DECISION 12/2004 (IV. 7.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of a petition seeking a posterior constitutional examination of a statute, the Constitutional Court has adopted the following

decision:

1. Acting *ex officio*, the Constitutional Court holds that an unconstitutional omission of legislative duty has resulted from the legislator not securing the guarantees related to the rule of law that ensure access to the data of public interest specified in Section 19 para. (5) of Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Data of Public Interest. Therefore, the Constitutional Court calls upon the Parliament to meet its legislative duty by 31 December 2004.

2. The Constitutional Court rejects the petition seeking the establishment of the unconstitutionality and the annulment of Section 19 para. (5) of Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Data of Public Interest.

3. The Constitutional Court rejects the petition seeking the establishment of the unconstitutionality and the annulment of Section 4 para. (1) of Act LXV of 1995 on State Secrets and Official Secrets.

This Decision of the Constitutional Court shall be published in the Official Gazette.

Reasoning

I

The petitioner has initiated the establishment of the unconstitutionality and the annulment of Section 19 para. (5) of Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Data of Public Interest (hereinafter: "DPA"). According to the challenged

provision, data created for internal use and data related to the preparation of decision-making are not public. In the petitioner's opinion, the expressions "created for internal use" and "related to the preparation of decision-making" constitute a "flexible clause" that can be used to prevent the publication of any data. Therefore this provision is deemed to "make it absolutely impossible to exercise the right to have access to data of public interest" and to prevent "the control provided by publicity in a democratic society". Furthermore, the petitioner claims that the thirty years of publicity restriction as per the challenged provision "exceeds the justifiable extent of restriction by orders of magnitude". Accordingly, the petitioner argues that the statutory provision violates the essential content of the right of access to data of public interest enshrined in Article 61 para. (1) of the Constitution, with consideration to Article 8 para. (2) thereof.

The petitioner has also requested the posterior establishment of the unconstitutionality and the annulment of Section 4 para. (1) of Act LXV of 1995 on State Secrets and Official Secrets (hereinafter: "AS"). The petitioner objects to the "excessively general wording" of the provision. In his opinion, the Act allows the organ authorised to classify official secrets to determine the data types belonging to the category of official secrets within its own "discretion". The petitioner does not see any guarantee for not classifying as official secrets data in the case of which the restriction of publicity is not justified. For this reason, too, the petitioner alleges the violation of the fundamental right enshrined in Article 61 para. (1) of the Constitution.

After submission of the petition, Section 19 para. (5) of the DPA was amended as from 1 January 2004 by Section 14 of Act XLVIII of 2003 on the Amendment of Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Data of Public Interest. Furthermore, Section 4 para. (1) of the AS was amended as from 19 July 2003 by Section 3 of Act LIII of 2003 on the Amendment of Act LXV of 1995 on State Secrets and Official Secrets and Other Related Acts. The original content of the statutory provisions challenged by the petitioner remained in force after the amendments. As the legislator changed the period of thirty years defined in Section 19 para. (5) of the DPA to twenty years, the Constitutional Court has not examined the justifiability of the restriction of publicity for thirty years. The Constitutional Court has examined the constitutionality of the normative text in force at the time of the constitutional examination.

The Constitutional Court has forwarded the petition to the Minister of the Interior, the Minister of Justice and the Ombudsman for Data Protection, requesting their opinion.

II

1. The provisions of the Constitution relevant in respect of the petition are as follows:

"Article 8 para. (2) In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by law; such law, however, may not restrict the basic meaning and contents of fundamental rights."

"Article 61 para. (1) In the Republic of Hungary everyone has the right to freely express his opinion, and furthermore, to have access to, and distribute information of public interest."

2. The relevant statutory provisions are as follows:

DPA "Section 2 For the purposes of this Act:
(…)
4. data of public interest: data handled by or related to the activity of organs and persons performing state or local government duties or other public duties defined in a statute, not falling under the definition of personal data;
(…)
9. data handling: irrespective of the procedure applied, any operation or the totality of operations performed on personal data, such as collection, entering, recording, organisation, storage, alteration, use, forwarding, disclosure, alignment, combination, blocking, deletion and destruction, and the prevention of further use. Data handling shall include photographing, sound or image recording, as well as the recording of physical characteristics suitable for personal identification (e.g. finger or palm prints, DNA samples, iris images);
(…)."

DPA "Section 19 para. (3) The organs mentioned in paragraph (1) shall grant access for anyone to the data of public interest handled by them, except for data classified as state or official secrets by organs authorised to do so under an Act and for data classified on grounds of an obligation resulting from an international treaty, furthermore except if the right of public

access to data of public interest is restricted by an Act – specifying the relevant types of data – in the interest of

a) national defence;

b) national security;

c) prosecution or prevention of crime;

d) central finances or currency policy;

e) foreign relations or relations with international organisations;

f) court proceedings."

DPA "Section 19 para. (5) Unless provided otherwise by an Act of Parliament, data created for internal use and data related to the preparation of decision-making shall not be public for twenty years following their handling. Upon request, the head of the organ concerned may allow access to such data even within this period."

DPA "Section 21 para. (1) The requester may turn to the court if his request for data of public interest is not fulfilled. (2) The lawfulness and well-foundedness of any refusal shall be proved by the organ handling the data.

(...)

(7) If the court sustains the request, in its decision it shall oblige the data-handling organ to disclose the requested data of public interest."

AS "Section 4 para. (1) Official secrets are data belonging to the types of data (hereinafter: "category of official secrets") specified by those authorised to classify data according to Section 6 para. (1) of this Act, in the case of which disclosure before the expiry of the period of secrecy, unauthorised obtainment and use, allowing access for unauthorised persons and preventing access for authorised persons violate or endanger the order of operation of a state organ or an organ performing public duties, hinder the exercise of the organ's competence without undue influence and thus indirectly violate the statutorily defined interests of the Republic of Hungary."

III

The petition is unfounded on the basis of the following:

1. Pursuant to Article 61 para. (1) of the Constitution, everyone has the right to have access to and distribute information of public interest. In this regard, the Constitutional Court pointed out in Decision 34/1994 (VI. 24.) AB that "Article 61 para. (1) of the Constitution guarantees the right to have access to data of public interest as a constitutional fundamental right that covers, from the set of the fundamental rights of communication, the right to be informed and the right to freely obtain information acknowledged and guaranteed by the State. The accessibility and the free flow of information is of key importance especially in respect of the transparency of the activities of public authority and the State's organs." (ABH 1994, 177, 185) With regard to Article 61 para. (1) of the Constitution, the Constitutional Court pointed out the following:
"Those data processed by state organs or local governments which are not personal and which are not declared confidential on the basis of the statutory regulations are classified as accessible to everyone. Only in this way can the requirement that citizens be given access to all data in the public interest be realized." [Decision 32/1992 (V. 29.) AB, ABH 1992, 182, 185] Accordingly, data handled by organs and persons performing state or local government duties or other public duties defined in a statute, not falling under the definition of personal data, qualify as data of public interest.

The Constitutional Court also pointed out the following: "It is not the citizen who must prove his authority to obtain the information but it is the organ created for serving the public which must justify – invoking appropriate statutory grounds – the refusal to communicate the required information." [Decision 32/1992 (V. 29.) AB, ABH 1992, 182, 185] Thus, in a democratic society the principal rule is the publicity of data of public interest; accordingly, the restriction of the publicity of data of public interest is to be considered exceptional.
Furthermore, the Constitutional Court emphasised as early as in Decision 32/1992 (V. 29.) AB that "free access to information of public interest provides an opportunity to control the lawfulness and efficiency of the elected bodies of popular representation, the executive power and public administration, and facilitates the democratic operation thereof. Due to the complexity of public affairs, the citizens' control and influence over decision-making and administration by the public authorities can only be efficient if the competent organs disclose the necessary information." (ABH 1992, 182, 183-184)

Decision 34/1994 (VI. 24.) AB, referred to above, also mentions that: "publicity is the test of the democratic operation of public authority. Access to data of public interest thus also

guarantees the transparency of public authority and the administration of public affairs as a fundamental democratic institution. Therefore, the publicity of data of public interest and access to such data constitute a fundamental constitutional guarantee of being a democratic state under the rule of law as declared in Article 2 para. (1) of the Constitution." (ABH 1994, 177, 185)

2. When examining the constitutionality of restricting the fundamental right enshrined in Article 61 para. (1) of the Constitution, the applicable rule is Article 8 para. (2) of the Constitution, according to which regulations pertaining to fundamental rights and duties are determined by law (in Acts of Parliament); such law, however, may not restrict the basic meaning and contents of fundamental rights. The Constitutional Court has examined the constitutionality of restricting fundamental rights on several occasions. It was pointed out by the Constitutional Court in one of its early Decisions that the State may only use the tool of restricting a fundamental right if "it is the sole way to secure the protection or the enforcement of another fundamental right or liberty or to protect another constitutional value." [Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 171]

With regard to the restriction of the fundamental right to the publicity of data of public interest, the Constitutional Court also referred to Article 10 paragraph 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 (hereinafter: "Convention") and promulgated in Hungary in Act XXXI of 1993. This provision specifies several values that may justify the restriction of access to data of public interest. As pointed out by the Constitutional Court, "the exercise of the freedom of information may only be subject to such formalities, conditions, restrictions or penalties as are prescribed in Acts of Parliament and are considered necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. Thus, the restriction of the freedom of information can only be accepted as constitutionally justified when it is a forcing necessity based on the enforcement of another fundamental right, or when the restriction of the fundamental right is absolutely necessary on the basis of the above criteria." [Decision 34/1994 (VI. 24.) AB, ABH 1994, 177, 186]

Furthermore, Decision 15/1995 (III. 13.) AB based on Decision 34/1994 (VI. 24.) AB established that "unnecessary and avoidable restrictions, ones disproportionate to the desired

objective as well as ones provided for in a norm other than an Act of Parliament are constitutionally unacceptable and thus unconstitutional." (ABH 1995, 88, 91)

"Therefore, it is not enough for the constitutionality of restricting the fundamental right to refer to the protection of another fundamental right, liberty or constitutional objective, but the requirement of proportionality must be complied with as well: the importance of the objective to be achieved must be proportionate to the restriction of the fundamental right concerned. In enacting a limitation, the legislator is bound to employ the most moderate means suitable for reaching the specified purpose. Restricting the content of a right arbitrarily, without a forcing cause is unconstitutional, just as doing so by using a restriction of disproportionate weight compared to the purported objective." [Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 171]

3. The Constitutional Court has established with account to Section 19 para. (3) of the DPA that at present the restriction of the fundamental constitutional right of access to data of public interest is applied in the case of the following types of data:

a) state secrets (Section 3 of the AS);
b) official secrets (Section 4 of the AS);
c) data classified on the basis of an obligation resulting from an international treaty (Chapter III of the AS);
d) data restricted by an Act of Parliament in the interest of 1. national defence, 2. national security, 3. prosecution or prevention of crime, 4. central finances or currency policy, 5. foreign relations or relations with international organisations, 6. court proceedings [Section 19 para. (3) items a)-f) of the DPA];
e) data created for internal use and data related to the preparation of decision-making [Section 19 para. (5) of the DPA]: the so-called automatic restriction of publicity;
f) by way of the legislation of the European Union, in view of a significant financial or economic interest of the European Union, including interests of monetary, budgetary and taxation policy [Section 19 para. (7) of the DPA].

From the above list, the petitioner claims official secrets and the so-called automatic restriction of publicity to constitute unconstitutional restrictions.

3.1. With regard to the – so-called automatic – restriction of publicity as per Section 19 para. (5) of the DPA, Decision 34/1994 (VI. 24.) AB of the Constitutional Court – cited above – points out that "it is in fact one of the guarantees of high quality and efficient public official activity that public officials can work on the preparations of decisions freely, informally and without the pressure of publicity. Thus the requirement of publicity applies only to the final outcome but not to the intermediary working materials." (ABH 1994, 177, 190-191)

The so-called automatic restriction of publicity is actually a kind of relief for those handling data of public interest, as they do not have to classify the data related to the preparation of decision-making one-by-one at the moment of their creation. The publicity of such data is restricted without any special measures, simply on the basis of the manner of their creation. Without the automatic restriction of publicity, a separate decision would have to be made on classifying each piece of data related to the preparation of decision-making, for the purpose of protecting working materials and ensuring the efficiency of the decision-making process and the operation of the organ concerned. This would result in an unbearable administrative burden. That is why it is necessary to maintain the so-called automatic restriction of publicity, which may proportionately restrict – under appropriate (constitutional) statutory conditions – access to data of public interest, and the restriction of the publicity of data of public interest subject to Section 19 para. (5) of the DPA is not contrary to Article 61 para. (1) of the Constitution.

3.2. The restriction of publicity within the category of official secrets as per Section 4 of the AS serves the purpose of securing the undisturbed and uninfluenced procedure of the State's organ; it provides protection against the publication of the content of documents made in the course of preparing decision-making in public administration in order to prevent the "indirect violation of the statutorily defined interests of the Republic of Hungary". Thus, in the case of classifying data as official secrets, there are more serious interests justifying the restriction of the publicity of data of public interest. Consequently, classification as official secret as per Section 4 para. (1) of the AS can only affect a category of data of public interest significantly narrower than the one of data of public interest whose publicity is restricted by Section 19 para. (5) of the DPA.

In order to limit the classification of data as official secrets to the most justified cases, only the organs specified by the AS [Section 6 para. (1) of the AS] may classify data as official

secrets on the basis of a public list of official secrets compiled by such organs [Section 4 para. (4) of the AS]. As provided for in the AS, each organ must apply its own specific list of official secrets, as the individual organs may have different types of data the publication of which would hinder their operation without undue influence or the impartiality of their decision-making. The lists had to be published by the organs concerned by the deadline specified in the Act [Section 27 para. (4) of the AS]. The organs concerned may only classify as official secrets the types of data included in the list of official secrets: during classification the relevant item on the list of official secrets justifying classification as well as the facts and circumstances necessitating classification must be specified [Section 7 para. (6) of the AS]. Classification as official secret may only be ordered for the period necessary for restriction [Section 9 para. (1) of the AS], and the justification of classification must be reviewed on a regular basis (Section 10 of the AS). In view of the above, the petitioner's claim that the Act allows the organ concerned to classify data as official secrets within its own discretion is unfounded.

In the case of the rejection of a request for access to classified data, including official secrets, the requester may turn to court for a review of the restriction of publicity. The provisions applicable to such court proceedings are the ones contained in Section 21 of the DPA [Section 15 para. (3) of the AS]. As the justification of classification as official secret in terms of content is a statutory requirement, the court performs content control when reviewing such classification. Since classification as official secret may only be performed on the basis of the Act and the list of official secrets of the organ concerned, the Constitutional Court could not examine the justification of classifying specific data of public interest as official secrets; such a review is a duty of the court.

In view of the above, the Constitutional Court has rejected the petition seeking the establishment of the unconstitutionality and the annulment of Section 19 para. (5) of the DPA and Section 4 para. (1) of the AS.

IV

1. As pointed out by the Constitutional Court with regard to the restriction of the fundamental right to the publicity of data of public interest, "although the constitutional right of access to data of public interest as one of the designated rights among the fundamental rights of

communication (...) is not an unrestrictable fundamental right, it enjoys special constitutional protection as a condition and element of exercising the right to the freedom of expression. This means that the Acts of Parliament restricting the freedom of information must also be interpreted strictly, because the freedom of information, the publicity of exercising public authority, and the transparency and control of the activity of the executive power are preconditions to the right and freedom of criticism and the freedom of expression. Therefore, this fundamental right – in relation to the evaluation of constitutional limitations – enjoys at least the same level of constitutional protection as the 'mother right', i.e. the freedom of expression. The open, transparent and controllable activity of public authority, and the public operation of State authorities and the executive power in general constitute a cornerstone of democracy and a guarantee of the rule of law. Without the test of publicity, the State becomes 'a machine alienated' from its citizens, and its operation becomes incalculable, unpredictable and expressly dangerous, because the lack of transparency of the State's operation poses a great danger to the constitutional freedoms." [Decision 34/1994 (VI. 24.) AB, ABH 1994, 177, 191-192]

Then the Constitutional Court also pointed out that the right of access to data of public interest "is directly and essentially violated through an authorisation for classification as secret without any statutory guarantees and on the basis of completely free discretion". [Decision 34/1994 (VI. 24.) AB, ABH 1994, 177, 193] Thus, "through indefinite and unclear legal concepts" the State's "constitutional duty provided for in Article 8 para. (1) of the Constitution – guaranteeing the protection of fundamental rights – (...) can be evaded". [Decision 34/1994 (VI. 24.) AB, ABH 1994, 177, 193]

Thus, according to Article 61 para. (1) of the Constitution, data of public interest not subject to restriction are public. It is a formal requirement concerning restriction that it may only be the result of a procedure defined in an Act of Parliament. It is a requirement of content that the restriction be necessary and proportionate to the desired objective. In addition, for the purpose of ensuring the enforcement of the fundamental right, the possibility of real and efficient judicial review must be secured in relation to the restriction of publicity, and such review must include not only the examination of formal criteria but also that of the justification of the restriction of publicity in terms of content.

2. As emphasised by the Constitutional Court in an earlier Decision, "the State duty to 'respect and protect' fundamental rights is, with respect to subjective fundamental rights, not exhausted by the duty not to encroach on them, but incorporates the obligation to ensure the conditions necessary for their realisation." [Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 302] To this end, the legislator must adopt regulations securing the enforcement of fundamental rights to the greatest possible extent.

Pursuant to Section 49 para. (1) of Act XXXII of 1989 on the Constitutional Court (hereinafter: "ACC"), if the legislature has failed to fulfil its legislative duty mandated by a statute and this has given rise to an unconstitutional situation, the Constitutional Court establishes an unconstitutional omission to legislate and – setting a deadline – it calls upon the organ in default to perform its duty.

According to the standing practice of the Constitutional Court, it also establishes an unconstitutional omission of legislative duty "in the case of the lack of the statutory guarantees necessary for the enforcement of a fundamental right" despite the existing regulations on the matter concerned. [Decision 15/1998 (V. 8.) AB, ABH 1998, 132, 138] Furthermore, according to Decision 4/1999 (III. 31.) AB: "Even when an unconstitutional omission is established due to the incompleteness of the content of the regulation concerned, the omission itself is based on the non-performance of a legislative duty deriving either from an explicit statutory authorisation or – if there is no such authorisation – from the absolute necessity to have a statutory regulation." (ABH 1999, 52, 57) Thus, according to the practice of the Constitutional Court, an unconstitutional omission of legislative duty may also be established when the legislator has performed its legislative duty resulting from a statutory authorisation, but with such regulatory deficiencies that have resulted in an unconstitutional situation.

The legislature shall be obliged to legislate even in the absence of a concrete mandate given by a statute if it recognises that there is an issue requiring statutory determination within its scope of competence and responsibility, provided that the enforcement or the securing of a constitutional right forms a pressing need for regulation [Decision 22/1990 (X. 16.) AB, ABH 1990, 83, 86]. As pointed out by the Constitutional Court in Decision 37/1992 (VI. 10.) AB (ABH 1992, 227, 231), the legislative duty of the State may follow from the Constitution even without an express provision thereon if it is absolutely necessary for ensuring a constitutional fundamental right (Decision 1395/E/1996 AB, ABH 1998, 667, 669).

3. The Constitutional Court points out that in respect of most documents related to the matters concerned, the restriction – in the interest of preparing decision-making – of access to data of public interest as guaranteed in Article 61 para. (1) of the Constitution is not justified after making a decision. From that time on, the publication of the data related to the preparation of decision-making does not impair the "level of quality", the "efficiency" and the uninfluenced nature of public officials' work. Thus the publicity of materials related to the preparation of decision-making does not hinder the work of public officials. After making a decision, the focus is shifted to the need to make public administration transparent, corruption-free and controlled by society and to reuse the information collected by public administration. The control of the lawfulness, efficiency and democratic operation of public administration as well as the reuse of information are made possible through access to information of public interest.

It is a duty of the legislator to find the right balance between the efficiency and the transparency of public administration. It can be established, however, that a restriction of the publicity of data of public interest can only be considered constitutional if it is absolutely necessary and justified by a "forcing" necessity in a democratic society, and if it is proportionate to the desired objective. Any restriction of the publicity of data of public interest must be terminated without delay when these requirements of content no longer justify it.

Section 19 para. (5) of the DPA orders the restriction of access to data of public interest on a formal basis, as the data handler must only state that the data are related to the preparation of decision-making or have been created for internal use. It restricts the publicity of such data of public interest not only when justified by the interest of making decisions lawfully, effectively and without influence, but also when there is no such justification, even for the time following decision-making, in all cases. Thus, with regard to data related to the preparation of decision-making, the legislator fails to make a distinction between restricting publicity before and after decision-making. On the basis of Section 19 para. (5) of the DPA, the right to the publicity of data of public interest may be restricted not only when justified by a "forcing" necessity to protect a fundamental right or constitutional value (i.e. when the restriction of the publicity of concrete data related to the preparation of decision-making is actually necessitated by the interest in the efficient, uninfluenced, high quality etc. operation of the data handler). Section 19 para. (5) of the DPA provides an opportunity to restrict a fundamental right without a due

cause. This is in conflict with the requirement according to which the restriction of the publicity of data of public interest is only constitutional when it is based not only on formal grounds but also on the fulfilment of the content requirements of restriction, and the restriction is to be maintained only as long as it is justified by such content requirements.

Furthermore, the necessary and proportionate restriction of the right to the publicity of data of public interest can only be guaranteed if a real possibility of reviewing the justification of the restriction in terms of content exists. The possibility of judicial control over the restriction of publicity is provided for in Section 21 of the DPA. With regard to the restriction of publicity on the basis of Section 19 para. (5) of the DPA, the judicial review only includes the examination of the formal criteria specified in the relevant statutory provisions. In the absence of guarantees enforcing the prohibition of the unjustified restriction of publicity and limiting restriction to cases justified by a forcing necessity – i.e. defining the conditions of the restriction of publicity in terms of content – there is no real legal remedy against the restriction of the publicity of data of public interest: such a legal remedy is only formally realised. The lack of the forcing causes of the restriction of publicity and that of proceedings of legal remedy aimed at the review thereof may result in an unjustified restriction – depending on the discretional decision of the data-handling organ – of access to data of public interest, i.e. of the constitutional right to the publicity of data of public interest.
On the basis of Section 19 para. (5) of the DPA, the restriction of publicity may be maintained for an indefinite period, as according to it the period of publicity restriction is to be reckoned from the date of data handling, and the continuous storage of data also qualifies as data handling [Section 2 item 9 of the DPA]. These rules make it possible to maintain the secrecy of classified data for an unlimited period.

Furthermore, the categories of the data defined in Section 19 para. (5) of the DPA as "related to the preparation of decision-making" and "created for internal use" are vague, and the application of these unclear concepts may result in the arbitrary restriction of the publicity of data of public interest.
Section 19 para. (5) of the DPA was introduced by Section 36 of Act LXVI of 1995 on Public Documents, Public Archives and the Protection of Materials in Private Archives. The drafters of the amending Act took account of the content of Decision 34/1994 (VI. 24.) AB, yet they deviated from it. In the context of Decision 34/1994 (VI. 24.) AB, the character of data as "intended for internal use" is inseparable from their relation to the preparation of decision-

making. ["Working materials intended for internal use, aide-memoires, drafts, sketches, proposals, letters exchanged within the organization, and generally the documents written in the course of preparations for a decision – the publicity of which may significantly hinder the public officials in fulfilling their task – are in general exempt from publicity." (ABH 1994, 177, 190)] The application of the expression "created for internal use" – included in the DPA at the time of its amendment – independently of the preparation of decision-making offers a wide margin for subjective evaluation, as it protects data on the basis of the intentions of their creator rather than on the basis of their content. The constitutional examination of the content of Section 19 para. (5) of the DPA by the Constitutional Court is aimed at deciding whether the legislator restricts access to data "created for internal use" and "related to the preparation of decision-making" with due justification and to the extent absolutely necessary. The DPA does not include any definition of data "for internal use" and data related to "the preparation of decision-making", and it does not specify, either, any constitutional objective that may justify restriction. The mere fact that certain data have been created during the everyday work of an organ performing public duties or in connection with the preparation of a decision made by such an organ does not duly justify the exclusion of publicity regarding data of public interest, i.e. – according to Section 2 item 4 of the DPA – data handled by or related to the activity of organs and persons performing state or local government duties or other public duties defined in a statute. Restriction is justified if Section 19 paras (1)-(3) of the DPA allow it, or if the publication of data of public interest would endanger the performance of a public duty, i.e. the exercise of a State duty without any external influence. The aspects of convenience of organs and persons performing public duties may not enjoy priority over a fundamental right. Section 19 para. (5) of the DPA can only be regarded as constitutional if the legislator clarifies the aim of restricting the freedom of information, limits the category of data that may be excluded from publicity to a reasonable size, and restricts access to data of public interest only to a necessary and proportionate extent.

The conceptual vagueness, lack of differentiation and joint use of the expressions "data created for internal use" and "data related to the preparation of decision-making", as well as the application of the same rules thereto constitute – in themselves – such a serious regulatory deficiency that results in the unnecessary and disproportionate restriction of the constitutional fundamental right to the publicity of data of public interest [Article 61 para. (1) of the Constitution], because the categories of data to be excluded from publicity are vague.

The Constitutional Court also notes that the restriction of publicity under examination does not become constitutional by allowing access, on request, to data upon the approval of the head of the organ concerned. This is so because such an approval is within the discretionary powers of the organ concerned and it can only be reviewed formally. However, the enforcement of a fundamental right may not depend on such a decision of the data-handling organ.

In view of the above, it can be concluded that Section 19 para. (5) of the DPA allows such a restriction of the publicity of data of public interest that is not justified by the interest in the efficient operation of State organs. The efficiency and the transparency of public administration are requirements to be taken into account to the same degree, and when one of them – in the present case, the first one – is granted priority, the right to the publicity of data of public interest is violated. Accordingly, the Constitutional Court, acting *ex officio*, has established an unconstitutional omission with consideration to the right to the publicity of data of public interest, as the legislator has failed to secure the guarantees related to the rule of law that ensure access to the data of public interest specified in Section 19 para. (5) of the DPA when the restriction of their publicity is no longer justified. The Constitutional Court has obliged the legislator to remedy the omission within the deadline specified in the holdings.

The Constitutional Court has ordered the publication of this Decision in view of the public interest therein.

Budapest, 6 April 2004

Dr. András Holló
President of the Constitutional Court

Dr. Mihály Bihari
Judge of the Constitutional Court, Rapporteur

Dr. Ottó Czúcz
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