DECISION 3069/2019 (IV. 10.) OF THE CONSTITUTIONAL COURT

on establishing the conflict with the Fundamental Law of the judgement No. Pfv.IV.21.749/2016/9 of the Curia, and annulling it

The plenary session of the Constitutional Court, in the subject of a constitutional complaint – with concurring reasoning by Justice *dr. László Salamon* and with dissenting opinion by Justice *dr. Béla Pokol* – adopted the following

d e c i s i o n:

The Constitutional Court states that the judgement No. Pfv.IV.21.749/2016/9 of the Curia is in conflict with the Fundamental Law, therefore the Constitutional Court annuls it.

R e a s o n i n g

I.

[1] 1 By way of its legal representative (Law Office of Dr. Dániel Karsai, 1056 Budapest, 10 Nyáry Pál utca V/1, represented by: dr. Dániel András Karsai attorney-at-law), the petitioner submitted a constitutional complaint to the Constitutional Court.

[2] 1.1 In the complaint submitted on the basis of Section 27 of the Act XXXII of 2011 on the Constitutional Court (hereinafter: the ACC) the petitioner initiated stating the conflict with the Fundamental Law with regard to the judgement No. Pfv.IV.21.749/2016/9 of the Curia and the annulment of the judgement, with reference to the violation of Article VI (2) (right to access data of public interest) and Article XXVIII (1) of the Fundamental Law (right to a fair court trial).

[3] According to the basic facts of the case underlying the constitutional complaint, the petitioner requested the court – after the refusal of performing its request for data of public interest and the failure of the controller to obey the notice made by the National Authority for Data Protection and Freedom of Information (hereinafter: NAIH) – to bind the Curia to disclose the following data related to the opinions obtained on the basis of Section 36 (1) of the Act CLXI of 2011 on the Organisation and the Administration of Courts (hereinafter: AOAC) in the context of the preparation of the uniformity of the civil law decision No. 6/2013: "1. the name of the organisations, persons invited to provide opinions; 2. the name of the organisations, persons who provided opinions; 3. in how many and in what questions did the defendant request opinions; 4. the copy of the original recorded opinions of those who provided an opinion; 5. the name of the judges who provided opinions to the contrary or dissents with respect to the decision 6/2013 PJE".

[4] The Budapest-Capital Regional Court acting as the court of first instance rejected the action with its judgement No. 70.P.24.522/2015/4. As laid down in the reasoning of the judgement, in line with the Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information (hereinafter: "Information Act"), the requested data are data of public interest, but according to Section 27 (2) *g)* of the Information Act, the right to access data of public interest or data accessible on public interest grounds may be restricted by an Act, if considered necessary for the purposes of court proceedings or administrative authority procedures. Section 37 (1) of the AOAC provides that sitting of the uniformity of the law council shall not be public, consequently, the materials drafted for preparing the decision-making are not public either. As held by the court, due to the special provisions of the AOAC, Section 27 (5) to (6) of the Information Act (the rules of access to the data that serve the foundation of the decision) shall not be applicable in the case.

[5] With its judgement No. 32.Pf.20.510/2016/6-II, the Budapest-Capital Regional Court of Appeal partly changed this decision and it ordered the Curia to disclose the data under points 1 to 4. (With respect to the claim under point 5, in the absence of an appeal, the decision of first instance has become final, see the judgement No. Pfv.IV.21.749/2016/9 of the Curia, Reasoning [32]). The court of second instance argued that Section 37 (1) of the AOAC is a provision applicable only to the sitting of the uniformity of law council, therefore, in the absence of an explicit restrictive rule, other parts of the procedure, including the data generated during the preparatory works may be accessed without restriction. The court of second instance pointed out in the context of Section 27 (5) to (6) of the Information Act that the defendant argued only generally and without indicating or proving concrete facts that the requested opinions serve the purpose of providing foundations for future decisions. With a detailed reasoning, the court refused to accept the arguments about the alleged danger posed by the access to the data with regard to the lawful order of operation or the performance of the duties and powers of the organ performing public duties free from undue external influences, in particular, the free expression, during the preparation of the decisions, of the position of the party generating the data. It stated, on the one hand, that every judicial forum should expect that its decisions may induce anger, and on the other hand it held that the arguments about the potential reluctance of the drafters of professional materials to be ready to assist the defendant in the future, if their identity and their opinion were revealed, is unfounded. As the defendant has not promised confidentiality, the parties who had provided opinion could expect on due ground that the fact and the result of their contribution might be disclosed. Finally, the court of second instance noted in principle, that the defendant had made only a brief remark, without indicating any concrete fact or evidence, about processing personal data in the context of the opinions or about the existence of any works protected by copyright among the data requested. However, in the case of persons acting on behalf of state bodies or social organisations, a reference to the protection of personal data would be unfounded, and copyright in itself does not prevent access to the data of public interest.

[6] According to the judgement No. Pfv.IV.21.749/2016/9 of the Curia acting in the scope of

review, the information to be disclosed are the names of the organisations invited to provide opinions as well as the data on how many and in what questions had the defendant requested opinions before adopting the uniformity decision. The Curia shared the view of the court of second instance regarding the question that the provision on the closedness of the uniformity of law council shall not justify the refusal of the disclosure of the external opinions obtained in the uniformity of the law procedure. The provisions restricting the publicity of data of public interest should be interpreted in the narrow sense, therefore, the refusal would have required an explicit and clear statutory provision on the basis of Section 27 (2) *g)* of the Information Act, also indicating the data type (judgement No. Pfv.IV.21.749/2016/9 of the Curia, Reasoning [39]). In the case of the organisations requested to provide opinions, there is no ground to assume that they would or could reject the official invitation received from the Curia, or that their opinion would be influenced by their fear from a potential reaction (judgement No. Pfv.IV.21.749/2016/9, Reasoning [44]).

[7] However, with regard to accessing the content of the opinions and with respect to the names of the natural persons invited to provide (and providing) opinions (claims No. 1 and 2), the Curia's conclusions were different from that of the court of second instance (claim No. 4). On the one hand, according to the Curia, "the name of the natural persons invited to provide (and providing) opinions are personal data beyond doubt [Section 3 point 2 of the Information Act], therefore it may not be disclosed without the consent of the data subject [Section 5 (1) of the Information Act], and the exceptional causes regulated in Section 6 of the Information Act are not applicable either" (judgement No. Pfv.IV.21.749/2016/9 of the Curia, Reasoning [43]).

[8] Regarding the accessibility of the content of the opinions, the Curia argued that, on the basis of Section 27 (5) to (6) of the Information Act, the refusal of the data request had not been causeless: external opinion providers – unlike the Curia – are not subject to an obligation of enhanced tolerance with respect to the criticism of their activity. If these persons become attackable, it may influence their readiness to cooperate as well as the unbiased nature of their opinion. The absence or the lack of unbiased external opinions may also potentially jeopardise the operation of the Curia. Moreover, "the opinions are presumed with due ground to be scientific works under copyright protection", and with regard to such works it is the author to decide about disclosure, and in the relevant case there was no information about the defendant asking for or receiving such a consent. Finally, the Curia also noted that as the uniformity decision is public, the plaintiff "also had the opportunity to indirectly get acquainted with the standpoints that formed the basis of the decision, thus the partial rejection of the claim cannot cause him a significant injury of interests" (judgement No. Pfv.IV.21.749/2016/9 of the Curia, Reasoning [40]–[42], [46]–[47]).

[9] 2 In the constitutional complaint submitted subsequently, the petitioner stated the violation of the right to have access to data of public interest [Article VI (2) of the Fundamental Law] and the right to a fair court trial [Article XXVIII (1) of the Fundamental Law].

[10] 2.1 With respect to Article VI (2) of the Fundamental Law, the petitioner explained that – according to the case law of the Constitutional Court – although there is an opportunity to ban public access to the data (of public interest, data accessible on public interest grounds) that form the basis of a decision, the restriction should not be a formal one and it should be based on the examination of the merits of the case. Nevertheless, in the present case, the Curia based its decision on general "assumptions stated arbitrarily and without supporting evidence", and without knowing the content of the requested documents. For example, with regard to the reference to restrictions under copyright law, it merely stated that it was "presumed on due ground". However, an insecure cause of rejection should not be the legitimate objective of restricting the freedom of information. The petitioner also complained about the fact that the court had partly based its decision on the lack of any injury of the data applicant's interest. Indeed, the aim of the request for data and similarly the fact whether the rejection had caused any injury of interests should not be included in the assessment of the application. Finally, as held by the petitioner, in the case of natural persons invited to provide (and providing) an opinion, two fundamental rights – the right to the protection of personal data and the right to have access to data of public interest – can be found in collision, but the Curia failed to apply the applicable test of necessity-proportionality. On the one hand, by violating the requirement of proportionality, the decision completely emptied out the freedom of information, and on the other hand, the argument that publicity would discourage any expert to provide the Curia with his or her professional position is unfounded.

[11] 2.2 According to the petitioner, the fact that the Curia decided without knowing the content of the documents to be disclosed, was a violation of the right to a fair trial as well. The judicial review on the merits of the reference to the data's character of providing the foundations for a decision "could have only been realised by way of the judicial review of the attached closed documents", but it has not been the case. Thus, in many respect, the Curia's judgement "is entangled in speculations". Moreover, its conclusions, logical contradictions and deficiencies violate the right to a reasoned judicial decision. On the one hand, according to the petitioner, the defendant should have proved in details the existence of the conditions specified in Section 27 (5) to (6) of the Information Act in the context of the relevant case. However, the Curia accepted the defendant's arguments referring to future circumstances and cases that might take place. On the other hand, the petitioner refers to the example of the court's statement according to which it is "presumed on due ground" that the works concerned are "scientific works under copyright protection". In the petitioner's opinion, it means that the court accepted the statements made by one of the parties without providing evidence. Finally, the petitioner holds that the Curia failed to provide any reasoning about why the experts who made a contribution in the present case should be more afraid of the potential criticism than the experts participating in other court procedures, who, as a general rule, make their statements at open hearings.

[12] 1 The relevant provisions of the Fundamental Law in force at the time of examining the petition:

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

[13] 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 accessible on public interest grounds means any data, other than data of public interest, the disclosure, availability or accessibility of which is prescribed by an Act for the benefit of the general public;"

"Section 5 (1) Personal data may be processed if
a) the data subject has given consent to the processing of personal data, or
b) it is prescribed in an Act or, based on the authorisation of an Act, within the limits set forth therein, in a local government decree for purposes in the public interest (hereinafter: »mandatory data processing«)."

"Section 27 (2) The right to access data of public interest or data accessible on public interest grounds may be restricted by an Act, with the specific type of data indicated, if considered necessary for the purposes of
[...]

h) intellectual property rights.
[...]
(5) Any data compiled or recorded by an organ performing public duties as part and in support of its decision-making process within the limits of its powers and duties shall not be disclosed for ten years from the date it was compiled or recorded. After considering the weight of public interest with respect to granting or denying access, the head of the organ that processes the data in question may permit access.
A request to access data underlying a decision may be dismissed after the decision is adopted but within the time limit referred to in paragraph (5), if the data underlies future decisions, or access to it would jeopardise the lawful functioning of the organ performing public duties, or would jeopardise the performance of its duties without any undue external influence, such as, in particular, the free expression of the standpoint of the organ which generated the data during the preliminary stages of its decision-making process."

"Section 31 (2) The burden of proof for the lawfulness and the reasons for refusal, as well as the reasons based on which the amount of the fee is payable for fulfilling the request, shall lie with the controller."

III

[14] First of all, on the basis of Section 56 of the ACC, the Constitutional Court had to examine if the constitutional complaint fulfilled the statutory conditions of admissibility.

[15] In the complaint submitted within the deadline of sixty days specified in Section 30 (1) of the ACC (the legal representative of the petitioner received the Curia's judgement of the 10th of February 2017, and he mailed the constitutional complaint on the 11th of April 2017), the petitioner challenges the Curia's judgement delivered in the merits of the case and not appealable with ordinary legal remedy. The applicant is entitled to be the petitioner of a constitutional complaint, and it is an affected party because it was the plaintiff of the litigation closed by the Curia's challenged decision.

[16] The application complies with the criteria of being explicit as listed under Section 52 (1b) of the ACC, because it contains: *a)* the provision of the Fundamental Law and of an Act of Parliament that establishes the competence of the Constitutional Court to adjudicate the petition, and which establishes that the entity is entitled to initiate proceedings [Article 24 (2) *d)* of the Fundamental Law, Section 27 of the ACC]; *b)* the reason for launching the procedure (as the consequence of the Curia's decision held to be in conflict with the Fundamental Law, the petitioner is prevented from accessing the data requested to be disclosed); *c)* the judicial decision to be reviewed by the Constitutional Court (judgement No. Pfv.IV.21.749/2016/9 of the Curia); *d)* the provisions of the Fundamental Law held to be injured [Article VI (2) and Article XXVIII (1) of the Fundamental Law]; *e)* the reasoning why the challenged judicial decision is contrary to the indicated provision of the Fundamental Law; *f)* an explicit request addressed to the Constitutional Court to declare that the

challenged judicial decision is contrary to the Fundamental Law and to annul it.

[17] It should be noted that after the submission of the petition, on 29 June 2018, the Seventh Amendment of the Fundamental Law of Hungary entered into force, and it moved from Article VI paragraph (2) to paragraph (3), with unchanged text, the right to access data of public interest.

[18] The petition alleging the violation of the right to access data of public interest under Article VI (3) of the Fundamental Law raises a question of fundamental constitutional importance and a potential conflict with the Fundamental Law that may influence the merits of a judicial decision (Section 29 of the ACC). It should be reviewed on the basis of the petition whether the violation of the right to access data of public interest resulted from the fact that the court had decided – in the course of reviewing the reference to Section 27 (5) to (6) of the Information Act – about the lawfulness of rejecting the disclosure of data without knowing the content of the documents requested to be disclosed, and whether, in this context, the right to a reasoned judicial decision acknowledged as a part of the right to a fair court procedure has been violated. Another question to be reviewed is whether the injury of interest caused by the refusal to perform the data request is an aspect that may be included in the judicial discretion.

[19] The Constitutional Court reviewed the merits of the complaint with the application of Section 31 (6) of the Rules of Procedure, without a specific procedure of admitting the complaint.

IV

[20] The constitutional complaint is well-founded according to the following.

[21] 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].}

[22] In the present procedure, the Constitutional Court first examined the conformity with Article VI (3) of the Fundamental Law of the challenged judicial decisions and the judicial

interpretation of the law found therein.

[23] Article VI (3) of the Fundamental Law – Article VI (2) before the entry into force of the Seventh Amendment of the Fundamental Law on 29 June 2018 – grants the right to access and disseminate data of public interest. On the basis of this provision of the Fundamental Law, one of the main rules is that everyone shall have the right to have access to and to disseminate data of public interest, i.e. all data of public interest shall be public. With respect to the data of public interest, the enforcement of the principle of publicity as the main rule requires that the obliged controller should grant access to the data of public interest in a proactive manner or by way of a request of data {Decision 21/2013. (VII. 19.) AB, Reasoning [35]; Decision 2/2014. (I. 21.) AB, Reasoning [41]}. It should also be recalled 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 or data accessible on public interest grounds. 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 accessible on public interest grounds, and in case of legal dispute, the court is entitled to perform this task" {Decision 3077/2017. (IV. 28.) AB, Reasoning [27]}.

[24] The petitioner challenged the judicial decision from two aspects: on the one hand, because according to the decision the Curia – adopted without carrying out the test of necessity-proportionality, on the basis of assumptions – from among those external parties invited to provide (and providing) opinions in the course of preparing the uniformity decision (hereinafter: "external opinion providers"), the names of natural persons are not public. On the other hand, because the petitioner claimed that the Curia had also ruled – without due grounds –, on the basis of allegations rather than on the basis of the documents, on not allowing access to the contents of the opinions by way of a request for data of public interest.

[25] 2 First of all, the special features of the uniformity of law procedure and of the uniformity decision should be briefly explained.

[26] In Article 25 (2) the Fundamental Law provides that in addition to the judicial activity of the Curia – adjudicating in criminal cases, in legal disputes of private law and in other cases specified in an Act – it "shall ensure the uniformity of the application of law by ordinary courts, and shall make uniformity decisions which shall be binding on the ordinary courts". With regard to administrative courts, the Fundamental Law regulates the duties of the Administrative High Court similarly. Consequently, the Fundamental Law institutionalises uniformity decisions as a tradition both of the European way of case law uniformisation and of the Hungarian legal history, as a coordinating instrument embodying the role of the Curia and of the Administrative High Court in the field of providing guidance and securing the

uniformity of law.

[27] In accordance with Article 25 (3) of the Fundamental Law, the AOAC describes uniformity decision as a part of the system of instruments applied for the purpose of securing the uniformity of adjudication (group analysing the jurisprudence of courts, authoritative court rulings and authoritative court decisions, board opinion). The operation of the consultative information system arching over and connecting the various court levels, regulated in the AOAC (Sections 26 to 28) is the basis of exercising the Curia's competence. It is the result of the flow of information that at a certain point the further development of the jurisprudence, the clarification of questions of principle related to interpretation and the uniform handling of such issues [Section 32 (1) *a)* of AOAC], as well as the clarification of the Curia's case law may become necessary. [Section 32 (1) *b)* of AOAC].

[28] In accordance with Section 175 of the AOAC, provisions of cardinal quality lay down the scope of parties entitled to initiate a uniformity procedure, the composition of the uniformity council linked to its duty, the rules on conflict of interest, quorum and adopting decisions as well as the form of the uniformity decision, its structure, content and publication.

[29] The preparation of the Curia's uniformity procedure, the sitting of the council, including the consideration of the subject matter, and finally the decision-making are all regulated by strict rules of procedure, and the process is characterised by the determining role of the president of the uniformity council. It is important to note that the president "may obtain opinions related to the motion" [Section 36 (1) of the AOAC]. In addition to the members of the council, the petitioner and the Prosecutor General, those persons invited on a case-by-case basis whose attendance is considered necessary by the president may attend the sitting. The participants – including, as the case may be, persons invited on a case-by-case basis, who provide, upon the president's request, an opinion about the petition – may speak at the sitting. However, the uniformity procedure shall not be public: in addition to the specific scope of the sitting's participants defined in the AOAC, in the consideration phase that follow the closure of the sitting by the president, only the members of the uniformity council (and the keeper of the minutes) may be present [Section 38 (2) of the AOAC].

[30] According to what has been explained above, the purpose of a uniformity decision – taking into account its function and the order of its adoption – is not to solve individual legal debates.

[31] No facts of the case can be found in a uniformity decision of the Curia. The reasoning of the decision shall contain, in addition to taking account of the affected judicial decisions – that provide the reason for the uniformity procedure –, the essence of the facts of the cases established in the judicial decisions as well as the different standpoints developed in the questions of principle to be judged upon [Section 40 (4) of the AOAC]. The uniformity decision shall pick up from several judicial decisions the questions of principle related to

interpreting the law, and it shall address them by giving guidance on the level of abstraction by separating them from the actual facts of the cases of the actual litigations.

[32] According to the Fundamental Law – and the AOAC – uniformity decisions shall bind the courts. The holdings of the uniformity decision – and the related system of logical arguments – shall provide guidances in questions of principle subject to the procedure or closely connected to it, the compliance with which shall guarantee that all court shall adjudicate the relevant question of law the same way.

[33] Accordingly, a uniformity decision is a strong, direct and effective legal institution that finally serves, by its nature, the enforcement of equality before the law. The fact that the uniformity decision is based on the Fundamental Law, it is applicable to all courts and it is enforceable and binding – otherwise going beyond the obligatory character of individual judicial decisions under Section 6 of the AOAC –, makes it a *quasi* norm, in other words, an "intern norm". "The special features of a decision on the uniform application of the law originate, among others, from the fact that its source is the supreme judicial body, the Curia, and on the other hand that it is addressed to the courts, for whom the *intern* norm is binding regarding its holdings and the related system of logical arguments" {Decision 3114/2017. (V. 22.) AB, Reasoning [13]}. The Decision 42/2005. (XI. 14.) AB, that has determined up till today the Constitutional Court's relation to the uniformity decisions, founded its competence for review on the very fact of the normative character of uniformity decisions. According to its arguments, the subjective side of abstract posterior normative control has become complete through the constitutional control over uniformity decisions, completing the Constitutional Court's constitutional purpose, which is today based on the Fundamental Law (ABH 2005, 504, 512-514.). This "interpreted" competence has been raised by law-maker to the level of cardinal Act in Section 37 (2) of the ACC.

[34] As explained above, the requirements applicable to the accessibility, by way of requesting data of public interest, to the data generated in the course of preparing a uniformity decision, as a *quasi* norm, are different from the ones applicable to the accessibility to the documents of individual – litigious and non-litigious – cases. In the later scope, "there are different criteria that determine the regulation and the interpretation of the rights of access. The subjects and the interested parties of court proceedings are a closed circle, therefore, the restrictive function of the protection of personal data in contrast with the right to access data of public interest has strenghtened and, as the case may be – in particular, in certain civil proceedings, especially in litigations related to personal status –, it may gain a prohibiting role as well. In the context of court proceedings, it is a requirement of enhanced importance that the abusive exercising of the right of access to data of public interest should not result in a situation that might jeopardise or significantly hinder the performance of the courts' basic functions." {Decision 3056/2015. (III. 31.) AB, Reasoning [14], c.p. also: Reasoning [7]–[10]}. In contrast with the above, in the context of uniformity procedures aimed at interpreting the content of the laws on abstract level and not aimed at adjudicating an individual legal debate, there is no subjective scope requiring special

protection in the sense of the above wording.

[35] It is important to underline that the explained difference is also presented at statutory level: in the cases aimed at adjudicating individual legal debates, the rules on accessing documents and on the accessibility of anonymous decisions are applicable, while in the case of a uniformity procedure, the special relevant rules of the AOAC shall apply. On the one hand, Section 42 (1) of the AOAC guarantees the publicity of the uniformity decision, and Section 37 regulates that the sitting of the uniformity council, including the consideration phase shall not be public. However, with regard to other phases of the procedure – for example, the opinions obtained during the preparation of the procedure – the law does not contain any provision on restricting access that could be put in parallel to the rules on accessibility of the documents of individual cases. The Curia's judgement challenged in the present case explicitly stated that Section 37 of the AOAC itself did not exclude the disclosure of the requested data: the provision on the closedness of the sitting should not be interpreted extensively and it should not be applied to the whole uniformity procedure. Thus the court itself held that the request for data should be judged upon on the basis of the general rules of the Information Act, primarily according to Section 27 (5) to (6), applicable to accessing data that serve the purpose.

[36] 3 With regard to the names of the external opinion providers who are natural persons, the Constitutional Court points out – in line with the Decision 3254/2018. (VII. 17.) AB – also in the present case, that "the conditions of having access to personal data are set by the Act 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 the procession of personal data any access to them as data of public interest.
[…] Therefore, in the absence of the affected person's approval or without a statutory rule ordering the publicity of the data, no personal data shall be disclosed in the framework of the request for data of public interest. Thus, in fact, the court is also prevented from assessing whether granting access to the personal data would be a proportionate restriction for the purpose of guaranteeing the freedom of information" {Decision 3254/2018. (VII. 17.) AB, Reasoning [32]–[33]}. "Basically, the violation of the fundamental right to have access to data of public interest cannot be declared because of the court granting protection to personal data on the basis of the right to the protection of personal data guaranteed in Article VI (2) of the Fundamental Law. Consequently, the right to have access to data of public interest shall not be considered violated when the court declares a personal data request ineligible with reference to the protection of personal data". {Decision 3254/2018. (VII. 17.) AB, Reasoning [35]}

[37] At the same time, the Constitutional Court reiterates also in the present case that "when a data controller organ performing public duties refers to the protection of personal data as the reason for refusing the disclosure of information, it shall prove that this right indeed justifies the refusal of the data request. In the judicial review of guaranteeing importance from the point of view of the enforcement of fundamental rights, launched in accordance

with Section 31 of the Information Act, the court should review – on the basis of Article VI (2) and Article I (3) of the Fundamental Law – the legal title of the restriction, i.e. the refusal of the disclosure of information as well as its substantive justification. Therefore, the court proceeding because of the rejection of performing the data request aimed at the disclosure of personal names (personal data) shall examine – subject to the plaintiff's relevant request – whether the data request was aimed at accessing data accessible on public interest grounds, and whether the right to the protection of personal data could have formed a justified restriction with regard to accessing the requested information. It is a requirement resulting from the right to have access to data of public interest, and the applicable law (Section 31 of the Information Act) should be applied in compliance with that." {Decision 3254/2018. (VII. 17.) AB, Reasoning [38]}

[38] By applying the above to the case under review, one may find that the Curia provided protection for the personal data – the personal names – on the basis of the right to the protection of personal data granted in Article VI (3) of the Fundamental Law. In the absence of the data subject's consent, the disclosure, accessibility or availability of a personal data should be explicitly ordered in an Act, therefore, the court could not review if it could be justified to grant access, only on the basis of the test of necessity-proportionality, to the names of the natural person external opinion providers, and similarly it could not specify the scope of personal data the accessing of which would qualify as a proportionate intervention for the purpose of granting the right to have access to data of public interest. Moreover, according to the available documents of the case, the plaintiff petitioner failed to make a reference in the lawsuit about the data request for the disclosure of personal data being aimed at having access to data accessible on public interest grounds (Section 3 point 6 of the Information Act). (Neither did the petitioner claim that in the constitutional complaint.) Thus, in this respect, the violation of the freedom of information could not be established with regard to the challenged judgement of the Curia.

[39] 4 On the basis of the other objection presented by the petitioner, the Constitutional Court had to primarily review whether the fact that the court adopted its decision about restricting the publicity of the data requested without actually examining the real data content of the requested documents (the external opinions obtained in the uniformity procedure) was in line with the right to have access to data of public interest.

[40] 4.1 Sections 27 (5) to (6) of the Information Act provide that any data compiled or recorded by an organ performing public duties as part and in support of its decision-making process within the limits of its powers and duties shall not be disclosed for ten years from the date it was compiled or recorded. However, this opportunity is not an obligation at the same time: on the one hand, accessing the data may be authorised before adopting the decision by assessing the weight of the public interest attached to accessing the data and to excluding the accessibility. On the other hand, after the decision has been adopted, the request to access the data may only be dismissed – within the time limit of ten years referred to above –, if *a)* the data also serves the purpose of forming the basis for any further future decision,

or *b)* access to the data would jeopardise the lawful functioning of the organ performing public duties, or would jeopardise the performance of its duties without any undue external influence, such as, in particular, the free expression of the standpoint of the party that generated the data during the preliminary stages of its decision-making process.

[41] Restricting access to the working documents intended for internal use (working materials, memos, drafts, plans, proposals, correspondence within the organisation) protects the decision-making process being free from influences and allowing the assessment of different standpoints. The Constitutional Court "has already stated in the scope of the data that serve the purpose of providing the basis for a decision (earlier: decision-preparatory data), that »it is a guaranteeing institution of high quality and efficient public administration work, that the decisions of public servants are prepared freely, informally and free from public pressure. Thus the requirement of publicity applies only to the final outcome rather than the intermediary working materials.« [Decision 34/1994. (VI. 24.) AB, ABH 1994, 177, 190–191.]" {Decision 21/2013. (VII. 19.) AB, Reasoning [43]}. Taking into account the nature of generating the data, the so called automatic restriction of publicity may limit access to the data of public interest. However, in the interest of preventing the rules on accessing the data that serve the purpose of providing the basis for a decision [Section 27 (5) to (6)] becoming a formal and arbitrary ground of restriction that may be referred to at any time, a narrow interpretation shall be followed and an examination of substance and of the merits shall be carried out.

[42] 4.2 In the context of the accessibility of the data that serve the purpose of providing the basis for a decision, the following main criteria may be identified in the case law of the Constitutional Court.

[43] On the one hand, the data that serve the purpose of providing the basis for a decision may only be a data compiled or recorded by the relevant organ during its decision-making process (within the limits of its powers and duties). Furthermore, this quality of the data that serve the purpose of providing the basis for a decision should exist exclusively by virtue of its connection to the actual decision-making process" {Decision 6/2016. (III. 11.) AB, Reasoning [35]}. Therefore, it is unacceptable on a constitutional basis to make a general reference in a procedure to the decisions to be adopted in the future; the data that serve the purpose of providing the basis for a decision should be connected to an actual decision-making process.

[44] On the other hand, without regard to the content of the document – i.e. without any examination or because of a single data – the whole document should not be classified as data that serves the purpose of providing the basis for a decision {data-centred approach, enforcement of the data principle instead of the document principle, also with due account to Section 30 (1) of the Information Act, see for example Decision 21/2013. (VII. 19.) AB, point 2 of the holdings and the Reasoning [60]}. The legal interpretation that considers the totality of the requested documents – irrespectively to their content – as data that serve the

purpose of supporting the decision-making, this way generally preventing access to the documents, allows for the unjustifiably broad – therefore unnecessary – restriction of the right to access data of public interest (enforcement of the document principle instead of the data principle).

[45] Thirdly, the controller may not refer to so called aspects "of convenience", i.e. that performing the data request would require additional work due to the need of the overviewing of a lengthy document and separating the pubic data in the document from the non-public ones. {Decision 5/2014. (II. 14.) AB, Reasoning [40]}

[46] Fourthly, the decision dismissing the request for data should be reasoned on the merits – in the interest of securing effective legal remedy – and the reasoning should specify the exact pending procedure in which the data of public interest to be disclosed serves the purpose of providing the foundations for a decision, as well as how the disclosure of the data of public interest influences the adoption of the relevant decision, i.e. whether it could impede the effective implementation of the decision or if it could jeopardise independent and effective work of public servants being free of any undue external influence. In the context of the above, judicial control on the merits is of special importance. This is why it is insufficient to formally refer to the character of the data serving the purpose of providing the foundations for a decision, as it needs to be justified, verified – in a manner that can be reviewed by the court – and the proceeding court "should examine both the title of dismissing the disclosure of data and its justification based on the content of the data" {Decision 21/2013. (VII. 19.) AB, point 2 of the holdings; c.p. also: Decision 6/2016. (III. 11.) AB, Reasoning [41]–[43]}. As another consequence of the foregoing, "only the examination of the content of the document subject to the data request may provide an actual clue verifying that it includes data of public interest, which are actually covered by one of the causes of restricting publicity, therefore such data need to remain closed from the public by all means" {Decision 6/2016. (III. 11.) AB, Reasoning [38]}. Consequently, the formal reference to the cause of restricting publicity may be remedied from the aspect of protecting fundamental rights by way of the judicial examination of the document subject to the data request.

[47] 4.3 In the court procedure underlying the constitutional complaint, according to the documents of the case, the court was not aware of the content of the external opinions – obtained during the preparatory phase of the uniformity procedure – the disclosure of which had been requested by the applicant. As laid down in the judgement No. 32.Pf.20.510/2016/6-II of the Budapest-Capital Regional Court of Appeal on its page 6, the controller defendant "failed to provide the court with these opinions as evidence", and the Curia underlined in its judgement No. Pfv.IV.21.749/2016/9 that no evidence can be taken in the review procedure (Reasoning [32]). Furthermore, neither does the statement made in the Curia's judgement that "the opinions are presumed with due ground to be under copyright protection" (judgement No. Pfv.IV.21.749/2016/9 of the Curia, Reasoning [46]) support the actual examination by the court of the content of the requested documents, nor does it

state that the court established as a result of an examination of the content that the totality of the requested documents falls under the restriction of publicity on the basis of Section 27 (5) to (6) of the Information Act or according to any other statutory regulation under the authorisation of Section 27 (2) of the Information Act.

[48] It means that the considerations of the challenged judgement of the Curia – although it contains detailed reasoning – are necessarily based on presumptions. In this respect, the Constitutional Court points out the following.

[49] According to Section 27 (6) of the Information Act, the request to get access to the data that serves the purpose of providing the foundations of a decision may be rejected if "access to the data jeopardised the lawful functioning of the organ performing public duties, or it jeopardised the performance of its duties without any undue external influence, such as, in particular, the free expression of the standpoint of the party that generated the data during the preliminary stages of its decision-making process". In the course of reviewing the controller's reference to this cause of rejection – and indeed the obligation of providing evidence, see Section 31 (2) of the Information Act –, the court shall weigh the arguments supporting the restriction of publicity and transparency – with a fairly wide discretion from a certain point of view. The law-maker only requires that the "jeopardising" should be verified, which means that it is not required to establish beyond doubt that disturbing the lawful functioning order or the undue external influencing of the powers and competences would take place for sure. At the same time, if the weighing of "jeopardising" is carried out by the court not on the basis and in the possession of the actual documents to be accessed, it means that the title and the material justification of rejecting the data disclosure is only reviewed generally and formally. However, "a formal reference to the cause of restricting publicity without the proof beyond doubt of the material justification of the restriction qualifies as an unfounded and thus unnecessary restriction of the right to access data of public interest" {Decision 6/2016. (III. 11.) AB, Reasoning [40]}. In such cases, the review of the merits of the justification and the causality of the causes of rejection presented by the controller – and thus the exclusion of an arbitrary decision by the controller – is impossible without knowing the content of the documents. It should also be noted that the aspects and concerns of assessment mentioned in the Curia's arguments ("these persons become attackable", "it may influence their readiness to cooperate as well as the unbiased nature of their opinion") are not, on the one hand, necessarily the same in the case of natural persons or organisations and in the case of persons/organs fulfilling public duties or the ones that do not have this function. On the other hand, as the case may be, these concerns can be eliminated by way of anonymization. Nevertheless, in these circumstances it is also assumed that the court decided in the knowledge of the content of the professional materials and of the opinion providing persons, rather than merely on the basis of the statements made by the controller and the concerns related to the potentially high interest of the public about the uniformity decision.

[50] Similarly, the review by the court should not be entirely hypothetical in the scope of the

application of Section 27 (2) of the Information Act: with regard to examining the title and the substantial justification of dismissing the data request, it is not enough to merely presume that the requested data are "scientific works under copyright protection".

[51] The Constitutional Court also points out that in the present case the absence of the examination of content – namely that the requested documents were put under restriction in their entirety, without regard to their content – means, at the same time, the violation of the data principle. In this respect, the Constitutional Court notes that also the NAIH requested by the petitioner before the court procedure, took the position – at the same time asking the Curia to perform the data request – that "neither is Section 27 (6) of the Information Act is applicable to the entirety of the documents with respect to having access to the copies of the opinions used, and only those data might be made unidentifiable – on the basis of the data principle under Section 30 (1) of the Information Act – that actually jeopardise the operation free from external influence" (case No. NAIH/2015/2069/8/V).

[52] It is important to emphasize in this regard that from a procedural point of view the requested documents could form part of the documents of the litigation: according to Section 119 (2) of the Act III of 1952 on the Civil Procedure, if the subject of the action is to decide whether or not the content of the document is a data of public interest, this document may not be accessed during the procedure, and it might be accessed or copied after the final closing of the procedure only on the basis of an affirmative decision; this provision shall not be applicable to the court, the keeper of the minutes (recorder) and to the person in the litigation who submitted the document. It means that in a lawsuit launched for the disclosure of data of public interest, the submission of the documents as evidence does not mean at the same time that the plaintiff could get acquainted with them simply by way of access to the documents. [The new Act on the Civil Procedure contains similar provisions, see Section 163 (3) of the Act CXXX of 2016.]

[53] Finally the Curia also noted that due to the publicity of the uniformity decision the plaintiff "also had the opportunity to indirectly get acquainted with the standpoints that formed the basis of the decision, thus the partial rejection of the claim cannot cause him a significant injury of interests". As recalled by the Constitutional Court, according to its case law {c.p. Decision 21/2013. (VII. 19.) AB, Reasoning [40]; Decision 83/2008. (VI. 13.) AB, ABH 2008, 1407, 1414; Decision 19/1995. (III. 28.) AB, ABH 1995, 100.}, the examination whether the dismissal of the data request caused any injury of interest to the applicant – including the nature and the extent of any injury actually caused –, means the restriction of the right to access data of public interest.

[54] To sum up: in the case under review – concerning the accessibility of the data that serve the purpose of providing foundations for a decision –, the Constitutional Court established that, as the court had had no information about the identity of the persons who had provided external opinion and about the content of the opinions, it had decided in the case without actually examining the material justification of restricting publicity. This way the court placed

the totality of the requested documents under the restriction of publicity without paying attention to their content. A judicial decision that allows for the restriction of fundamental rights to an extent wider than necessary is incompatible with the Fundamental Law. The Constitutional Court, therefore, annulled the challenged judgement of the Curia as set forth in the holdings of the decision.

[55] 5 The Constitutional Court points out that – in accordance with its case law, see Decision 21/2013. (VII. 19.) AB, Reasoning [52]–[53] and Decision 6/2016. (III. 11.) AB, Reasoning [46]–[47] – in the case related to restricting the right to access to data of public interest, it has reviewed the challenged judicial decision only from the aspect of constitutionality. No direct obligation to grant access to the requested data shall result from the decision of the Constitutional Court. The reason of the annulment is that the court failed to enforce the constitutional criteria deductible from the Fundamental Law and raised with respect to restricting the publicity of data that serve the purpose of providing the foundations of a decision. In line with the nature of the complaints under Section 27 of the ACC, the Constitutional Court decides about the questions of constitutional relevance that affect the merits of the actual case, but its consequences applicable to the relevant case shall be drawn by the proceeding court – within the range of interpretation delimited by the Constitutional Court. In the course of adopting its decision, based on the above, it has to take into account the data principle (instead of the document principle) and, in the case of deciding on the restriction of publicity, to the necessity to examine the content of the documents.

[56] 6 The petitioner also claimed that the challenged judicial decision was in conflict with Article XXVIII (1) of the Fundamental Law. As the Constitutional Court found that the challenged judicial decision was contrary to the Fundamental Law because of the violation of Article VI (3) of the Fundamental Law, and therefore it annulled the decision, thus – in accordance with its guiding case law {see for example most recently: Decision 3179/2018. (VI. 8.) AB, Reasoning [85]; Decision 10/2017. (V. 5.) AB, Reasoning [100]} – it has not examined the potential violation of the right to a fair court procedure.

Budapest, 26 March 2019.

Dr. Tamás Sulyok
President of the Constitutional Court

Dr. István Balsai
Justice
of the Constitutional Court

Dr. Tamás Sulyok
President
of the Constitutional Court

Dr. Egon Dienes-Oehm
Justice
of the Constitutional Court

on behalf of
Dr. Ágnes Czine
Justice of the Constitutional Court, unable to sign

Dr. Attila Horváth Justice of the Constitutional Court	*Dr. Ildikó Hörcherné dr. Marosi* Justice of the Constitutional Court, rapporteur	*Dr. Imre Juhász* Justice of the Constitutional Court
Dr. Béla Pokol Justice of the Constitutional Court	*Dr. Tamás Sulyok* President of the Constitutional Court on behalf of *Dr. László Salamon* Justice of the Constitutional Court, unable to sign	*Dr. Balázs Schanda* Justice of the Constitutional Court
Dr. István Stumpf Justice of the Constitutional Court	*Dr. Marcel Szabó* Justice of the Constitutional Court	*Dr. Mária Szívós* Justice of the Constitutional Court

Dr. András Varga Zs.
Justice of the Constitutional Court

Concurring reasoning by Justice *dr. László Salamon*

[57] I agree with the annulment of the Curia's decision.

[58] As explained in the decision, by deciding in the absence of knowing the identity of the opinion providers and the content of the opinions, without the examination of the actual content of the restriction of publicity, the court violated the petitioner's right granted in Article VI (3) of the Fundamental Law.

[59] Nevertheless, in the present case I refer to my standpoint that has been explained consistently, namely that the application of the test of necessity-proportionality according to Article I (3) of the Fundamental Law is the duty of the law-maker rather than that of the judiciary [see among others my concurring reasoning attached to Decision 30/2015. (X. 15.) AB].

Budapest, 26 March 2019.

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

Dissenting opinion by Justice *Dr. Béla Pokol*

[60] I do not support the decision because of its reasoning. Although the narrowly interpreted normative basis of the holdings – *ratio decidendi* – can be localised in the reasoning, and I can agree with that, but in my opinion, in the context of the complete set of requirements applicable to the access to data of public interest, the entire decision excessively extends the obligations of state bodies in the field of data generation made necessary by data requests.

[61] The narrowly interpreted reasons of the decision, with which I can agree, are the following: In the case […] under review, the Constitutional Court established that, as the court had had no information about the identity of the persons who had provided external opinion and about the content of the opinions, it had decided in the case without actually examining the material justification of restricting publicity. […] The Constitutional Court, therefore, annulled the challenged judgement of the Curia as set forth in the holdings of the decision" (Reasoning IV.4.3., [54]). By focusing on it as the *ratio decidendi* – in a more explicit form, as the specification of the right to access and disseminate the data of public interest under Article VI (3) of the Fundamental Law – this may be laid down – with some modification – as follows.

[62] The Constitutional Court states in principle that the judicial review of the merits of the justification and the foundedness of the causes of rejection presented by the controllers – and thus the exclusion of an arbitrary decision by the controller – is impossible without knowing the content of the documents.

[63] However, taking into account the complete issue of disclosing data of public interest – indeed, declared in the most extensive way in the Decision 13/2019 (IV. 8.) AB adopted recently –, it shall be included in the Constitutional Court's case law formulated so broadly that makes this unacceptable. It has already been stated in our previous decisions that on the basis of Article VI (3) of the Fundamental Law, anyone, without any relevant interest, may finally sue at the court and receive any data of public interest from any state body or any organ handling state funds. We have also laid down years ago that the state bodies and the organs financed by the State should disclose not only the existing data, but, as the data request may require, they shall not be entitled to refuse – not even by referring to the significant workload – to produce new tables from their existing databases or to put datasets into new order. However, in our latest decision, the Decision 13/2019. (IV. 8.) AB , the Constitutional Court stated – along with rejecting the petition – that we have rejected to oblige the Curia to disclose the requested data only because the relevant data were handled by the courts of first instance and they were obliged to perform the disclosure in case of such data requests: "Therefore, it had to be stated in the present case that while the Curia only indirectly handles the statement of claim, its date of submission […] there is a judicial level, which is directly connected to it […] in line with its duties specified in the Acts on procedure, the court of first instance necessarily contributes to all essential points of the civil procedure, including the procedural moments from the submission of the statement of claim to the service of the Curia's decision closing the review procedure" {Decision 13/2019.

(IV. 8.) AB, Reasoning [81]}. Although it should still be interpreted in the future, but according to its evident meaning, from now on, the data disclosures may be addressed to more state bodies in parallel, provided that these data have not been centrally summarised and they are in the possession of several local organs.

[64] However, this way the statements made in the earlier requirements by the Constitutional Court about data disclosures in the public interest – anyone, without verifying any affected interest, may bind the state bodies to do extra work by requiring the preparation of newer and newer tables and rows of data, provided that they otherwise possess the requested data ˜– are broadened to the level of absurdity. Indeed, this way, the latest precedent of the Constitutional Court declared not only the possibility of requiring, by anyone, all courts of first instance to work, but it shall be applicable – or the precedent may also be interpreted this way – to all local organs of any state sector: all prosecutor's offices, police headquarters, penal institutions, but also the primary schools, waterworks, gas suppliers, electricity providers etc.

[65] As this decision repeats the formerly elaborated formulas of obliging to wide-scale data disclosure, those who intend, in an extreme case, to oblige all state organs to disclose data, should not worry about the extent of their data disclosure rights – qualified above as extended to the level of absurdity –, it is enough to refer to this decision. With regard to the "constitutional" right to extra work: "Thirdly, the controller may not refer to so called aspects »of convenience«, i.e. that performing the data request would require additional work due to the need of the overviewing of a lengthy document and separating the pubic data in the document from the non-public ones" (Reasoning [45]). Similarly, a formula can also be found here for the right, without any affected interest, to bind any organ of the State to do extra work: "The examination whether the dismissal of the data request caused any injury of interest to the applicant – including the nature and the extent of any injury actually caused – , means the restriction of the right to access data of public interest" (Reasoning [53]).

[66] To sum up, I hold that the ever wider list of extensions – together with the last one – is a kind of absurdity, and therefore I shall not be able to support any decision in the field of the disclosure of data of public interest until we carry out a systematic overview of the issue and we try to remedy this absurd situation.

Budapest, 26 March 2019.

Dr. Béla Pokol
Justice of the Constitutional Court

Consitutional Court file No.: IV/1079/2017.