fundamental Law" (Reasoning [15]). The Constitutional Court has also held that the TFEU establishes a link between the courts of the Member States and the Court of Justice, and that although the parties to a dispute may request the initiation of a preliminary ruling procedure, the judge acting in the case has discretion to decide whether to refer the matter to the Court of Justice. It is open to the court to initiate the preliminary ruling procedure, but Article 267 (3) TFEU provides that, where such a question arises in a case pending before a court of a Member State against whose decisions there is no judicial remedy under national law, that court is obliged to refer the matter to the Court of Justice (see Decision 26/2015. (VII. 21.) AB, Reasoning [17] to [23]).

[23] The Constitutional Court stated in the 2015 Court Decision that it "considers a court to be a court which is obliged to make reference for a preliminary ruling and against whose decision there is no further domestic appeal" (Reasoning [26]). As regards the duty of the judge acting as a judge to refer a case to the Court of Justice for a preliminary ruling, it stated that '[t]he Constitutional Court shares the Court's view in this respect, that is, that the obligation to refer is not automatic and unconditional. It is therefore within the discretion of the national court to decide whether or not to initiate the preliminary ruling procedure." (In the 2015 Court Decision, the Constitutional Court also held that the decision of the court seised of the matter to refuse to make any reference for a preliminary ruling can only be taken in a reasoned decision, since the absence of such a decision may give rise to a violation of the right to a fair trial. "In the view of the Constitutional Court, it follows from the right to a fair trial that the court seised of the matter, whether or not it has been held to be bound and whether or not it grants the request for an initiative, must take a formal decision on the initiative and must state its reasons for that decision in the decision ruling on the case at the latest. The petitioner litigant has a legitimate expectation that a problem of Community law which has arisen in his case and which is relevant to the resolution of the case will be brought before the Court of Justice. Failure to do so may have a material impact on the outcome of the dispute, and the court is therefore obliged to state the reasons for rejecting the motion, since this guarantees that it has reached a well-founded decision on the initiative and enables the litigant to know the reasons for the decision." (Reasoning [60]) The court seised is therefore obliged to give a reasoned decision on the obligation to make reference for the preliminary ruling {Decision 3082/2016 (IV. 18.) AB, Reasoning [36] and [37]; Decision 3003/2017 (II. 1.) AB, Reasoning [27] to [30]; Decision 3142/2019 (VI. 13.) AB, Reasoning [15] and [16]}.

V

[24] The preliminary ruling procedure is part of the institutionalised cooperation of the European courts. The TFEU provides for the mandatory submission of a request for a preliminary ruling in specific cases, and this creates a mandatory dialogue between the national court applying EU law and the Court of Justice. The Constitutional Court, in its Decision 22/2016 (XII. 5.) AB, "considers the constitutional dialogue within the European Union to be of the utmost importance [cf. Decision 61/2011 (VII. 13.) AB, Decision 30/2015 (X. 15.) AB]" (Reasoning [33]). Decision 2/2019 (III. 5.) AB stated, in relation to the relationship between EU law and national law, that "[i]t is arguable that both EU law and the national legal system based on the Fundamental Law are intended to achieve the objectives set out in Article E (1). In this respect, the 'creation of European unity', integration, is an objective not only for political bodies but also for the courts and the Constitutional Court, from which 'European unity' follows the harmony and coherence of legal systems as a constitutional objective" (Reasoning [37]). Constitutional dialogue as a tool is capable of guaranteeing the sui generis nature of both national law and European law {see Decision 3241/2019 (X. 17.), Reasoning [18]}; and it may be able to strike a balance in specific situations between the core of national constitutional law, which is untouchable by integration, and European law, which has the primacy of application as developed by the Court of Justice. Without a dialogue between these courts, which are open to each other's arguments, neither the sui generis nature of national constitutional law nor that of European law can be guaranteed.

[25] The Constitutional Court cannot take a neutral position in this institutionalised cooperation. Pursuant to Article E (2) of the Fundamental Law, "With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union". The Court of Justice is part of the institutional system of the European Union, but it ensures the effective application of EU law not only by itself, but also, through the EU rules applied in individual cases by the court seised, in conjunction with the courts of the Member States. Uniform interpretation is a guarantee of effective legal protection, and the necessary element of this is the normative regulation of the procedure which provides the means of unifying questions of interpretation. Participation in institutionalised cooperation, which is enshrined in both Article E of the Fundamental Law and Article 267 TFEU, is the task of the general court and of an institution recognised as a court by the practice of the Court of Justice (see C-393/92 Almelo municipality and others v NV Energiebedrijf Ijsselmij [1994] ECR I-1477).

[26] The Constitutional Court notes that the above interpretation of the Fundamental Law also gives rise to the right of the Constitutional Court to initiate a preliminary ruling procedure, in particular if the case before it involves a risk of a restriction of the fundamental rights and freedoms under Article E (2) of the Fundamental Law or of a restriction of Hungary's inalienable right to dispose of its territorial unity, population, form of government and State organisation. The case law of the German Federal Constitutional Court [cf. BVerfGE 134, 366 and BVerfGE 142, 123; BVerfGE 146, 216 and BVerfG, judgement of the Second Senate of 5 May 2020, 2 BvR 859/15] may be regarded as authoritative in this respect.

[27] The Constitutional Court then assessed the relationship between the preliminary ruling procedure before the Court of Justice and the right to a lawful judge, one of the rights to a fair trial enshrined in Article XXVIII (1) of the Fundamental Law. In the petitioner's view, the decision of the court seized of the case deprived him of his right to a fair trial, as enshrined in Article XXVIII (1) of the Fundamental Law. It is clear from the above-quoted practice of the Constitutional Court that, in the context of the right to a lawful judge, the previous practice of the Constitutional Court had mainly formulated constitutionality aspects in relation to the rules on material and territorial competence between domestic courts and the criteria for the assignment of cases. The reference for the preliminary ruling is in a partly different context compared to the rules on the right to a lawful judge under the domestic court system. The TFEU grants the Court of Justice a monopoly on the interpretation of the law through the preliminary ruling procedure. The Constitutional Court considers the Court of Justice's preliminary ruling procedure to be part of the institutionalised cooperation based on Article E (2) of the Fundamental Law. From the petitioner's initial argument, according to which the court seised may refer questions of interpretation of EU law to the Court of Justice, it clearly follows from Article E (2) of the Fundamental Law and Article 267 TFEU that, if the court seised of the matter has in fact initiated a procedure for a preliminary ruling, the Court of Justice is also a lawful judge for the purposes of its assessment. Since the preliminary ruling procedure is to be interpreted in the context of institutionalised cooperation between courts and tribunals and is

not a substantive right of a party to a dispute, the right of the party to a lawful judge could not have been infringed by the judgement of the Curia.

[28] In the case of a preliminary ruling procedure, the constitutional law issue of fundamental importance arises as to how the petitioner's components right to a fair trial can be enforced in the given court proceedings, if the Court of Justice is also a lawful judge in the preliminary ruling procedure. The Constitutional Court has previously pointed out this issue, albeit in a different context, and following the 2015 Court Decision. In accordance with the amended rules, if the court of last instance has decided to grant a request for a preliminary ruling, it must state the reasons for its decision. The obligation to state reasons is of particular importance in this respect, since failure to do so may in itself constitute a violation of the right to a fair trial and, in the context of the preliminary ruling procedure, may indirectly affect the right of the parties to the proceedings to a lawful judge. The Constitutional Court further notes that, by providing inadequate reasons for the decision of the court seised to order a preliminary ruling, the court also fails to fulfil its institutional obligation under Article E (2) of the Fundamental Law. The Constitutional Court, acting within the powers conferred on it by the Fundamental Law, reviews the constitutionality of the decision to initiate the preliminary ruling procedure and thereby fulfils its institutional responsibility under Article E of the Fundamental Law, in addition to guaranteeing the right to a fair trial.

[29] The initiation of a preliminary ruling procedure is a matter of professional law (BH2018. 312., BH2016. 338.), but like all judicial decisions, it must comply with the requirements of the Fundamental Law. The Constitutional Court also does not act as a super-judicial body in this procedure, that is, as a general review body for the initiation of preliminary ruling proceedings, and therefore does not take a position on the technical law of the initiation of preliminary ruling proceedings in accordance with its previously established practice {2015 Court Decision, Reasoning [60]; Decision 3257/2020 (VII. 3.), Reasoning [44]}. The Constitutional Court "does not consider it its task to review the application of the law by the courts, but merely to verify compliance with its constitutional framework." {Decision 23/2018 (XII. 28.) AB, Reasoning [29]}. At the same time, the Constitutional Court recalls the constitutional requirement formulated in Decision 11/2020 (VI. 3.) AB as follows: the court may not disregard the application of Hungarian law in the absence of an EU legal concernment. It is for the court to decide on the question of the applicable law. The court seised of the matter is obliged to give a reasoned decision on the request for a preliminary ruling, but it is not automatically obliged to initiate the preliminary ruling procedure, an exception to which was also made by the Court of Justice in the CILFIT case (C-283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health). If a case falls within one of the criteria developed in CILFIT and the court seised gives reasons for its decision, it may, without prejudice to the right to a fair trial, decide not to initiate a preliminary ruling procedure.

[30] The Constitutional Court refers to the fact that the constitutional courts of other Member States examine the constitutionality of a decision on a request for a preliminary ruling while respecting the interpretation of the rules of professional law. In line with the settled case law of the German Federal Constitutional Court, a decision on a reference for a preliminary ruling cannot be uninterpretable and manifestly untenable, the court must ascertain and assess the

EU law governing the case [BVerfGE 82, 159 <194>, 1 BvR 1159/08,, para. 4]. The Austrian Constitutional Court also examines the reasoning of a court's decision on a preliminary ruling and finds the decision unconstitutional if, in case of doubt as to the interpretation of the relevant EU law issue, the court does not request a preliminary ruling [VfGH 27.06.2012, para. 2.5; U 330/12; cf. VfGH 11.12.1995, B 2300/95]. The Slovak Constitutional Court also reviews the reasoning of a judicial decision to see whether it sufficiently reflects the question of interpretation of EU law and whether the parties' right to a fair trial has not been infringed [III. ÚS 388/2010, II. ÚS 381/2018, II. ÚS 792/2016], a practice similar to that of the Czech Constitutional Court [II. ÚS 4225/16, 26 September 2017, ÚS 1009/08, 8 January 2009 and Pl. ÚS 50/04, 8 March 2006]; and the Slovenian Constitutional Court has also found a decision unconstitutional on the basis of the reasoning governing the EU law issue when the parties' fundamental rights have been infringed by the failure to comply with the obligation to request a preliminary ruling [Up-1056/11, 21 November 2013; Up-561/15, 16 November 2017].

[31] In his constitutional complaint and in the main proceedings and in the proceedings concerned by the contested judgements, the petitioner complained of the failure to apply EU law. In his constitutional complaint, he alleged that the courts had infringed his right to a fair hearing by failing to comply with the request for a preliminary ruling.

[32] The Constitutional Court notes that the Curia has given detailed reasons as to which law should be applied in the petitioner's case. In its judgement, the Curia gave detailed reasons for the fact that, on the basis of Articles 49 and 54 (2) TFEU, the judgement complained of by the petitioner did not restrict his right of establishment and he was able to pursue his economic activities without hindrance. The Curia also pointed out that the effective legal protection granted by the Member State under Article 19 of the Treaty on European Union was also applicable in the proceedings which the petitioner considered to be contrary to fundamental law (Judgement of the Curia, reasoning [30] to [33]).

[33] In the present case, the Constitutional Court noted that the court had also assessed the petitioner's request to make reference for a preliminary ruling before the Court of Justice, but did not consider it necessary. The judgement of the court contains detailed and exhaustive reasoning in this respect. The reasoning in the judgement under appeal contains detailed reasoning to the effect that the question sought to be raised in the reference for a preliminary ruling is irrelevant to the dispute. The Curia considered the question of the interpretation of EU law irrelevant because EU law is not the governing law for the resolution of the dispute and therefore there can be no question of interpretation. The Constitutional Court points out that the Curia provided detailed reasons for the arguments of the petitioner when it analysed in detail the decisions of the Court of Justice in relation to the case, in addition to EU law (Judgement of the Curia, reasoning [34] and [35], as well as [38]).

[34] The Constitutional Court therefore concludes that the court did not violate the petitioner's right to a fair trial by not making a reference for a preliminary ruling, because it stated in its statement of reasons, in accordance with the criteria applied by the Court of Justice in the CILFIT case (paragraph 10), that the interpretation of EU law is not necessary for the resolution of the dispute, that is, it is irrelevant. Therefore, the Constitutional Court found no violation of Article XXVIII (1) of the Fundamental Law and dismissed the petition.

VI

[35] The Constitutional Court ordered the publication of its Decision in the Hungarian Official Gazette on the basis of the second sentence of Section 44 (1) of the Constitutional Court Act.

Budapest, 10 November 2020

Dr. Tamás Sulyok, sgd.,
Chief Justice of the Constitutional Court,
Justice-Rapporteur

Dr. Tamás Sulyok, sgd.,
Chief Justice of the Constitutional Court,
on behalf of Dr. Ágnes Czine,
Justice of the Constitutional Court,
prevented from signing

Dr. Tamás Sulyok, sgd.,
Chief Justice of the Constitutional Court,
on behalf of Dr. Béla Pokol,
Justice of the Constitutional Court,
prevented from signing

Dr. Tamás Sulyok, sgd.,
Chief Justice of the Constitutional Court,
on behalf of Dr. Egon Dienes-Oehm,
Justice of the Constitutional Court,
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Dr. Tamás Sulyok, sgd., Chief Justice of the Constitutional Court, on behalf of Dr. László Salamon, Justice of the Constitutional Court, prevented from signing

Dr. Tamás Sulyok, sgd.,
Chief Justice of the Constitutional Court,
on behalf of Dr. Attila Horváth,
Justice of the Constitutional Court,
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Dr. Tamás Sulyok, sgd.,
Chief Justice of the Constitutional Court,
on behalf of Dr. Balázs Schanda,
Justice of the Constitutional Court,
prevented from signing

Dr. Tamás Sulyok, sgd.,
Chief Justice of the Constitutional Court,
on behalf of Dr. Ildikó Hörcher-Marosi,
Justice of the Constitutional Court,
prevented from signing

Dr. Tamás Sulyok, sgd.,
Chief Justice of the Constitutional Court,
on behalf of Dr. Marcel Szabó, Justice of the Constitutional Court,
prevented from signing

Dr. Tamás Sulyok, sgd.,
Chief Justice of the Constitutional Court,
on behalf of Dr. Imre Juhász,
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Dr. Tamás Sulyok, sgd.,
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on behalf of Dr. Péter Szalay,
Justice of the Constitutional Court,
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Dr. Tamás Sulyok, sgd.,
Chief Justice of the Constitutional Court,
on behalf of Dr. Miklós Juhász,
Justice of the Constitutional Court,
prevented from signing

Dr. Tamás Sulyok, sgd.,
Chief Justice of the Constitutional Court,
on behalf of Dr. Mária Szívós, Justice of the Constitutional Court, prevented from signing

Concurring reasoning by *Dr. Ágnes Czine*, Justice of the Constitutional Court

[36] I agree with the dismissal of the constitutional complaint and its Reasoning, but I consider it important to highlight the following.

[37] 1. In line with the consistent interpretation of the Court of Justice of the EU, the preliminary ruling procedure is an instrument of cooperation between the Court of Justice and the national courts, whereby the Court of Justice provides the national courts with the interpretation of EU law necessary for the resolution of cases pending before them (see, inter alia, judgement in Gmurzynska-Bscher, C-231/89, paragraph 18, and judgement in Djabali, C-314/96, paragraph 17). Consequently, Article 267 TFEU must be interpreted as meaning that the jurisdiction of the Court of Justice extends to providing an interpretation of a rule of EU law. It does not, however, extend to considering the conditions under which national courts must or may apply EU law in a case pending before them (Case C-137/08 VB Pénzügyi Lízing Zrt. paragraph 44). The Court of Justice has also stressed that it has no jurisdiction to assess the compatibility of the provisions of EU law with those of national law (Di Felice, C-128/88, paragraph 7). The Court of Justice has also stressed that it is not for it to interpret national law in these proceedings (Luigi Benedetti, C-52/76, paragraph 25).

[38] By signing the founding Treaties, the Member States of the European Union undertook to cooperate sincerely and, in this context, to "assist the Union in the performance of its tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Union." [Article 3 (3), third sentence, TFEU] The preliminary ruling procedure assists this cooperation by allowing an authentic interpretation of the rules of EU law in proceedings pending before the courts of the Member States.

[39] It follows from the foregoing that the purpose of the preliminary ruling procedure is to ensure a uniform interpretation of the rules of EU law in the practice of the courts of the Member States. However, it is not intended to enable the Court of Justice to rule on the compatibility of EU law with national law or on the correct interpretation of national law.

[40] 2. In the present case, the Constitutional Court has recognised that the Court of Justice is a lawful judge and that, as such, the decision to initiate the preliminary ruling procedure may give rise to a possible infringement of the right to a fair trial. In this context, I consider it important to highlight the following.

[41] 2.1 Under Article 267 TFEU, the national court has an autonomous discretion to decide whether or not to grant a preliminary ruling (Rheinmühlen (II), C-166/73, paragraph 4). That discretion of the national court cannot be called into question by the application of rules which allow the court of appeal to reverse the order which initiated the reference for a preliminary ruling before the Court of Justice, to disregard that initiative and to order the court which issued that order to continue the stayed national proceedings (Case C-210/06 Cartesio, paragraph 98).

[42] The national courts thus in principle have a discretion as to whether or not to initiate the preliminary ruling procedure. However, Article 267 TFEU also provides, in addition to that

general rule, that where a question of interpretation arises in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal is obliged to refer the matter to the Court of Justice. In interpreting this provision, the Court of Justice has ruled that decisions of a national court of appeal which the parties may challenge before the highest judicial forum do not come from a court against whose decisions there is no judicial remedy under national law (Lyckeskog, 99/00, 16th Cases C-116/00 and C-116/00). Consequently, in its case law, the Court of Justice has made the obligation to refer a case to the Court of Justice conditional on the exclusion of the specific possibility of appeal and not on the general availability of an appeal against the decisions of the court concerned (Case C-210/06 Cartesio, paragraphs 75 to79).

[43] On the basis of the foregoing, it can therefore be concluded that, in principle, the national courts have a discretion as to whether or not to initiate proceedings under Article 267 TFEU. The exception to this is where there is no appeal against the decision of the national court, because in that case the national court is under an obligation to take the initiative. The possibility of an appeal must always be assessed in the specific case pending before the Member State.

[44] 2.2 In the view of the Constitutional Court, "[t]he requirement of a court established by law includes the right to a lawful judge, that is to say, to be governed in a particular case by the rules of material and territorial competence laid down in the general rules of procedure." {Decision 36/2013 (XII. 5.) AB, Reasoning [32]}. In its practice, the Constitutional Court has typically taken as a point of departure the provisions of Act CLXI of 2011 on the Organisation and Administration of Courts (hereinafter referred to as the "Courts Organisation Act") as a basis for defining the concept of the judge. Under this concept, a lawful judge is a judge who is appointed in accordance with the rules of procedure of the court with material and territorial competence and acting on the basis of predetermined criteria for the assignment of cases [Section 8 (2) of the Courts Organisation Act] {e.g. Decision 3001/2020 (II. 4.) AB, Reasoning [45] and [46]}.

[45] The Constitutional Court has, however, in its previous practice made it clear that "[i]n assessing who is to be considered a lawful judge in a specific case [in addition to the Courts Organisation Act], the other provisions of the procedural Act relating, inter alia, to material and territorial competence, the rules of legal remedy and the requirement of a fair trial shall be given equal weight" (Decision 993/B/2008 AB, ABH 2009, 2352, 2354-2355).

[46] It follows from the above that in cases where the interpretation of a rule of EU law is necessary for the decision on the substance of the dispute, the Court of Justice is a lawful judge and therefore the refusal to refer a question to the Court of Justice for a preliminary ruling may constitute an infringement of the right to a lawful judge. However, it is necessary to consider whether there is a right of legal redress against the decision of the court seised of the matter in the proceedings in question, because, in my view, the infringement of the right to a lawful judge may arise primarily in cases where the court seised is under an obligation to initiate proceedings under Article 267 TFEU.

[47] 3. In conclusion, I agree that the Constitutional Court has extended the constitutional content of the right to a lawful judge in relation to the Court of Justice. However, I also consider it essential to stress that a review of constitutionality is possible only in an extremely narrow context. As reflected in the consistent practice of the Curia (e.g. BH 2013.164): the clarification of interpretative concerns about the applicable law falls within the "sovereignty" of the judge deciding the dispute, that is, it is part of the judge's independence in deciding an individual case.

Budapest, 10 November 2020

Dr. Tamás Sulyok, sgd.,
Chief Justice of the Constitutional Court
on behalf of Dr. Ágnes Czine
Justice of the Constitutional Court
prevented from signing

Concurring reasoning by *Dr Egon Dienes-Oehm*, Justice of the Constitutional Court

[48] I agree with the decision. I wish to add a concurring statement of reasons to Part III and Part V of the Reasoning, as follows.

[49] 1. In Part III of the Reasoning for the Decision (Reasoning [11] et seq.), the validity and future applicability of the constitutional findings of principle governing the relationship between the preliminary ruling procedure and the right to a lawful judge, which are based on the fundamental constitutional issue in the 2015 Court Decision and which are established by the examples of consistent practice highlighted this Decision, as reaffirmed by a number of examples in that part, are not affected by this Decision.

[50] The constitutional requirement laid down in Decision 11/2020 (VI. 3.) AB means only the development of the practice based on the 2015 Court Decision in the formulation of the operative part of the Decision referred to in the present case, applicable to the subject of national law and the EU's involvement. This, read in conjunction with this Decision, will make it easier for the courts and the Constitutional Courts, in considering complaints invoking the Court of Justice as a lawful judge, to apply the constitutional requirements in a uniform manner in relation to the application of national law and the EU's involvement.

[51] 2. In Part V of the Reasoning for the Decision (Reasoning [25] et seq.), the Decision states that the Constitutional Court's prior jurisdiction may also be inferred from its interpretation of Article E of the Constitution.

[52] I do not, of course, dispute that finding. However, in this context, I would have considered it necessary to state, in order to avoid any possible misunderstanding, that the Constitutional Court is not at present a direct participant in the institutional judicial cooperation between the

courts and the Court of Justice. The Constitutional Court is the supreme and primary forum for constitutional protection, as provided for in the Fundamental Law, and its role in defining and deciding the right to a lawful judge in accordance with the law is therefore indirect and principled, and its aim is to ensure that constitutional requirements are enforced. However, the specific conditions for its direct involvement are currently lacking (that is, the underlying legal basis for the conduct of adversarial proceedings and, consequently, its recognition by the EU and its own case law excluding the assessment of EU law). These conditions can of course be created if necessary, including primarily the intention of the legislator, and there is no constitutional obstacle to this.

Budapest, 10 November 2020

Dr. Tamás Sulyok, sgd.,
Chief Justice of the Constitutional Court
on behalf of Dr. Egon Dienes-Oehm
Justice of the Constitutional Court
prevented from signing

Concurring reasoning by *Dr Ildikó Hörcher-Marosi*, Justice of the Constitutional Court

[53] 1. I agree in principle with the conclusion of the Decision that, like other European constitutional courts, the Constitutional Court of Hungary may refer a preliminary ruling to the Court of Justice, subject to the EU principle of sincere cooperation. I supported the operative part of the Decision, despite the fact that the resolution of the present case did not raise the need to initiate a preliminary ruling procedure. Nevertheless, the Reasoning of the majority Decision has, in my opinion, left open a number of relevant questions, which will necessarily have to be answered by the body in the future.

[54] I regard as one such question the question of the exercise of the powers of the Constitutional Court in the course of which a reference for a preliminary ruling may be made, and the question of how the reference may be incorporated into the existing procedural rules of the Constitutional Court (having regard, for example, to Section 60 of the Constitutional Court Act).

[55] A further open question is whether the initiation of a preliminary ruling is merely an opportunity or an obligation for the Constitutional Court. In this context, it should be borne in mind that, from the point of view of the national legal order, the constitutional basis of the legally established concept is Article E of the Fundamental Law, while the specific substantive and procedural rules of the concept are laid down in Article 267 TFEU. In addition to this, it should also be pointed out that the constitutional complaint has the function of a legal remedy {Decision 6/2020 (III. 3) AB, Reasoning [117]} and that no further legal remedy is available to the petitioner. The consideration of these aspects has an influence not only on the relationship of the Constitutional Court with the Court of Justice but also with the Curia.

[56] 2. I have supported the recognition that the Court of Justice, if the general court seised of a matter has in fact initiated a preliminary ruling, is a lawful judge in the course of its assessment, as well as the fact that, nevertheless, the Constitutional Court may only find that the right to a reasoned decision has been infringed in cases involving a question of a preliminary ruling. The Constitutional Court has not and will not take a position on the technical law applicable to the initiation of a preliminary ruling procedure, and it is not possible to directly establish an infringement of the right to a lawful judge in this respect.

[57] In my interpretation, this is based on the fact that the Court of Justice constitutes a lawful judge, within the scope of the Fundamental Law, by its monopoly on the interpretation of EU law and its competence to decide questions of validity. A national judge, on the other hand, is also a judge of EU law to the extent that he applies EU law to the case before him. Consequently, the Court of Justice, together with the national judge, is a lawful judge for the purpose of deciding cases with an EU element. It seems to me to follow from that specificity that the national judge has autonomy in deciding whether a reference to the Court of Justice is necessary in a particular case and that his decision cannot be reviewed as to its substance by any other court, including the Constitutional Court.

Budapest, 10 November 2020

Dr. Tamás Sulyok, sgd.,
Chief Justice of the Constitutional Court
on behalf of Dr. Ildikó Hörcher-Marosi
Justice of the Constitutional Court prevented from signing

Dissenting opinion by *Dr Béla Pokol*, Justice of the Constitutional Court

[58] The constitutionally significant question in the case, and thus the aspect of the merits of the Constitutional Court's decision, was whether the Court of Justice is a lawful judge in the case of a request for a preliminary ruling by the parties to the dispute. A lawful judge is defined by statutory provisions and legislation and is therefore a judge to whom the party concerned has a subjective right. Thus, in the present case, the question to be decided was whether or not to include the Court of Justice in this category. The majority Decision dismissed the annulment of the Curia judgement, which was the petitioner's specific problem, and held that the Curia was not obliged to refer the request for a preliminary ruling even though there was no longer any appeal against its decision, and this could be agreed. But elsewhere in the Reasoning, an argument was laid down which acknowledged the Court of Justice's status as a lawful judge, and in the longer term this internal logical inconsistency could create legal uncertainty. Quote: "it clearly follows from Article E (2) of the Fundamental Law and Article 267 TFEU that, if the court seised of the matter has in fact made a reference for a preliminary ruling, the Court of Justice is also a lawful judge for the purposes of its assessment" (Reasoning [28]). As can be seen from the Reasoning, it is a matter of discretion for the judge whether or not to make a reference for a preliminary ruling and thus the party has no substantive right to do so.

Therefore, the conceptual element of a lawful judge is absent here. This conceptual and logical inconsistency may lead to increased legal uncertainty in the future because the autonomy of the domestic legal order and the preservation of Hungarian State sovereignty in cooperation within the EU are in a constant struggle not only in the public political arena but also through the legal procedures. Thus the increased subordination of Hungarian law and courts to the EU, or resistance to it, has already created fault lines within the judiciary. We have seen the problems of this in connection with the adoption of Decision 11/2020 (VI. 3.) AB, cited by the Decision, and thus this argument of this Decision, by classifying the Court of Justice as a lawful judge, may reinforce the efforts of some members of the judiciary to subordinate Hungarian law and the State to the European Union.

[59] Thus, I did not support the current majority decision because I disagreed with the line of reasoning of the Decision. This line of reasoning tends to shift the domestic courts' power of preliminary ruling on the Court of Justice away from discretionary appreciation and towards obligation, using the lawful judge formula. With this line of reasoning, the decision accepted the petitioner's claim that the Court of Justice should be regarded as a lawful judge guaranteed by the Fundamental Law for litigants beyond domestic courts. Let us now note that in its reasoning for dismissing the annulment of the Curia judgement, the decision implicitly reverses this, since the overall reasoning formula to be used in the following is not the specific dismissal of the Curia judgement, but the establishment of the Court of Justice as a lawful judge. Contrary to this line of argumentation, I would have preferred to state in the Reasoning that a Hungarian court may only declare the primacy of Hungarian law in its decision in the event of a possible conflict between domestic law and EU law if the meaning of the EU law provision in question makes the conflict with Hungarian law clear according to the established methods of interpretation, or if the Court of Justice has previously expressly found a conflict with the Hungarian law provision in question.

[60] If this primacy does not exist for the EU legal provision as described above, the court concerned may only refer to the EU legal provision as a legal interpretation aid, but must base its decision on the domestic legal provision. This principle of sovereignty-conform interpretation, which is binding for all Hungarian courts, could have been clearly derived from the declarations of the National Avowal of the Fundamental Law proclaiming independent Hungarian statehood. In order to protect Hungary's interests, a "priority constitutionality procedure" should be introduced in Hungary in relation to the initiative for a preliminary ruling, which the Court of Justice already assessed and upheld in 2010 in the Melki and Abdeli cases (C-188/10 and C-189/10). But this also follows from Article E of the Fundamental Law, on the basis of which Decision 22/2016 (XII. 5.) AB has already stated the possibility of Constitutional Court action against EU acts in order to protect constitutional identity and in the case of *ultra vires*, the abuse of jurisdiction. The preliminary ruling procedure, as a preliminary stage of the Court of Justice's EU act, should be included in the competence of the Constitutional Court to review, so now the statement of this would have been a clarification of Decision 22/2016 (XII. 5.) AB. This would be all the more important because, according to the data of the Curia Analysis Group published at the end of 2013, the number of preliminary rulings in Hungary is extremely high compared to other Central and Eastern European Member States, e.g. eight

times higher in relation to the population of Poland, but two and a half times higher in relation to the Czechs, who have roughly the same population.

[61] Unfortunately, the majority decision did not address these issues, but instead, by using the formula of the lawful judge, enhanced the role of the Court of Justice beyond the scope of the Treaty. This enhancement in evaluation is contrary to the fact that, in the domestic rules of court procedure, the court has discretionary power to decide on the parties' proposals to this effect, but also to the fact that the relevant Article 267 TFEU itself only provides for this as a possibility for the courts of the EU Member States, but not as an obligation. The possibility of the lower courts being given this option is emphasised twice in Article 267 (2), when, first, it leaves it to the personal discretion of the judge to decide whether to turn to the court in a case, and then, once again, it emphasises the possibility, when the wording of the Article states that the court may request the Court of Justice to give a ruling on the matter. This dual possibility is reduced, in the main, to the highest judicial forum under paragraph 3, where there is no possibility of appeal against the decision, in that if, in the course of its interpretation, it considers that an opinion of the Court of Justice is necessary on a question, it is already obliged to initiate the preliminary ruling procedure. However, even here, it is not binding in so far as it is up to the discretion of such a court to interpret the EU law at issue itself or to classify a particular question as requiring a Court of Justice decision and an interpretation by the Court of Justice, and it is not bound by any such request by the parties to the dispute.

[62] Thus, the EU Treaty does not impose an obligation on any national court or tribunal to use the preliminary ruling procedure, but only provides for the possibility to do so. Thus, it is not possible to agree with the earlier argument of the Constitutional Court in the 2015 Court Decision that Article 267 (3) TFEU makes the Curia what is termed as a 'court bound' to take a preliminary ruling in the present case (see 2015 Court Decision [21]). This is further compounded by the current reasoning of the decision, which excludes the Hungarian courts from interpreting EU law and declares this to be the exclusive monopoly of the Court of Justice: "The TFEU grants the Court of Justice a monopoly on the interpretation of the law through the preliminary ruling procedure." (Reasoning [28]). In contrast, it can be argued that there is no accepted legal theory today, either in Hungary or in the Western world as a whole, which deprives the courts applying the law of the right to interpret the law and establishes it as a monopoly of only one court of general jurisdiction. This is what the reasoning of the majority decision now needed here, because it allowed the Court of Justice to be declared a lawful judge because of the obvious need for interpretation of EU law (an abstract rule can never be applied in a particular case without interpretation). However, even the official socialist legal theory of Imre Szabó in Hungary did not admit this exclusion of the courts from interpretation from 1960 onwards, after the relaxation of the State party dictatorship (see in detail: Béla Pokol. Hungarian Science 1992/11. p. 1325-1335) However, rejecting this, the Court of Justice does not have a monopoly on the interpretation of EU law, but only a hierarchical priority, if the domestic court decides to refer to the Court of Justice after its own interpretation.

[63] To sum up the interpretation of Article 267 TFEU, the reasoning of the Constitutional Court in the Reasoning for this Decision, which declares the Court of Justice to be the lawful judge for the parties to the dispute in addition to the domestic courts with regard to the preliminary

ruling, shifts the discretionary judicial decision, which has hitherto been based on discretion, towards binding, going beyond both the domestic procedural rules and the provision of the EU Treaty. This infringes the judicial independence of the members of the Hungarian judiciary, but also the independence of the Hungarian legal order from EU law. With this declaration and argumentation, the majority of the Hungarian Constitutional Court that voted for this resolution has taken a step towards reducing our State sovereignty, which does not even stem from the EU Treaty.

[64] These objections concerned the arguments contained in the reasoning of the decision, but in a dissenting opinion it is necessary to address the issue raised in the case, which has important constitutional significance in the relationship between EU law and Hungarian law, but the decision did not unravel its context. I have already dealt with this in my concurring reasoning to the already cited Decision 11/2020 (VI. 3.) AB, and this is the scope of EU law. In other words, if EU law is to be applied in the dispute between the parties in a given case, what can be considered EU law, whose primacy over the law of the Member States in European integration has not been disputed since 1964. It should be seen that the Fundamental Law, as amended in 2012, places increased emphasis on the preservation of Hungarian statehood and sovereignty, and thus the question of what can be considered EU law overriding domestic law is one of the most important aspects of the constitutional protection of the Fundamental Law. It is clear that, in addition to the founding Treaty, this includes the normative content of EU regulations, which the Commission has a monopoly right to initiate and adopt in the Council of Ministers and, in the case of co-decision powers, in the European Parliament. In the case of the EU directive, there have been a number of changes in this area over the last fifty years, and as this includes the Member States' autonomous right to formulate their own legislation, the direct scope has been the subject of much debate over many years. The Court of Justice insisted on this in the 1970s, then backed down in the face of opposition from Member States, for example the French Council of State in a 1978 decision forbidding French courts to base decisions on EU directives, and in 1980 the French National Assembly passed a law to this effect in what is known as the Aurillac amendment. In addition, under the basic Treaty, the Commission can in certain cases take decisions with direct effect which are binding in the Member States concerned without transposition.

[65] However, beyond their individual effects between the parties, individual Court of Justice decisions do not in any way fall within the concept of EU law, but in practice the Commission incorporates the more important Court of Justice case law decisions into its current proposal for a regulation or directive, and thus secondary EU legislation is largely a codification of Court of Justice case law. (See Björn Schreienmacher: Vom EuGH zur Richtlinie - wie die Eu-Mitgliedstaaten über die Kodifizierung europäischer Rechtsprechung entscheiden. Transtate Working Papers, 2014. No. 183. Bremen. p. 22.) But as long as these case law decisions do not go through the legislative machinery and compromise procedures of the European Parliament and the Council of Ministers, they do not constitute EU law, but are binding only on the Member State in the individual case in respect of which the case law decision was taken.

[66] Thus, the various Court of Justice case law decisions do not yet constitute EU law binding on Hungary and to which the courts would still have to pay attention beyond domestic law, let

alone on the basis of which Hungarian law could be set aside. Except, of course, for the case-by-case decisions that have been made in Hungary's case in particular. If they go beyond that and take the arbitrary case-by-case decisions of the courts and the Court of Justice as general EU law, they will be pushing aside the guarantee compromise machinery of the European Parliament and the Council of Ministers, in violation of the Member States' decision-making mechanisms in the Treaties. In this way, the courts would tend to create a federal Europe without the mandate of the masses of citizens by invoking EU law in violation of the sovereignty of the Member States and the autonomy of national rights.

[67] The importance of the protection of domestic law by the Constitutional Court must be stressed in contrast to the decisions of many general courts, which seek to subordinate it to EU law, and which do so by applying a broader conception of EU law beyond the EU Treaty, see the case already cited in Decision 11/2020 (VI. 3.) AB. In recent years, the federalist powers of the Union have also adopted an extended approach to EU law among some judges, both in this country and in other Member States, which seeks to take as a basis for EU law, in addition to the sources of EU law recognised by the Treaty, the individual decisions of the Luxembourg judges, going beyond the effects of their individual decisions, as general EU law. This infringes the scope of the Hungarian State's subordination to Article E of the Fundamental Law, in particular in view of the fact that paragraph 3 of that Article expressly states that a general rule of conduct under EU law is recognised by the Fundamental Law only within the limits permitted by the Treaty: 'European Union law may, within the limits of paragraph 2, lay down a mandatory rule of conduct.'

[68] In my opinion, the Constitutional Court must, on the one hand, take action against the use of EU law rules by certain Hungarian general courts to marginalise domestic law in violation of the Basic Law, but, on the other hand, it must also find a way to ensure that the individual decisions of Luxembourg judges are only allowed to have an effect in the Hungarian judiciary in this status and are not allowed to be understood as general EU law. The case-by-case decisions of Luxembourg EU judges will only become general EU law if the Commission, on the basis of its right to propose EU regulations and directives, incorporates their normative content and the relevant EU bodies adopt them on the basis of its proposal. The practice, which is contrary to the Treaty, and therefore contrary to the Fundamental Law, of treating individual Luxembourg decisions as general EU law, in effect deprives the EU decision-making forum of national ministers of part of their competence to make EU law. This has been recognised by the Polish constitutional judges in their decision, made public in recent weeks, prohibiting Polish general courts from treating individual Luxembourg decisions as general EU law.

[69] To summarise the position expressed in the dissenting opinion, the following can be highlighted: (1) Article 28 of the Fundamental Law requires Hungarian courts to interpret legislation in accordance with the Fundamental Law; (2) It follows ultimately from Article E of the Fundamental Law that, within the framework of this Article, courts may request the Court of Justice to interpret the EU law at issue. (3) In practice, cases of preliminary rulings that go beyond these limits require the Constitutional Court to defend these constitutional limits in a separate procedure, and it is therefore suggested that the French procedure known as "*Question Prioritaire de Constitutionalité – QPC* – priority constitutionality issue" could be a

useful tool to ensure that the EU judicature is able to apply the principle of the right to a fair hearing. In the light of the French model of the procedure "priority constitutionality issue", it is therefore suggested that the legislator should be obliged to amend the procedure by declaring a constitutional omission, and that the court should refer the preliminary ruling request to the Constitutional Court for review of its conformity with Article E. Such a move would only further extend the constitutional protection of the Constitutional Court, already laid down in Decision 22/2016 (XII. 5.) AB, against the extension ultra vires of EU acts and the infringement of constitutional identity by EU acts.

[70] In the context of the present case, I would have considered it important that the scope of EU law be laid down by the Constitutional Court in the majority decision, as mentioned above, but at least in this dissenting opinion, hoping that in the future it will be included in some form in the agreed Constitutional Court argumentation materials.

Budapest, 10 November 2020

Dr.Tamás Sulyok, sgd.,
Chief Justice of the Constitutional Court
on behalf of Dr. Béla Pokol
Justice of the Constitutional Court
prevented from signing

Dissenting opinion of *Dr László Salamon*, Justice of the Constitutional Court

[71] 1. I do not agree with the dismissal of the petition, as in my view the petition requested the Constitutional Court to rule on issues of technical law and legality which did not justify the admission and substantive adjudication of the petition, and did not raise any constitutional law issues of fundamental importance. Consequently, the petition should have been rejected.

[72] 2. With regard to Article XXVIII (1) of the Constitution, I would point out that that provision of the Constitution contains a subjective right. Thus, if it were possible to establish a link between the initiation of the preliminary ruling procedure and the right of the parties to the dispute to a lawful judge, the court seised would be required, if requested by the party to the dispute, to initiate the preliminary ruling procedure without any discretion. However, unlike the right to a lawful judge, the parties to the dispute do not have the right to reference for a preliminary ruling as a matter of right. Thus, in my view, the element which would make the Court of Justice (one of its members) a court or tribunal with the status of a lawful judge in relation to the parties to the proceedings is missing in the context of the preliminary ruling procedure.

[73] The concept of the right to a lawful judge, as set out in the Decision, is defined in Section 8 (2) of the Courts Organisation Act as follows: "[a] lawful judge is a judge appointed in accordance with the rules of procedure in a court with material and territorial competence and acting on the basis of a pre-established criteria for the assignment of cases"; I do not consider

that this definition can be interpreted as applying to bodies outside the Hungarian court system.

Budapest, 10 November 2020

Dr. Tamás Sulyok, sgd.,
Chief Justice of the Constitutional Court
on behalf of Dr. László Salamon
Justice of the Constitutional Court
prevented from signing

Dissenting opinion of *Dr Imre Juhász*, Justice of the Constitutional Court

[74] I do not agree with either the operative part or the Reasoning for the Decision supported by the majority.

[75] 1. In its practice so far, in all the cases before it, including the constitutional complaints concerning the preliminary ruling, the Constitutional Court has consistently refrained from reviewing the decisions of the courts on questions of interpretation of law that are exclusively of no relevance to the legality and constitutional law. As a consequence of that practice, it should have rejected the petition in the present case as well, since the courts seised of the matter, including the Curia, which assessed the request for review in the judgement under review, had given detailed reasons for their decisions. No doubt has been raised as to the unconstitutionality of those decisions, nor, at least on the basis of the consistent decisions of the Constitutional Court to date, in my view has the dismissal of the action for damages raised any question of fundamental constitutional importance. The petitioner, hoping that the annulment of the review decision would open the way to a reversal of the decision unfavourable to him, himself states in his constitutional complaint that the Constitutional Court would have 'the opportunity to declare' in the context of the present proceedings that the Court of Justice is a lawful judge.

[76] The petitioner therefore called on the Constitutional Court to change its previous practice. The majority of the Constitutional Court, in the spirit of constitutional dialogue, having stretched the limits of Article 29 of the Constitutional Court Act, complied with this request and, by not conducting a separate admission procedure under Sections 55 and 56 of the Constitutional Court Act, acting under Section 31 (6) of its Rules of Procedure, and essentially anticipating the constitutional significance of the issue, decided, in my view incorrectly, to admit the complaint and consider it on the merits.

[77] 2. I am also concerned about the Reasoning of the majority Decision.

[78] 2.1 Although the majority decision deals with certain issues of the Constitutional Court's practice in relation to the right to a lawful judge and the obligation to state reasons, it does

not, however, address them in Part V of the Reasoning of the Decision (Reasoning [25] et seq.), it reaches a conclusion on these two elements of the right to a fair trial, the constitutional basis of which is not elaborated or justified in the majority decision: "The obligation to state reasons is of particular importance in this respect, since if the court does not fulfil this obligation, this may in itself give rise to a violation of the right to a fair trial and, in the context of the preliminary ruling procedure, may also indirectly affect the right of the parties to the proceedings to a lawful judge."

[79] From the obligation to state reasons already elaborated by the 2015 Court Decision (Reasoning [60]), the right to a lawful judge is brought to the fore in such a way that the majority decision did not first examine what is meant by "court" in this context under the Fundamental Law and how this positions the actual constitutional position of perhaps the two most important stakeholders in the present decision, the Court of Justice and the Constitutional Court. In Part V of the Reasoning of the majority Decision (Reasoning [25] et seq.), the recognition of the Court of Justice as a court is based, in short, on Article E of the Constitution, Article 267 TFEU and the (own) practice of the Court of Justice. In my view, however, 'the courts' are provided for in Articles 25 to 28 of the Fundamental Law and in the Courts Organisation Act (in particular, as regards the right to a lawful judge, in Sections 8 and 9 thereof), which has been adopted as the cardinal law for the implementation of these provisions. Nor can we ignore the criteria which the Constitutional Court itself has developed in its practice in relation to the courts.

[80] There can be no doubt: the court (organisational system) constituted by the Constitution is unquestionably a court, but Article 25 (7) allows other bodies to act and decide on certain disputes. In response to the question of which organisation can be considered a "court" on this basis, the Constitutional Court has developed a filter which is essentially a set of criteria. According to this, the body is considered a court if (1) it is established by law, (2) it carries out judicial activities in the context of which it applies legislation, (3) its procedure is regulated by law, (4) it is independent of the executive, (5) its procedure is not secret, (6) its decision is binding {Decision 21/2014 (VII. 15.) AB, Reasoning [36]}.

[81] 2.2 It follows directly from this that the right to a lawful judge cannot be linked to the preliminary ruling procedure (it is no coincidence that the majority decision itself only examines the fulfilment of the obligation to state reasons in the specific case, in the context of the constitutional complaint in question). The right to a lawful judge can only be interpreted in a court of law, and from the point of view of the party as the holder of this fundamental right, can only be challenged in a court of law by means of an appeal (as is the alleged or allegedly inappropriate application of the law). In the preliminary ruling procedure, it is not the party but the judge who decides whether or not to initiate a preliminary ruling procedure. Constitutionally, it is, and only that, that he is required to give reasons for his decision. However, the majority decision goes beyond this and makes the following observation:

[82] "From the petitioner's initial argument, according to which the court seised may refer questions of interpretation of EU law to the Court of Justice, it clearly follows from Article E (2) of the Fundamental Law and Article 267 TFEU that, if the court seised of the matter has in fact initiated a procedure for a preliminary ruling, the Court of Justice is also a lawful judge for the

purposes of its assessment. Since the preliminary ruling procedure is to be interpreted in the context of institutionalised cooperation between courts and tribunals and is not a substantive right of a party to a dispute, the right of the party to a lawful judge could not have been infringed by the judgement of the Curia." (Reasoning [28])

[83] I cannot accept this position, in my view a subjective decision of a national court cannot create, or deprive, a party of a fundamental right (since the right to a lawful judge is not considered as a subjective but as a fundamental right), nor can the fact whether the Court of Justice is or is not a lawful judge depend on such a court decision, which varies from time to time.

[84] 2.3 Finally, I also dispute the following statement in Part V of the majority decision:

[85] "The Constitutional Court notes that the above interpretation of the Fundamental Law also gives rise to the right of the Constitutional Court to initiate a preliminary ruling procedure, in particular if the case before it involves a risk of a restriction of the fundamental rights and freedoms under Article E (2) of the Fundamental Law or of a restriction of Hungary's inalienable right to dispose of its territorial unity, population, form of government and State organisation. The case law of the German Federal Constitutional Court [...] may be regarded as authoritative in this respect" (Reasoning [27]).

[86] This definition, albeit with an arbitrarily narrow interpretation and apparently only as regards the power of empowerment, in fact makes the Constitutional Court a court bound by Article 267 TFEU, which cannot in any event be derived from the Fundamental Law and may in future have the consequence that the Constitutional Court will ultimately have to decide whether it is defending the Fundamental Law or EU law. In my opinion, if the Hungarian Constitutional Court detects a threat to any of the subjects listed in the majority decision (e.g. territorial unit, population, etc.), it can only give the appropriate answer on the basis of the Fundamental Law. The fulfilment of this constitutional obligation cannot be subject to the preliminary ruling procedure of the Court of Justice.

[87] The majority decision departs from the basic premise that the Constitutional Court, in exercising its powers, must start from Article R (1) of the Fundamental Law, which is the basis of the legal system of Hungary.

[88] In view of this, I am of the firm opinion that the Hungarian Constitutional Court, as the supreme guardian of the constitutionality of the sovereign Hungarian State, cannot refer to the practice of other Member States' constitutional courts as a guide. I would like to emphasise that my categorical dismissal of the recognition of the "guiding" character by a majority decision does not mean that the principles, concepts and institutions developed in earlier decisions of a Member State's constitutional court, in so far as they are also in conformity with the Fundamental Law and can be derived from it, cannot be used in the cases assessed by the Constitutional Court.

[89] 3. In conclusion, the majority decision, in my opinion, with its flawed constitutional and logical reasoning, by arbitrarily linking the preliminary ruling procedure and the right to a lawful judge, raises the possibility that the Constitutional Court may not perform its function of

protecting the fundamental law in certain matters under Article 24 (1) of the Fundamental Law, but may become the executor of the decisions of the Court of Justice, even in violation of our national sovereignty.

Budapest, 10 November 2020

Dr. Tamás Sulyok, sgd.,
Chief Justice of the Constitutional Court
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