DECISION 3/2018. (IV. 20.) AB OF THE CONSTITUTIONAL COURT

The plenary session of the Constitutional Court, in the subject of constitutional complaints – with dissenting opinions by Justices dr. Béla Pokol and dr. András Varga Zs. – adopted the following

d e c i s i o n:

1 The Constitutional Court established: there is a lack of conformity with the Fundamental Law manifested in an omission, as the legislator failed to secure, by way of the Act CLXXXI of 2007 on the transparency of support provided from public funds, the transparency of the support provided to natural persons by the foundations established by the Hungarian National Bank and financed from public funds.

The Constitutional Court therefore calls upon the Parliament to meet its legislative duty by 30 September 2018.

2 The Constitutional Court hereby rejects the constitutional complaints aimed at establishing the lack of conformity with the Fundamental Law and annulling the judgement No. 2.Pf.20.123/2016/6/II of the Budapest-Capital Regional Court of Appeal and judgement No. 35.P.22.353/2015/10 of the Budapest-Capital Regional Court approved by the Budapest-Capital Regional Court of Appeal as well as the judgement No. 2.Pf.20.149/2016/7/II of the Budapest-Capital Regional Court of Appeal.

3 The Constitutional Court refuses the petitions aimed at establishing that the text "not falling under the scope of personal data" in Section 3 point 5 of the Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information is in conflict with the Fundamental Law and at the annulment of it.

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

R e a s o n i n g

I

[1] 1 The petitioner turned to the Constitutional Court on the basis of Section 27 of Act CLI of 2011 on the Constitutional Court (hereinafter: the ACC) with two constitutional complaints of similar content. With regard to the relation of the subject matter of the cases, the Constitutional Court consolidated the constitutional complaints and judged them in a single procedure on the basis of Section 58 (2) of the ACC.

[2] In the constitutional complaint first submitted, the petitioner asked the Constitutional Court to establish the lack of conformity with the Fundamental Law and to annul the judgement No. 2.Pf.20.123/2016/6/II of the Budapest-Capital Regional Court of Appeal and

the judgement No. 35.P.22.353/2015/10 of the Budapest-Capital Regional Court approved by the Budapest-Capital Regional Court of Appeal.

[3] In the second constitutional complaint submitted, the petitioner asked for establishing the lack of conformity with the Fundamental Law and annulling the judgement No. 2.Pf.20.149/2016/7/II of the Budapest-Capital Regional Court of Appeal.

[4] In the petition submitted alternatively on the basis of Section 26 (1) of the ACC, the petitioner asked for establishing that the text "not falling under the scope of personal data" in Section 3 point 5 of the Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information (hereinafter: "Information Act") is in conflict with the Fundamental Law and for the annulment of it.

[5] 2 In the case behind the first constitutional complaint, on 25 February 2015, the petitioner had filed request for data to the Pallas Athéné Domus Scientiae Foundation (hereinafter: defendant) founded by the Hungarian National Bank (hereinafter: MNB) on the basis of Section 28 (1) of the Information Act. In the request for data, the petitioner asked the defendant to provide the following information concerning the academic year 2014-2015:

- how many applications were received to each of the calls for applications?
- who participated in the evaluation of the applications, what kind of scoring system was used in the decision-making?
- who were the winners of the calls for applications and what were the amounts granted?
- what kind of undertakings did the winners make in consideration of receiving the amount awarded and when did they fulfil them (or, in case of pending procedures, when shall the time limit for performance expire)?
- what was the amount of the national bank's total expenditure for all the applications in the academic year 2014-2015 and what amount will be spent in the academic year 2015-2016?"

[6] In the reply provided on 5 March 2015, the defendant refused to provide the petitioner with the requested data of public interest.

[7] Due to the refusal of the data request, the petitioner brought an action on the basis of Section 31 of the Information Act for the judicial review of the refusal. On the basis of the action, the Budapest-Capital Regional Court proceeding in the case of first instance obliged the defendant to perform the data request, but it rejected the claim related to the performance of the data request aimed at receiving the personal data of the natural person applicants. Acting on the basis of appeals submitted by the defendant and the plaintiff, the Budapest-Capital Regional Court of Appeal then, by not affecting the part of the judgement of the court of first instance not subject to the appeal, approved the provision appealed against, thus the court of second instance did not find the plaintiff's appeal well-founded and did not oblige the defendant to disclose the names of the winner applicants. (The petitioner indicated in its constitutional complaint that it did not file a request for review against the judgement of final force.)

[8] 3 In the case behind the second constitutional complaint, on 25 February 2015, the petitioner had filed request for data to the Pallas Athéné Geopolitics Foundation (hereinafter:

defendant) founded by MNB on the basis of Section 28 (1) of the Information Act. In the request for data, the petitioner asked the defendant to provide the following information concerning the academic year 2014-2015:

- how many applications were received to each of the calls for applications?
- who participated in the evaluation of the applications, what kind of scoring system was used in the decision-making?
- who were the winners of the calls for applications and what were the amounts granted?
- what kind of undertakings did the winners make in consideration of receiving the amount awarded and when did they fulfil them (or, in case of pending procedures, when shall the time limit for performance expire)?
- what was the amount of the national bank's total expenditure for all the applications in the academic year 2014-2015 and what amount will be spent in the academic year 2015-2016?"

[9] In the reply provided on 5 March 2015, the defendant refused to provide the petitioner with the requested data of public interest.

[10] Due to the refusal of the data request, the petitioner brought an action on the basis of Section 31 of the Information Act for the judicial review of the refusal. Based on the action, in the judgement No. 5.P.22574/2015/10, the Budapest-Capital Regional Court as the court of first instance obliged the defendant to perform the request for data; nevertheless, the claim was in part rejected as the petitioner itself withdrew from the last question of the data request about the size of the National Bank's expenditure for the applications. Acting on the basis of appeal submitted by the defendant, the Budapest-Capital Regional Court of Appeal then, by not affecting the part of the judgement of the court of first instance not subject to the appeal, partly changed the provision appealed against and rejected the claim aimed at disclosing the names of the winner applicants. (The petitioner indicated in its constitutional complaint that it did not file a request for review against the judgement of final force.)

[11] 4 The petitioner claimed in both constitutional complaints that the challenged judgements violate the right to have access to data of public interest as granted in Article VI (2) of the Fundamental Law. According to the petitioner, a disproportionate restriction of the right to have access to data of public interest resulted from the judicial interpretation of the law according to which the full request for data was not to be entertained as it would have allowed the processing (accessing) of the applicants' personal data in a manner being in conflict with the Information Act. With regard to allowing no public access to the names of the winner applicants of the calls made by the defendant as an institution clearly managing public funds and performing a public duty, the petitioner challenged the allegation that these data were not qualified as data of public interest (data public on grounds of public interest) according to the Fundamental Law, the access to which may be restricted with reference to the right to the protection of personal data.

[12] 5 In both constitutional complaints, the petitioner alternatively requested the establishment that the text "not falling under the scope of personal data" in Section 3 point 5 of the Information Act was in conflict with the Fundamental Law and the annulment of it. According to the petitioner, this provision may hinder access to personal data as data of public interest without imposing an obligation on the data processor to weigh whether it is

actually justified to restrict the right to access data of public interest with reference to the right to the protection of personal data. Therefore, according to the petitioner, this provision of the Information Act is not compliant with Article 39 (2) of the Fundamental Law due to blocking the enforcement of accessing public data related to (awarding) public funds.

II

[13] 1 The affected provisions of the Fundamental Law:

"Article VI (3) Everyone shall have the right to the protection of his or her personal data, as well as to access and disseminate data of public interest."

"Article 39 (2) Every organisation managing public funds shall be obliged to publicly account for its management of public funds. Public funds and national assets shall be managed according to the principles of transparency and the purity of public life. Data relating to public funds and national assets shall be data of public interest."

[14] 2 The relevant provisions of the Information Act:

"Section 3 For the purposes of this Act:

[...]

2. *personal data* shall mean data relating to the data subject, in particular by reference to the name and identification number of the data subject or one or more factors specific to his physical, physiological, mental, economic, cultural or social identity as well as conclusions drawn from the data in regard to the data subject; [...]

5. data of public interest shall mean information or data other than personal data, registered in any mode or form, controlled by the body or individual performing state or local government responsibilities, as well as other public tasks defined by legislation, concerning their activities or generated in the course of performing their public tasks, irrespective of the method or format in which it is recorded, its single or collective nature; in particular data concerning the scope of authority, competence, organisational structure, professional activities and the evaluation of such activities covering various aspects thereof, the type of data held and the regulations governing operations, as well as data concerning financial management and concluded contracts;

6. data public on grounds of public interest shall mean any data, other than public information, that are prescribed by law to be published, made available or otherwise disclosed for the benefit of the general public; [...]"

"Section 26 (1) Any person or body attending to statutory State or municipal government functions or performing other public duties provided for by the relevant legislation (hereinafter jointly "body with public service functions") shall allow free access to the data of public interest and data public on grounds of public interest under its control to any person, save where otherwise provided for in this Act.

(2) The name of the person undertaking tasks within the scope of responsibilities and authority of the body undertaking public duties, as well as their scope of responsibilities, scope of work, executive mandate and other personal data relevant to the provision of their responsibilities to which access must be ensured by law qualify as data public on grounds of public interest. Personal data public on grounds of public interest may be disseminated in compliance with the principle of purpose limitation. Provisions on the disclosure of personal data public on the grounds of public interest shall be regulated by Annex 1 of this Act and the specific Act on the status of the persons undertaking public duties."

"Section 27 (3) Any data that is related to the central budget, the budget of a local government, the appropriation of European Union financial assistance, any subsidies and allowances in which the budget is involved, the management, control, use and appropriation and encumbrance of central and local government assets, and the acquisition of any rights in connection with such assets shall qualify as data public on grounds of public interest, and as such shall not qualify as business secrets, nor shall any data specified by a separate Act – in the public interest – as information to have access to or to be disclosed. Such disclosure, however, shall not result in access to any data, in particular to protected know-how, that, if made public, would be unreasonably detrimental for the business operation, provided that withholding such information shall not interfere with the availability of, and access to, information of public interest.
(3a) Any natural or legal person, or unincorporated business association entering into a financial or business relationship with a person belonging to the sub-system of state finances shall, upon request, provide any member of the general public with information on the data public on grounds of public interest under paragraph (3) and related to this legal relationship. The obligation referred to above may be fulfilled by the public disclosure of data public on grounds of public interest, or, if the information requested had previously been disclosed electronically, by way of reference to the public source where the data is available."

[15] 3 The relevant provision of the Act CLXXXI of 2007 on the Transparency of Subsidies Provided from Public Funds (hereinafter: ATP):

"Section 1 (1) The scope of this Act shall cover support provided in kind or in pecuniary form on the basis of an individual decision, by way of announcing a call for applications or without a call for applications, awarded to natural persons not belonging to state finances, legal persons, other unincorporated bodies – not including condominiums – (hereinafter jointly: person"), originating from
a) the sub-systems of state finances,
b) sources of the European Union,
c) other programs financed on the basis of an international agreement."

III

[16] The Constitutional Court first examined whether the constitutional complaints comply with the criteria laid down in the ACC on the admissibility of constitutional complaints.

[17] In accordance with Section 27 of the ACC, the constitutional complaint may be filed, in line with Section 30 (1) of ACC, within sixty days of receipt of the contested decision, to the court that proceeded with the case on first instance as regulated in Section 53 (2) of the ACC.

[18] On 13 June 2016, the final judgement No. 2.Pf.20.123/2016/6/II of the Budapest-Capital Regional Court of Appeal was served on the legal representative of the petitioner. As notified by the court of first instance, the petitioner mailed its constitutional complaint to the court of first instance, on 12 August 2016, thus being within the time limit specified in Section 30 (1) of the ACC.

[19] On 11 July 2016, the final judgement No. 2.Pf.20.149/2016/7/II of the Budapest-Capital Regional Court of Appeal was served on the legal representative of the petitioner. As notified by the court of first instance, the petitioner mailed its constitutional complaint to the court of first instance, on 8 September 2016, thus being within the time limit specified in Section 30 (1) of the ACC.

[20] Both constitutional complaints contained the mandatory petitionary elements set forth in Section 52 (1b) of the ACC. In both petitions, the petitioner:
– indicated Section 27 of the ACC justifying the competence of the Constitutional Court to judge upon the petition;
– indicated the judicial decisions to be examined by the Constitutional Court (judgement No. 2.Pf.20.123/2016/6/II of the Budapest-Capital Regional Court of Appeal and the judgement No. 35.P.22.353/2015/10 of the Budapest-Capital Regional Court as well as the judgement No. 2.Pf.20.149/2016/7/II of the Budapest-Capital Regional Court of Appeal) and it also indicated the challenged provision (the text "not falling under the scope of personal data" in Section 3 point 5 of the Information Act);
– indicated the violation of the fundamental right granted in the Fundamental Law [Article VI (2)];
– explained the essence of the violation of the fundamental right to access data of public interest as enshrined in the Fundamental Law and in this respect provided arguments about why the judicial decisions and the challenged provision are in conflict with the Fundamental Law;
– provided an explicit request to annul the challenged judgements and the challenged provision.

[21] The petitioner exhausted all available legal remedies. The petitioner qualifies as an entitled person under Section 26 (1), Section 27 and Section 51 (1) of the ACC, the petitioner is clearly an affected person as a litigant party in the challenged court judgements. The two final judgements challenged are decisions passed in the merits of the relevant cases.

[22] According to Section 29 of ACC, the Constitutional Court shall admit the constitutional complaint, if a conflict with the Fundamental Law significantly affects the judicial decision, or the case raises constitutional law issues of fundamental importance.

[23] The petitions alleging the violation of the right to access data of public interest as regulated in Article VI (3) of the Fundamental Law raise a question of fundamental constitutional importance that affect the merits of the judicial judgements on reviewing the

refusal of the data request. It is to be examined on the basis of the petitions whether the right to have access to data of public interest is violated if, according to the court, the data request may be rejected by referring to the fact that the requested data are personal data. It should be examined in particular in this respect whether the the right to have access to data of public interest is violated when the court fails to resolve in line with the Fundamental Law the conflict between this fundamental right and the right to the protection of personal data. It is a question to be examined whether a fundamental right may be restricted against another conflicting fundamental right without any weighing to guarantee a proportionate restriction.

[24] On the basis of the constitutional complaints, the Constitutional Court should in particular assess with regard to the above questions if the challenged judicial decisions violate the petitioner's fundamental right enshrined in the Fundamental Law. The Constitutional Court has to pass a decision on the basis of the petitions about a conflict with the Fundamental Law influencing the merits of the judicial decision as the challenged judicial interpretation of the law – due to which the petitioner asked the establishment of the conflict with the Fundamental Law – forms an important central element of the challenged judgements.
[25] Based on the foregoing, the Constitutional Court admitted the constitutional complaints.

IV

[26] The constitutional complaints are unfounded.

[27] 1 In line with Article 24 (2) *d)* of the Fundamental Law and Section 27 of ACC, on the basis of a constitutional complaint, the Constitutional Court examines the conformity of the challenged judicial decision with the Fundamental Law. The Constitutional Court shall review the judicial decisions by taking into account Article 28 of the Fundamental Law. According to Article 28 of the Fundamental Law, in the course of the application of law, courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law. As pointed out by the Constitutional Court several times, "the Constitutional Court may review the judgements of the courts [...] if they violate the boundaries of interpretation set by the Fundamental Law, thus rendering the judicial decision to be in conflict with the Fundamental Law" {Ruling 3119/2015. (VII. 2.) AB, Reasoning [22].; Ruling 3031/2016. (II. 23.) AB, Reasoning [19]; Decision 16/2016. (X. 20.) AB, Reasoning [16]; Decision 17/2016. (X. 20.) AB, Reasoning [25].}

[28] 2 In the present procedure carried out on the basis of Section 27 of ACC, the Constitutional Court examined the challenged judicial decisions' conformity with Article VI (2) of the Fundamental Law with respect to the judicial interpretation of the law found in the decisions. According to the petitioner, the challenged final judgements are in conflict with Article VI (2) of the Fundamental Law with regard to the following judicial interpretation of the law.

[29] In the judgement No. 2.Pf.20.123/2016/6/II of the Budapest-Capital Regional Court of Appeal – by referring to the judgement of first instance – the court argued that, "on the basis of the definitions found in Section 3 point 5, Section 3 point 2 and Section 3 point 6 of the

Information Act, the data of the natural person applicants were not data to be disclosed as neither data of public interest nor data public on grounds of public interest. The court established, by taking into account the character of the organ performing pubic duty and the purpose of using the funds, that the protection of the applicants' personal data enjoys privacy over the right to the transparency of using public funds. Therefore the court empowered the defendant to render unrecognisable the personal data of natural person applicants and it rejected the action aimed at disclosing the names of the winner applicant persons." Thus the court held that the data of the natural person applicants were neither data of public interest nor data public on grounds of public interest, therefore it did not consider Section 26 (1) of the Information Act to be applicable to secure access to such data.

[30] In the judgement No. 2.Pf.20.149/2016/7/II, the Budapest-Capital Regional Court of Appeal held, on the basis of Section 3 point 5 of the Information Act that "according to this statutory provision, personal data do not form part of the scope of data of public interest, thus no personal data may ever be considered as a data of public interest. According to Section 3 point 6 of the Information Act, data public on grounds of public interest shall mean any data, other than public information, that are prescribed by law to be published, made available or otherwise disclosed for the benefit of the general public. Therefore, in the absence of the affected person's consent, personal data may only be disclosed on the basis of a statutory provision as data public on grounds of public interest. Thus, according to the above provisions, public data are in general public and their disclosure may be restricted in the cases specified by the law, while personal data are in general not public but an Act of Parliament may order them to be disclosed. Therefore data public on grounds of public interest may also include personal data." However, on the basis of Section 26 (2) and Section 27 (3a) of the Information Act as well as according to Section 1 (1) of the ATP, the court concluded that "in the absence of a concrete authorisation by the law, the names of the winner applicants may not be disclosed as data public on grounds of public interest. The names of the natural persons who received support from the defendant shall not become data public on grounds of public interest, irrespectively to the fact that other organs performing public duties in the sub-systems of state finances have to disclose the names of winner applicants as beneficiaries of public funds. According to the data principle, the defendant bound to disclose a document containing public data may apply, with regard to personal data, the provision on masking as specified in Section 30 (1) of the Information Act."

[31] 3 The petitioner challenged the above interpretation of the law by holding that the personal data challenged in the action (the names of the natural person winner applicants receiving support from the defendant that performs a public duty and manages public funds) should have been qualified as public data (data public on grounds of public interest) on the basis of Article VI (2) of the Fundamental Law, therefore it should not have been allowed to block public access to such data by reference to the protection of personal data.

[32] Article VI (3) of the Fundamental Law, quoted by the petitioner, grants as a fundamental right the right to access and disseminate data of public interest. According to one of the general rules laid down in Article VI (3) of the Fundamental Law, everyone shall have the right to access and disseminate data of public interest, therefore all data of public interest are public, and the enforcement of the principle of openness as a general rule requires a conduct on behalf of the data processor – either in a proactive manner or on the basis of a data

request – aimed at providing access to the data of public interest. {Decision 21/2013. (VII. 19.) AB, Reasoning [35]} Decision 2/2014. (I. 21.) AB (hereinafter: CCDec 1), Reasoning [41]}

[33] The Constitutional Court examined in its Decision 8/2016. (IV. 6.) AB (hereinafter: CCDec 2) and in the Decision 3077/2017. (IV. 28.) AB (hereinafter: CCDec 3) whether the subject matter of the fundamental right under Article VI (2) of the Fundamental Law can be established solely on the basis of the Fundamental Law. In this context, the Constitutional Court pointed out the following: "according to Article VI (2) of the Fundamental Law, everyone shall have the right to to access and disseminate data of public interest. The scope of data of public interest is defined in general terms in Section 3 point 5 of the Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information (hereinafter: "Information Act"), developed – according to the preamble of the Act – »for the purpose of implementing the Fundamental Law, on the basis of Article VI of the Fundamental Law«. At the same time, in the chapter entitled »Public funds« [Article 39 (2)], the Fundamental Law explicitly lays down the principles of public accountability, transparency and the purity of public life with regard to the management of public funds. As a guarantee, the Fundamental Law clearly states that the data relating to public funds and national assets shall be data of public interest. Accordingly, the Fundamental Law itself declares that a special scope of data qualify as data of public interest – irrespectively to the person, the organ-type, the legal form or the acitvity of the data processor." {CCDec 2, Reasoning [17]; CCDec 3, Reasoning [28]}.

[34] As explained by the Constitutional Court in CCDec 3: "It is beyond doubt with regard to the data under Section 3 points 5 and 6 of the Information Act (data of public interest and data public on grounds of public interest) that providing access to these data serves the enforcement of the fundamental right laid down in Article VI (2) of the Fundamental Law. Therefore, when it can be established that the lawmaker shrinks, by way of interpreting the law, the scope of such data – classified according to Section 3 points 5 and 6 of the Information Act as data of public interest and data public on grounds of public interest – (by taking into account other conditions not regulated in the Information Act), resulting in an unjustified restriction of the freedom of information, this interpretation of the law shall cause the violation of the fundamental right enshrined in Article VI (2) of the Fundamental Law" (Reasoning [30]).

[35] At the same time, CCDec 3 also established that: „In a case affecting the restriction of the right to access data of public interest, the Constitutional Court shall only review the challenged judicial decision in terms of its constitutionality. Therefore, in the course of the review of the constitutionality of the judicial decision, it shall not take a stand on whether or not the concrete data requested to be disclosed do qualify as data of public interest and data public on grounds of public interest. Indeed, this is a judicial task that requires the application of Section 3 points 5 and 6 of the Information Act, i.e. the statutory definition of data of public interest and data public on grounds of public interest, and in case of legal dispute, the court is entitled to perform this task" (Reasoning [27]).

[36] Accordingly, neither was the Constitutional Court empowered in the present case to take a stand on whether or not the concrete data requested by the petitioner to be disclosed (the data of the natural persons who received support from public funds through the grant

schemes managed by defendant financed from public funds) do qualify as data of public interest and data public on grounds of public interest. This question should be adjudicated by the courts. [It would fall into the competence of the Constitutional Court if the task to be completed was the interpretation, on the basis of Article 39 (2) of the Fundamental Law, of the concept of "data relating to public funds and national assets", i.e. the types of data that the Fundamental Law qualifies as data of public interest in this scope. It is also within the Constitutional Court's scope of competence to interpret, on the basis of Article 39 (2) of the Fundamental Law, what are the data (of public interest and data public on grounds of public interest) to which access must be provided by the organisation managing public funds in order to give public account of its management of public funds. However, the question raised in the basic case was the accessibility of the personal data of natural persons who are winners of the applications for grants of the defendant organisations financed from public funds.] Thus the only question the Constitutional Court could examine about the judicial decision was whether the judicial decision violated or not the scope of interpretation set by the Fundamental Law, this way restricting access to the data of public interest (data public on grounds of public interest) and the enforcement of the freedom of information. However, contrary to what has been claimed by the petitioner, this question could not be answered in the context of the challenged judicial decisions.

[37] The conditions of accessing personal data are in fact set by the Act of Parliament itself and not by the judiciary. Section 3 point 5 of the Information Act *ipso facto* excludes personal data from the scope of data of public interest, thus blocking any access to personal data as data of public interest. Neither can the restriction of the enforcement of the freedom of information through the court's interpretation of the law may be established with regard to the accessibility of data public on grounds of public interest according to Section 3 point 6 of the Information Act. According to the Information Act, data public on grounds of public interest shall mean any data, other than public information, that are prescribed by law to be published, made available or otherwise disclosed for the benefit of the general public. Thus personal data (not classified as data of public interest) may be disclosed in the public interest, however, it needs to be ordered in an Act of Parliament. The proceeding court concluded accordingly that "in the absence of a concrete authorisation by the law, the names of the winner applicants may not be disclosed as data public on grounds of public interest." This conclusion is based on the information Act itself. It is, indeed, a fundamental statutory guarantee of the protection of personal data that personal data may only be processed if the data subject agrees thereto, or if it is ordered by an Act of Parliament (or by a local government decree on the basis of the authorisation of an Act of Parliament, within the scope defined therein) for a purpose based on public interest [Section 5 (1) of the Information Act]. Therefore, contrary to the claims made in the petition, without any statutory regulation ordering the disclosure of the data, the court was not authorised to assess whether or not it had been justified to provide access to the personal data of the winners of the defendant's grant application, thus neither had the court any margin of discretion to decide to which personal data of the winner applicants should access be provided as a proportionate intervention for the purpose of granting the right to access data of public interest.

[38] Based on all the above, the restriction of the enforcement of the freedom of information through the court's interpretation of the law and the resulting violation of Article VI (2) of the

Fundamental Law could not be established. The Constitutional Court therefore rejected the constitutional complaints aimed at establishing the lack of conformity with the Fundamental Law and annulling the judgement No. 2.Pf.20.123/2016/6/II of the Budapest-Capital Regional Court of Appeal and judgement No. 35.P.22.353/2015/10 of the Budapest-Capital Regional Court approved by the Budapest-Capital Regional Court of Appeal as well as the judgement No. 2.Pf.20.149/2016/7/II of the Budapest-Capital Regional Court of Appeal.

V

[39] The Constitutional Court established above that without any statutory regulation ordering the disclosure of the data, in an action proceeding according to Section 31 (1) of the Information Act, there is no room for judicial discretion to decide whether or not to disclose – for the purpose of providing the transparency of supports from public funds – the personal data of the winners of the defendant's grant application financed from public funds, who thus qualify as natural persons supported from public funds.

[40] In accordance with Section 5 (1) *b)* of the Information Act, securing the accessibility of personal data is the lawmaker's duty.

[41] If the Constitutional Court, in its proceedings conducted in the exercise of its competences, establishes an omission on the part of the lawmaker that results in violating the Fundamental Law, it shall, in accordance with Section 46 (1) of the ACC, call upon the organ that committed the omission to perform its task and set a time-limit for that. An omission on the part of the lawmaker shall be established if the legal regulation's essential content that can be derived from the Fundamental Law is incomplete [Section 46 (2) *c)* of the ACC].

[42] According to Article I (1) of the Fundamental Law, the respect and protection of fundamental rights is a "primary obligation of the State". This duty is not exhausted by the obligation of the State to refrain from violating the fundamental rights, but includes the obligation to provide for the conditions necessary for the enforcement of the fundamental rights.

[43] As laid down by the Constitutional Court in the Decision 3056/2015. (III. 31.) AB, in the Fundamental Law, the fundamental rights connected to the protection of personal data and to the disclosure of data of public interest "can be found in the same systematic unit, in paragraphs (2) and (3) of Article VI". The Constitutional Court emphasized that "the protection of personal data clearly serves the purpose of enforcing the right to having one's privacy respected as enshrined in Article VI (1)." In this respect, the Constitutional Court also pointed out that, as appropriate, "there is a constitutional collision related to the enforcement of the fundamental rights affected by Article VI of the Fundamental Law" and this collision can be resolved by way of appropriately "comparing and examining with scrutiny" these two rights. The Constitutional Court also noted that in some case providing the right to the protection of personal data restricts the enforcement of "access to data in the public interest". (Reasoning [7]–[9]). Therefore the lawmaker has to adopt regulations securing the balanced enforcement of fundamental rights to the greatest possible extent.

[44] The Consitutional Court took a position in the Decision 3026/2015. (II. 9.) AB (hereinafter: CCDec 4) on the following: "Article 39 (2) contains concrete provisions, in line with the content of Article VI, about the management of public funds and national assets, by stating that 1/ every organisation managing public funds shall be obliged to publicly account for its management of public funds, 2/ public funds shall be managed according to the principles of transparency and the purity of public life, 3/ data relating to public funds and national assets shall be data of public interest" (Reasoning [28]).

[45] Accordingly, in the chapter "Pubic funds", the Fundamental Law "grants enhanced protection to public funds and the national assets, and sets guarantees in the interest of their responsible and transparent management" (see the presenter's reasoning). Indeed, one of the important guarantee provisions affecting the management of public funds is that: "public funds and national assets shall be managed according to the principles of transparency and the purity of public life." Section 27 (3a) of the Information Act may also be regarded – among others – as an implementing regulation of the requirement under Article 39 (2) of the Fundamental Law as it binds any natural or legal person, or unincorporated business association entering into a financial or business relationship with a person belonging to the sub-system of state finances – i.e. with regard to any relation that affects the management of public funds – to provide information (CCDec 4, Reasoning [29]).

[46] As established by the Constitutional Court in CCDec 2, "beyond doubt, the foundations of MNB manage public funds and perform a public duty 1/ due to the source of the assets allocated (public funds received from MNB) and 2/ as they can only be established »in accordance with the duties and the primary objective of MNB« [Section 162 (2) of the Act on the National Bank]. The management of public funds is independent from the question whether or not the founder has any direct influence, in the legal sense, regarding the utilisation of the foundation's assets" (Reasoning [27]).

[47] The requirement under Article 39 (2) of the Fundamental Law is only deemed to be properly enforced, if the organisations, such as the defendants of the present basic case, that – as established in the CCDec 2 – "manage public funds and perform a public duty", are obliged to disclose to the general public the information related to their management of public funds. In the basic case, the subject matter of the debate was the accessibility of the personal data of the natural persons supported from public funds as the winners of the grant applications of the above organisations. The proceeding court referred to the ATP, which was not applicable to the defendants as it only contains reporting and disclosure rules related to the support provided in kind or in pecuniary form on the basis of an individual decision, by way of announcing a call for applications or without a call for applications, awarded to natural persons not belonging to state finances, legal persons, other unincorporated bodies – not including condominiums –, originating from the sub-systems of state finances, from sources of the European Union, or from other programmes financed on the basis of an international agreement. In accordance with Section 1 (1) of the Act, defining its personal scope, the reporting and disclosure provisions of the ATP do not guarantee the transparency of the supports provided by the foundations established by the National Bank of Hungary and financed from public funds, although, in line with Article 39 (2) of the Fundamental Law, securing the transparency and the purity of public life is a general requirement in the protection of public funds.

[48] Based on the above, it is concluded that, in contrast with Article 39 (2) of the Fundamental Law, by adopting the ATP, the lawmaker failed to provide for the transparency of the supports granted by the foundations established by the MNB and financed from public funds as well as the accessibility of the data on those who received support from this source.

[49] With account to the above, the Constitutional Court – acting *ex officio* – established the violation of Article 39 (2) of the Fundamental Law, manifested in an omission, and called upon the Parliament to meet its legislative duty by 30 September 2018. In the course of performing its duty, the lawmaker shall act in accordance with Article I (1) to (3) of the Fundamental Law and to enforce the requirement under Article 39 (2) of the Fundamental Law in a manner to guarantee that the right to the protection of personal data is only restricted to the extent absolutely necessary and in proportion with the desired objective.

VI

[50] In both constitutional complaints, the petitioner alternatively requested the establishment that the text "not falling under the scope of personal data" in Section 3 point 5 of the Information Act was in conflict with the Fundamental Law and the annulment of it. According to the petitioner, this provision of the Information Act is not compliant with Article 39 (2) of the Fundamental Law due to blocking the enforcement of accessing public data related to (awarding) public funds.

[51] The Fundamental Law does not limit the constitutional complaint procedure to the review and the annulment of laws that violate a right granted in the Fundamental Law in narrow sense: the Constitutional Court shall, on the basis of a constitutional complaint, review the conformity with the Fundamental Law of any law applied in a particular case, and it annuls any law or any provision of a law which conflicts with the Fundamental Law [Article 24 (2) *c)*, paragraph (3) *a)*].

[52] However, in accordance with the ACC and the case law of the Constitutional Court, a constitutional complaint is a legal remedy: according to Section 26 (1) and (2) as well as Section 27 of the ACC, the person or organisation affected in the concrete case can only turn to the Constitutional Court if his or its right guaranteed in the Fundamental Law has been violated [Section 26 (1) *a)*, paragraph (2) *a)* and Section 27], {Decision 3367/2012. (XII. 15.) AB, Reasoning [13]}. Therefore, as a general rule, the relation with a right guaranteed in the Fundamental Law is a precondition of admitting a constitutional complaint. It is also reflected in Section 52 (1b) *b)* of the ACC, according to which, in the case of a constitutional complaint, the substance of the violation of the right guaranteed by the Fundamental Law shall be indicated among the reasons for initiating the proceedings.

[53] The petitioner indicated Article VI (2) of the Fundamental Law in general as the legal basis of its application incorporated in the constitutional complaint. However, the claims made in the petitions for the review of the law only contained a detailed reasoning about why – in the opinion of the petitioner – the challenged provision was in conflict with the last sentence of Article 39 (2) of the Fundamental Law. Nevertheless, the petitioner failed to explain why the statutory exclusion of personal data from the definition of data of public

interest violates the right to have access to data of public interest as granted in Article VI (2) of the Fundamental Law. [4] Article 39 (2) of the Fundamental Law – quoted by the petitioner – is not a fundamental right, the violation of this provision is not a due ground to justify a constitutional complaint; however, the petitions failed to contain any explicit and reasoned request to establish the violation of a fundamental right in the context of the text "not falling under the scope of personal data" in Section 3 point 5 of the Information Act. Therefore, the Constitutional Court rejected the constitutional complaints in this respect.

VII

[54] The publication of this decision of the Constitutional Court in the Hungarian Official Gazette is based upon the second sentence of Section 44 (1) of the ACC.

Dr. Tamás Sulyok,
President of the Constitutional Court

Dr. István Balsai,
Jusctice of the Constitutional Court

Dr. Egon Dienes-Oehm,
Jusctice of the Constitutional Court

Dr. Ildikó Hörcherné dr. Marosi,
Jusctice of the Constitutional Court

Dr. Béla Pokol,
Jusctice of the Constitutional Court

Dr. Balázs Schanda,
Jusctice of the Constitutional Court

Dr. Marcel Szabó,
Jusctice of the Constitutional Court

Dr. Mária Szívós,
Jusctice of the Constitutional Court

Dr. Tamás Sulyok,
President of the Constitutional Court,
on behalf of
Dr. Ágnes Czine
Jusctice of the Constitutional Court unable to sign

Dr. Attila Horváth,
Jusctice of the Constitutional Court

Dr. Imre Juhász,
Jusctice of the Constitutional Court

Dr. László Salamon,
Jusctice of the Constitutional Court

Dr. István Stumpf,
Rapporteur Jusctice of the Constitutional Court

Dr. Péter Szalay,
Jusctice of the Constitutional Court

Dr. András Varga Zs.,
Jusctice of the Constitutional Court

Dissenting opinion by *Dr. Béla Pokol* Jusctice of the Constitutional Court

[55] To address the problem of the disclosure of data of public interest raised in the basic case of the petitioner, the decision established the existence of an omission and rejected the

part of the petition, made on the basis of Section 26 (1) of the ACC, for a mosaic-like annulment, also rejecting, as a consequence, the annulment of the challenged judicial judgements. However, this conclusion of the Constitutional Court is reached by sharply refusing the possibility of linking Article VI (2) – as the primary basis of the petition – with Article 39 (2). After making this distinction, the decision states – as a deficiency of the petition – that it "only contained a detailed reasoning about why – in the opinion of the petitioner – the challenged provision was in conflict with the last sentence of Article 39 (2) of the Fundamental Law. Nevertheless, the petitioner failed to explain why it violates the right to have access to data of public interest as granted in Article VI (2) of the Fundamental Law." (Reasoning [53]) In my opinion, the petitioner did make a link between the two provisions of the Fundamental Law and therefore the objection made in the decision is unfounded: "Article VI (2) of the Fundamental Law grants the right to have access to data of public interest and Article 39 (2) *expressis verbis* declares any data on public funds to be data of public interest." (Petition, point 32).

[56] Accordingly, I hold – in contrast with the decision – that when the content of a fundamental right is explored, it may be evaluated together with other provisions of the Fundamental Law (with the relevant values of the Fundamental Law found in the "Foundation" part or the provisions contained in the part on the State organisation), as it has been actually admitted many times by the Constitutional Court in its case law. I hold that this time, too, it should have been done and we should have accepted the relevant arguments of the petitioner.

[57] In my standpoint, the part of the petition aimed at a mosaic-like annulment should have been examined on the merits and the requested provision of the Act should have been annulled on the basis of the petition. Consequently, these changes in the holdings of the decision would have resulted in the annulment, in line with the petitioner's request, of the judicial decisions based on the relevant provisions.

Budapest, 10 April 2018.

Dr. Béla Pokol
Jusctice of the Constitutional Court

Dissenting opinion by *Dr. András Varga Zs.* Jusctice of the Constitutional Court

[58] I disagree with point 1 of the holdings of the majority decision.

[59] The reasoning of the holdings provides detailed arguments why the access to data of public interest results – regarding the data raised in the case – from Article VI (2) of the Fundamental Law. I could only support this reasoning if the relevant provision of the Fundamental Law was only about data of public interest. However, Article VI (2) and (3) also provides for the protection of personal data, indeed, it links the right to the protection of personal data with the right to have access to data of public interest. The case law of the Constitutional Court also reflects the interrelated interpretation of the two fundamental rights.

[60] The omission on behalf of the lawmaker could have only been established in the context of the accessibility of data of public interest after clarifying (at least with regard to the scope of data raised in the case) the mutual relation of the two rights. The majority decision failed to perform this clarification and – contrary to its previous judicial practice – it emphasized one-sidedly the accessibility of data of public interest, by totally neglecting the constitutional obligation to protect personal data.

[61] I cannot support this solution, as the arguments laid down in the reasoning may also be applied with regard to other scopes of data, thus any benefit received from public funds (pension, healthcare, education, remuneration) shall qualify as data of public interest. This would empty out the content of the right to the protection of personal data with regard to significant scopes of data.

Budapest, 10 April 2018.

Dr. András Varga Zs.
Jusctice of the Constitutional Court