

Decision 8/2020 (V. 13.) AB of the Constitutional Court of Hungary

On the annulment with retroactive effect of the normative text reading "and Section 60/A (1a) as laid down by Section 95" of Section 111 (36) of Act CXCV of 2011 on Public Finances, and its disapplication in any case pending before any court

In the matter of a judicial initiative seeking a finding unconstitutionality by non-conformity with the Fundamental Law, the Constitutional Court, sitting as the Full Court, has passed the following

decision:

1. The Constitutional Court finds that the normative text reading "and Section 60/A (1a) as laid down by Section 95" of Section 111 (36) of Act CXCV of 2011 on Public Finances is contrary to the Fundamental Law in violation of Article B (1) of the Fundamental Law, and therefore annuls said normative text with retroactive effect to its promulgation, effective as of 9 July 2019.

Section 111 (36) of Act CXCV of 2011 on Public Finances shall remain in force following its annulment with the following wording: "Section 54 (1b) of this Act, as laid down by Section 94 of Act LXVI of 2019 on the Foundation of the Central Budget of Hungary for 2020, shall also apply in pending public authority proceedings."

2. The Constitutional Court finds that normative text reading "and Section 60/A (1a) as laid down by Section 95" of Section 111 (36) of Act CXCV of 2011 on Public Finances shall not be applicable in the review proceedings pending before the Curia under No Kfv.IV.35.568/2019, as well as in the case pending before any court.

3. The Constitutional Court dismisses the petition seeking a finding of unconstitutionality by non-conformity with the Fundamental Law, retroactive annulment and disapplication of Section 60/A (1a) of Act CXCV of 2011 on Public Finances.

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

Reasoning

I

[1] 1. In Case No.Kfv.IV.35.568/2019, the Review Panel of the Curia initiated, while ordering a stay in the proceedings pending before it, a review of constitutionality of statutory provisions by order pursuant to Section 34 (b) of Act I of 2017 on the Code of Public Administration Procedure (hereinafter referred to as the "Code of Public Administration Procedure").

[2] The Curia's request was that the Constitutional Court, acting within the remit of its competences under Article 24 (2) (b) of the Fundamental Law and Section 25 (1) of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"), review the constitutionality of Section 60/A. (1a) of Act CXCV of 2011 on Public Finances (hereinafter referred to as the "Public Finances Act"), find it contrary to the Fundamental Law, annul said legislative provision with retroactive effect to the date of its promulgation and hold that such provision be disapplied in the main proceedings pending before the Curia and in all individual cases pending before a court at the time of its annulment. In its addendum to the petition, the Curia requested the Constitutional Court to exercise the same competence by finding the same legal consequences against Section 111 (36) of the Public Finances Act.

[3] 2. The case giving rise to the judicial initiative and its background can be summarised as follows, based on the information contained in the Curia's petition and the documents available to the Constitutional Court.

[4] 2.1 The Curia issued its decision on the recovery of State subsidy related to the village caretaker and farm caretaker services in accordance with the rules of the pilot proceedings (see Section 33 of the Code of Public Administration Procedure) on 22 January 2019.

[5] According to the facts of the cases in the pilot proceedings, the local governments provided the village caretaker service free of charge pursuant to Section 57 (1) (a) and Section 60 of Act III of 1993 on Social Administration and Social Benefits (hereinafter referred to as the "Social Administration and Benefits Act"), and therefore, pursuant to Act C of 2014 on the 2015 Central Budget of Hungary (hereinafter referred to as the "Act on the Central Budget"), they used the maximum budgetary support of HUF 2,500,000 per service pursuant to Annex 2 of the Act on the Central Budget. According to the relevant rules, the full amount of the subsidy is due if the service is registered in the service provider register for the whole of the reference year.

[6] The common problem in the pilot proceedings was that the village caretaker service provided by the local governments was registered in the service provider register for the whole period under investigation by the Hungarian State Treasury, but the service was provided in a specific period with a different registration number of the vehicle than the one previously registered. This deficiency was subsequently rectified by the local governments, and reported the details of the new vehicles. The replacement of vehicles was financed by public tenders and the municipalities providing the service therefore reported a mass of this category of cases throughout the country.

[7] On the basis of the above facts, the Hungarian State Treasury recovered the entire State subsidy for the period in which the data of the new vehicles were not yet included in the register, with reference to Section 60/A (1) of the Public Finances Act and the regulations issued for the implementation of the Public Finances Act. In the pilot proceedings, this period was the whole of the year 2016. It should be noted that the municipalities concerned otherwise lawfully provided the service during the contested period.

[8] The diverging practice was unified by the Curia in its final judgement No Kfv.IV.35.496/2018/12 (the first case of the pilot proceedings). In its decision, it held, among other things, that it was disproportionate to recover the entire subsidy for a given period

merely because the local governments had belatedly notified the details of the new vehicles. The Curia pointed out that the village caretaker and farm caretaker services generally concern small municipalities and usually includes services for the elderly and the disabled. In addition, the repayment of all the subsidy is a serious financial problem for the small municipalities concerned. In the interpretation of the Curia, the imposition of the obligation, which is proportionate to the gravity of the infringement found, is the obligation that is in accordance with Article N, Article 28 and Article XXIV (1) of the Fundamental Law.

[9] On this basis, the Curia formulated the guidelines for the new procedure in its judgement in the pilot proceedings in such a manner that the Treasury "is obliged to consider the facts of the case in order to impose a repayment obligation and, if it decides that the claimant is liable to repayment because of the infringement found, it must determine the amount proportionately. However, the defendant may not order the claimant to repay all the subsidy due for 2016. In the assessment, it must also be taken into account that the purpose of the subsidy under Section 60 of the Social Administration and Benefits Act has been achieved and that the local authority providing the service has also complied with the additional professional and other conditions" (Judgement of the Curia, No. Kfv.IV.35.496/2018/12, Reasoning [44]).

[10] 2.2 The judicial initiative pending before the Constitutional Court is one of the requests for review received after the pilot proceedings, raising a similar question of law. The Curia has referred the other cases to the Constitutional Court while ordering a stay of proceedings. The facts of the specific case before the Constitutional Court are as follows.

[11] The Hungarian State Treasury obliged the local government to repay all the village caretaker subsidies for 2016 plus interest, because instead of the vehicle recorded in the register it used another vehicle purchased under a public tender with the assistance of a state body to provide the village caretaker service and the local government was late in notifying the replacement of the vehicle. It thereby infringed Section 60/A (1) (d) of the Public Finances Act. Throughout 2016, the data of the previous vehicle were entered in the register, only by request dated 17 January 2017 did the municipality initiate the registration of the new data.

[12] The municipality brought an action against the decision of the Hungarian State Treasury. By its judgement No 13.K.27.394/2019/7 of 9 July 2019, the Administrative and Labour Court of Miskolc (hereinafter referred to as the "Administrative and Labour Court"), which was hearing the case, quashed the defendant's decision in relation to the village caretaker and caretaker services, including the first instance decision, and ordered the first instance authority to conduct a new procedure in this regard. In its instructions for the new procedure, the Administrative and Labour Court, referring to the pilot proceedings practice of the Curia, required the authority to apply proportionality. In essence, the Administrative and Labour Court repeated verbatim the content of the Curia's guidelines, cited at the end of the previous subsection, requiring an exercise of discretionary powers. According to the Administrative and Labour Court, the low gravity of the infringement is also confirmed by the fact that, following an amendment to the legislation in force since 1 January 2018, the make, type and registration number of the vehicle no longer have to be indicated in the service provider register.

[13] The Hungarian State Treasury filed a request for review against the final judgement of the Administrative and Labour Court with the Curia, in which it requested the setting aside of the final judgement and the dismissal of the action brought by the claimant municipality. The Treasury argued that it could not comply with the duty of appreciation imposed by the Administrative and Labour Court, since under Section 111 (36) of the Public Finances Act, Section 60/A (1) and (1a) of the Public Finances Act must also be applied in pending proceedings and could not therefore be disregarded by the Curia. In addition, the Treasury argued that the interpretation of the Curia in the pilot proceedings was contrary to the Curia's previous practice of classifying as lawful the control and public authority procedure carried out in the context of a budgetary approach based on the protection of budgetary resources.

[14] In its request for review, the Hungarian State Treasury did not dispute that the wording of Section 60/A (1) of the Public Finances Act offers the possibility of *pro rata* assessment, but that this can only be a *pro rata* assessment over time. Accordingly, the repayment obligation may only cover the months in which the data content of the service provider register complied with the legal requirements. In the case of the claimant municipality, however, there were no such months in 2016. The mere fact that the municipality used the State subsidy for the performance of its task does not in itself render the use of the subsidy lawful.

[15] 3. The Curia's petition challenged two provisions of the Public Finances Act.

[16] 3.1 According to the judicial initiative, Section 60/A (1a) of the Public Finances Act is contrary to the right to a fair hearing before a public authority [Article XXIV (1) of the Fundamental Law], the right to a fair trial [Article XXVIII (1) of the Fundamental Law] and point 27 (b) of the Final and Miscellaneous Provisions of the Fundamental Law.

[17] In the Curia's view, the requirement of Article XXIV (1) of the Fundamental Law "is not satisfied by the amendment to the Public Finances Act which categorically prohibits the exercise of discretion in the adoption of a decision establishing the repayment obligation. The contested rule prevents decisions from being based on a full investigation and consideration of the facts and on a fair (just) application of the law, since it restricts the Treasury's power of review. The contested amendment represents the opposite trend to a modern and public administration placing the party to the public administration proceedings at the centre, degrading the functioning of the public administration into a mechanical application of the law." (Order of the Curia No Kfv.IV.35.568/2019/3, Reasoning [15])

[18] On the side of the court, Section 60/A (1a) of the Public Finances Act is contrary to Article XXVIII (1) of the Fundamental Law, because "by narrowing the scope of assessment, it hinders the realisation of effective legal protection before the administrative court. In this case, the requirement of fairness overrides the supplement to the Act requested to be reviewed" (Order of the Curia Kfv.IV.35.568/2019/3, Reasoning [17]).

[19] It is a constitutional requirement of a fair trial, the petition states, that the court must be able to adjudicate on the merits of the rights and obligations at issue. "[T]he rule governing public administrative decision-making power must contain an appropriate criterion or standard against which the legality of the decision may be reviewed by the court [...]. This requirement is also enforced by the Constitutional Court under the Fundamental Law. Most recently,

Decision 11/2019 (III. 29.) AB reaffirmed this, adding that judicial review of the legality of public administrative decisions cannot therefore be constitutionally limited to an assessment of formal legality. Legislation which expressly excludes judicial review that goes beyond the question of law or leaves so little scope for judicial review as opposed to administrative discretion that there can be no question of a substantive assessment of the case within the appropriate constitutional guarantees is contrary to the Fundamental Law (Reasoning [12]). In the present case, the problem is not that there is no criteria for a margin of appreciation, but, on the contrary, that there is no room for appreciation." (Order of the Curia No Kfv.IV.35.568/2019/3, Reasoning [19])

[20] The Curia also pointed out that the application of Section 60/A (1a) of the Public Finances Act to pending public authority procedures is clear from the reasoning of Section 60/A (1a) of the Public Finances Act, in accordance with which the legal provision designed to override previous court judgements is also applicable to court proceedings (Order of the Curia No Kfv.IV.35.568/2019/3, Reasoning [22] and [26]).

[21] In the Curia's view, Section 60/A (1a) of the Public Finances Act is also in conflict with point 27 (b) of the Final and Miscellaneous Provisions of the Fundamental Law. in force at the time of the drafting of the petition, because the challenged norm also narrows the scope of judicial review of public administrative decisions. If the law provides that there is no discretion at all in the decision of the administrative authority in a given category of cases, and if the court has previously imposed that discretion on the public administrative authority in that category of cases, it is clear that the court is also bound by that provision. The unification of judicial practice by the administrative court subordinated to the law is also overridden by the legislation in the resumed proceedings, limiting judicial review of public administrative decisions to a mere review of formal legality. This legislative solution violates the provision of the Fundamental Law that makes it the task of the courts (administrative courts) to decide on the legality of public administrative decisions (Order of the Curia No Kfv.IV.35.568/2019/3, Reasoning [18]).

[22] 3.2 According to the supplement to the petition, Section 111 (36) of the Public Finances Act violates Article B (1) of the Fundamental Law for the following reasons.

[23] The Curia has consistently held that, in the case of the farm caretaker and village caretaker services, the recovery of the entire amount of the relevant State subsidy is unlawful merely because of the late registration of a new vehicle. Section 111 (36) of the Public Finances Act alters the legal relationship with retroactive effect, that is, by ordering the application of the new Section 60/A (1a) of the Public Finances Act to public administration proceedings with retroactive effect.

[24] "In line with the practice of the Constitutional Court, legal certainty follows from the rule of law enshrined in Article B (1) of the Fundamental Law, which adds a number of other requirements to the level of protection of the Fundamental Law. These include the prohibition of retroactive legislation which makes the situation of the persons liable more burdensome or which restricts or deprives them of a right. [...] [I]f a provision categorically prohibiting the exercise of discretionary powers were to pass the test of constitutionality, it should only apply to public authority proceedings initiated after the entry into force of the Act, that is, 10 July

2019. It follows from the legal certainty arising from Article B (1) of the Fundamental Law that the practice hitherto standardised by the Curia should be preserved and that stayed proceedings should be closed accordingly." (Order of the Curia No Kfv.IV.35.568/2019/5, page 2)

II

[25] 1. The relevant provisions of the Fundamental Law after the entry into force (13 December 2019) of the eighth amendment (12 December 2019) of the Fundamental Law read as follows:

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

"Article XXIV (1) Everyone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities. Authorities shall be obliged to state the reasons for their decisions, as provided for by an Act."

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

"Article 25 (2) Courts shall decide on criminal matters, civil disputes, the lawfulness of administrative decisions, the conflict of local government decrees with any other law and their annulment, the establishment of omission by a local government of its obligation based on an Act to legislate, and on other matters specified in an Act.."

[26] 2. The relevant rules of the Public Finances Act read as follows:

"Section 58 (1) Local governments shall account for the subsidies paid to them in the financial year in their annual budgetary accounts."

"Section 59 (1) The Treasury shall, on the basis of the annual budgetary accounts of the local government, review the accounting and use of subsidies in the framework of the official control under the General Public Administrative Proceedings Act."

"Section 60 (1) If the Treasury, in the course of the review, finds a discrepancy with the data communicated in the annual budgetary accounts, it shall determine, in an *ex officio* procedure, the amount of the subsidy due to the local government or to be repaid by it."

"Section 60/A (1) If the local government has

- (a) provided false information for the subsidy,
- (b) not used the subsidy for the purpose for which it was granted,
- (c) received subsidy in excess of the rate fixed by law; and / or
- (d) not complied with any of the conditions to which the subsidy is subject

[for the purposes of this Chapter, points (a) to (d) hereinafter jointly referred to as "misuse"], shall immediately cancel and repay the subsidy or the part of the subsidy affected by the misuse.

(1a) If the misuse is established by the Treasury in a review procedure pursuant to Section 59, no discretionary power shall be exercised in the adoption of the decision establishing the repayment obligation."

"Section 111 (36) Section 54 (1b) of this Act as laid down by Section 94, as well as Section 60/A (1a) of this Act, as laid down by Section 95 of Act LXVI of 2019 on the Foundation of the Central Budget of Hungary for 2020, shall also apply in pending public authority proceedings."

III

[27] First of all, the Constitutional Court had to determine whether the judicial initiative complied with the provisions of the Constitutional Court Act {see, for example, Order 3058/2015 (III. 31.) AB, Reasoning [15] to [24]; Decision 3223/2018 (VII. 2.) AB, Reasoning [13] to [22]; Decision 12/2018 (VII. 18.) AB, Reasoning [19] and [20]; and Decision 8/2019 (III. 22.) AB, Reasoning [16]}.

[28] 1. According to the initiative, the contested rules apply to the proceedings. The Constitutional Court, in order to ensure that the individual / specific nature of the judicial initiative is preserved, defines as a requirement that the rule in question must be a rule on the application of which the decision of the individual case before the court depends or which substantially affects the procedural situation of the parties {see e.g. Decision 3016/2016 (II. 2.) AB, Reasoning [14]; Decision 3049/2016 (III. 22.) AB, Reasoning [19]}.

[29] The contested provisions meet these conditions. The Curia's petition was expressly motivated by the application of the contested legislation in the proceedings.

[30] 2. The suspension of the review proceedings has been granted, and the petition, with one exception, complies with the provisions of Section 52 (1b) of the Constitutional Court Act.

[31] The aforementioned partial exception refers to the wording of Section 111 (36) of the Public Finances Act, which states that "Section 54 (1b) of this Act as laid down by Section 94 [...] of Act LXVI of 2019 on the Foundation of the Central Budget of Hungary for 2020, shall also apply in pending public authority proceedings". While the Curia provided a constitutionally assessable justification for the rule providing that Section 60/A (1a) of the rule as laid down by Article 95 of Act LXVI of 2019 on the Foundation of the Central Budget of Hungary for 2020, which also applies in pending public authority procedures, is contrary to the Fundamental Law, it did not address why a similar rule concerning Section 54 (1b) of the Public Finances Act would violate the Fundamental Law. The absence of a statement of reasons does not permit an assessment of the whole of the cited Subsection.

[32] 3. The Constitutional Court noted that the Eighth Amendment to the Fundamental Law (12 December 2019) entered into force between the date of the submission and the date of consideration of the petition, which repealed point 27 (b) of the Final and Miscellaneous Provisions of the Fundamental Law rules referred to in the submission on 13 December 2019. The Eighth Amendment to the Fundamental Law (12 December 2019) did not, however, abolish the provision that the court shall decide on the legality of public administrative decisions, but merely moved it to Section 25 (2) of the Fundamental Law. The Constitutional Court therefore

conducted its review of constitutionality of the decision in this light. The amendment was also referred to in the Curia's petition.

[33] 4. The Deputy State Secretary for Legal Affairs and Coordination of the Ministry of Finance submitted an *amicus curiae* opinion *ex officio*, which was taken into account by the Constitutional Court as described in points V-VI.

[34] 5. There was therefore no obstacle to an investigation on the merits. Below, the Constitutional Court first summarised its established practice on the rules of the Fundamental Law invoked in the petition (point IV, Reasoning [35] *et seq.*). It then briefly reviewed the provisions of the law challenged and those closely connected with them, and explained the purpose for which the rules challenged were drawn up (point V, Reasoning [62] *et seq.*). By comparing them, it ruled on the elements of the petition against Section 60/A (1a) of the Public Finances Act (points VI/1 to VI/3, Reasoning [87] to [104]), which essentially required an interpretation of fundamental procedural rights. Finally, the Constitutional Court ruled on the contested version of Section 111 (36) of the Public Finances Act, which raised a different constitutional law issue from the previous ones: the content of legal certainty had to be expanded in the context of the prohibition of retroactivity in the light of the specific circumstances of the case (point VI/4, Reasoning [105] *et seq.*). The Constitutional Court did not go into an explanation of the constitutional principles of budgetary management in its procedure, which was subject to the petition [*cf.* Section 52 (2) of the Constitutional Court Act]. The Curia's petition did not allege any violation of these principles. Nor did the Constitutional Court review the validity of the rules.

IV

[35] The practice of the Constitutional Court in relation to the fundamental rights, the rule of judicial competence and the constitutional value invoked in the petition can be cited as follows.

[36] 1. The Constitutional Court first reviewed the practice of the Fundamental Law in relation to Article XXIV (1).

[37] 1.1 The right to a fair hearing before a public authority [Article XXIV (1) of the Fundamental Law] has already been dealt with by the Constitutional Court in a number of cases. In one of its most recent decisions {see Decision 17/2019 (V. 30.) AB, Reasoning [36] to [39]} and in the decisions referred to and relied upon therein, it summarised its content as follows.

[38] The right to a fair hearing before a public authority [Article XXIV (1) of the Fundamental Law] cannot be identified with the right to a fair trial guaranteed by Article XXVIII (1) of the Fundamental Law. "The requirement of a fair hearing before a public authority may not be infringed in any public authority procedure, although the system of requirements deriving from Article XXIV (1) of the Fundamental Law may differ from one specialised administration procedure to another, having regard to their specific characteristics." {Decision 3223/2018 (VII. 2.) AB, hereinafter referred to as the "2018 Court Decision", Reasoning [34]}.

[39] Within the framework of the rule of law, a "fair" (fair, equitable, balanced) character is a requirement for any procedure vested with public authority. Therefore, while taking into account the specificities, the requirements of a fair procedure must also be present in the public

authority procedure, which must be enforceable as a substantive right, ultimately as a fundamental right, by the party to the public administrative proceedings with fundamental legal subjectivity. The enforceability of these rights is a limit to the authority's action and a benchmark for its lawful procedure. Article XXIV of the Fundamental Law recognises the right to a fair hearing before a public authority as a fundamental right in its own right. The protection of the fundamental right extends to the impartial, fair and timely administration of public authorities, to the statutory justification of public authority acts [Article XXIV (1) of the Fundamental Law] and to compensation for damage caused in the exercise of administrative authority [Article XXIV (2) of the Fundamental Law] {2018 Court Decision, Reasoning [28] and [29]; most recently reaffirmed, for example, by Decision 28/2019 (XI. 4.) AB, Reasoning [74]}.

[40] As the content of the right to a fair public authority procedure, the Constitutional Court has pointed out in its practice a subset of rights which focus on the party to the public administrative proceedings and whose enforcement is intended to serve the formal and material efficiency (speed, professionalism, legality) of the investigative type of public authority procedure, and its overall subordination to law. This subset of rights is subject to the regime of Article I (3) of the Fundamental Law as regards the possibility of limitation. For example, the communication of the decision {Decision 6/2017 (III. 10.) AB, Reasoning [37] to [39]} and the manner of communication {Decision 17/2015 (VI. 5.) AB, Reasoning [109], reaffirmed by Decision 35/2015 (XII. 16.) AB, Reasoning [109]} are considered to be such.) 2018 Court Decision, Reasoning [27]]; equality of arms in public authority procedures involving opposing parties {Decision 10/2017 (V. 5.) AB, Reasoning [61] to [63]}; right of access to the file (2018 Court Decision, Reasoning [36]). The Constitutional Court has also already held that "the right to be notified of the opening of proceedings and the right to have access to evidence, through the right to make a statement and the right of defence, necessarily form part of the scope of interpretation of the right to a fair hearing before a public authority." {Decision 3311/2018 (X. 16.) AB, Reasoning [33]}.

[41] In a recent relevant decision of the Constitutional Court {Decision 3090/2019 (V. 7.) AB, Reasoning [30]} it was also stated that, similar to Article XXVIII (1) of the Fundamental Law, the public authority procedure must be fair in its entirety. In the latter approach, there is no room for justification of the limitation, because the very finding of fairness is itself the result of an exercise of discretionary powers.

[42] 1.2 Article XXIV (1) of the Fundamental Law does not therefore provide for the right to a fair hearing before public authorities, but rather represents an unlimited quality in the interest of the party to the public administrative proceedings which each public authority must assert in its proceedings. In terms of its elements, it is made up of a number of rights that can be limited in accordance with the test of necessity and proportionality, which, in accordance with the current practice of the Constitutional Court, do not include the right of the party to the public administrative proceedings to a considered decision by the public authority, either in general or in specialised public administration proceedings. However, the undisputed part of this right is the impartial, fair and timely administration of public authorities, the statutory justification of public authority acts and the other subset of rights referred to in the case law of the Constitutional Court.

[43] 2. The Constitutional Court also reviewed its practice in relation to Article XXVIII (1) of the Fundamental Law.

[44] 2.1 The content of the right to a fair trial can be summarised as follows.

[45] In line with the practice of the Constitutional Court, which has been reaffirmed also under the Fundamental Law, the right to a fair trial does not mean the violation of a procedural rule, but the assessment and quality of the entire procedure before the court {Decision 6/1998 (III. 1.) AB, ABH 1998, 91, 95, reaffirmed by Decision 36/2013 (XII. 5.) AB, Reasoning [31]; Decision 3/2014 (I. 21.) AB, Reasoning [59] and [73]}. In addition, the fundamental procedural right recognised by Article XXVIII (1) of the Fundamental Law, its content and the possibility of limiting it, as well as the content and possibility of limiting the subset of rights derived from it, are described in a systematic manner in Decision 3046/2019 (III. 14.) AB (Reasoning [48] to [51]).

[46] The right of access to the courts is part of the right to a fair trial. Under Decision 17/2015 (VI. 5.) AB, "judicial review of the legality of public administrative decisions cannot be constitutionally limited to an assessment of legality in accordance with purely formal criteria, limited to compliance with procedural rules. The court seized of an administrative matter is not bound by the facts established in the public administrative decision and may—indeed must—review the discretion of the administrative body as regards legality." (Reasoning [88]).

[47] The right of access to the courts has, however, a specific dimension in the context of public administrative adjudication. Namely, the relevant procedural rules as a whole must allow for judicial review of the administrative body's legitimate discretion. This requirement stems, on the one hand, from the fact that the defendant is bound by law, that is, he must act in accordance with the substantive and procedural rules of the law, and, on the other hand, from the fact that it is within the competence of the administrative court to rule on the legality of the defendant's decision in the context of the request for review. Thus, in conceptual terms, the procedure of a judge hearing an administrative case can be fair and equitable if it is not bound by the decision of the defendant. In this case, the right of the claimant to have recourse to the court is actually exercised, and through this the subordination of the functioning of the public administration is achieved {Decision 17/2018 (X. 10.) AB, Reasoning [43]}.

[48] "[T]he legislature must provide for a procedure in which the judge can decide what is legitimate and what is not, in the light of the relevant statutory provisions. The aim of the fundamental right concerned is therefore to protect the quality of the procedure. Indeed, the meaning of a recourse to the courts is the possibility of obtaining a decision on the substance of the case by a court which measures the claims in dispute against the applicable substantive and procedural law. In the course of judicial proceedings, it is a requirement that the court identify all relevant questions of law and decide them by interpreting the law." {Decision 17/2018 (X. 10.) AB, Reasoning [47]}

[49] The Constitutional Court has already pointed out on several occasions during the period of the Fundamental Law that "the fairness of the procedure ensures the legal framework of the procedure and the enforcement of procedural rights. The Fundamental Law grants the right to the procedure necessary, and in most cases appropriate, for the enforcement of substantive

justice, but does not grant a substantive right to the enforcement of substantive justice." {More recently, see Decision 3074/2016 (IV. 18.) AB, Reasoning [57]}

[50] 2.2 To summarise the above: Article XXVIII (1) of the Fundamental Law does not presuppose a fundamental right to a judicial procedure leading to substantive justice. Nor does this fundamental procedural right express a moral value judgement. The right to a fair trial protects the quality of the proceedings as a whole, which is unlimited because it is itself the result of legal discretion. Its content consists of a subset of rights. One of these is the right of access to the courts, which in administrative matters is intended to enable the court, upon request, to review the legality of the public administrative procedure and decision, not only in form but also in substance. The right of access to the courts does not therefore release the court from the law, but requires the court to weigh the claims in dispute against the applicable substantive and procedural law, to identify all the relevant questions of law and to decide them by interpreting the law.

[51] 3. Article 25 (2) of the Fundamental Law states that "[the] court shall decide [...] on the legality of public administrative decisions".

[52] In the context of the judicial initiative, it is necessary to point out the content of the provision contained in Article 25 (2) of the Fundamental Law. Article 25 (2) of the Fundamental Law regulates the powers of the judiciary. It provides that the Hungarian courts, and not other bodies of power or foreign courts, are competent to decide, *inter alia*, on the legality of public administrative decisions. It also sets out the scope of the duties of the courts, since the types of decision-making powers confer upon them an obligation to perform their duties, given the monopoly of the judiciary within the framework of the rule of law. The specific allocation of functions and material competence, as well as the definition of territorial competence, is carried out by law (see in particular: Decision 3243/2018 (VII. 11.) AB, Reasoning [37] to [40]; Decision 9/2018 (VII. 9.) AB, Reasoning [52] and [53]).

[53] 4. "Hungary shall be an independent, democratic State governed by the rule of law" [Article B (1) of the Fundamental Law]. The rule of law includes legal certainty, in relation to which the Constitutional Court has the following practice.

[54] 4.1 "According to the interpretation of the Constitutional Court, legal certainty requires that the legal system as a whole, its subdivisions and individual rules are clear, unambiguous, predictable in their effects and foreseeable for the addressees of the norm, and that they carry a normative content that can be recognised in the course of the application of the law {...}; Decision 38/2012 AB, Reasoning [84]]. [...] The requirement that legal rules be foreseeable and predictable encompasses the limited and exceptional possibility of retroactive legislation. That is to say, a statute may not lay down legal consequences for a period prior to its promulgation: it may not impose an obligation or declare conduct unlawful. In the view of the Constitutional Court, a statute may be considered to be contrary to the above prohibition not only if it entered into force retroactively, but also if its provisions are applicable to legal relationships established before its entry into force, on the basis of an express provision to that effect {...} Decision 16/2014 (V. 22.) AB, Reasoning [32]]. In the latter case, the rule attaches a new legal consequence to an event or fact occurring before its entry into force which is different from

that of the rule previously in force, which may give rise to a retroactive effect. One also speaks of retroactivity if the new rule determines the legal consequence of a situation existing at the time of its entry into force which arose before its entry into force in a different way from the old one." (Decision 10/2018 (VII. 18) AB, Reasoning [49] to [51], cited in affirmation in Decision 6/2019 (III. 20.) AB, Reasoning [49] and Decision 33/2019 (XI. 27.) AB, Reasoning [39])

[55] The Constitutional Court has also made statements relevant to the petition at issue in its previous decisions concerning the prohibition of retroactive legislation. It is necessary to recall the following three of them.

[56] In Decision 6/2019 (III. 20.) AB, the panel reviewed the constitutionality of a statutory rule which, in the case of foreign currency cases, "- including pending lawsuits - eliminated the possibility of bringing a declaratory action under the former Civil Code [Act IV of 1959 on the Civil Code] and the new Civil Code [Act V of 2013 on the Civil Code] (the consumer may not seek a finding that the contract is invalid without applying the legal consequences of invalidity) and excluded the possibility of bringing an action for *restitutio in integrum*. In addition, there is an additional condition for the resolution of nullification proceedings: the submission of an explicit request for a settlement between the parties, which must be specific and quantified. The actions already brought had to be amended as a result of the amendment, otherwise they could not be dealt with on the merits." {Decision 6/2019 (III. 20.) AB, Reasoning [47]}

[57] In this case the dismissal was based on two grounds. On the one hand, there was neither a circumstance preventing the bringing of the action nor a change of circumstances leading to a forfeiture of rights. On the other hand, the challenged legislation did not attach to the event, fact or state of affairs prior to its entry into force a new legal consequence different from the previously existing rule, which did not exist before {Decision 6/2019 (20.III.) AB, Reasoning [57] and [58]}.

[58] In another case, the Constitutional Court reviewed Section 197 (7) of Act CXLI of 2015 on Public Procurement. In order to determine whether the transitional provision set out in the preceding Subsection leads to a violation of the prohibition of retroactive legislation as regards the applicability of a ground for preclusion, it applied the following test: whether the challenged provisions "relate to legal relationships established before their entry into force and, in relation to them, impose an obligation, make an obligation more onerous, restrict or withdraw a right or declare conduct unlawful {Decision 13/2015 (V. 14.) AB, Reasoning [56]}" {Decision 35/2019 (XII. 31.) AB, Reasoning [27]}.

[59] The Constitutional Court held in the above case that the contested rule applied the new ground for preclusion to an infringement committed and completed in October 2015, which constituted an additional sanction for the public procurement infringement, in addition to the finding of infringement and the imposition of a fine, and consequently decided to annul it.

[60] In its Decision 4/2020 (I. 29.) AB, the Constitutional Court stated in principle "that legal relations which have already been closed by a final court decision and which are pending enforcement cannot generally be affected by a newly created legal provision" (Reasoning [40]).

[61] 4.2 The Constitutional Court has therefore an extensive practice in relation to the prohibition of retroactive legislation, also from the point of view of what this prohibition means for pending proceedings. This also includes the fact that it is incompatible with the content of the rule of law to enact a new rule in such a manner that it adversely affects the substantive legal effects of a situation already existing at the time of its enactment in pending proceedings. It is therefore necessary to assess whether the facts were already in existence before the entry into force of the newly applicable rule and, if so, whether the latter introduces a new legal consequence different from the old one, causing prejudice or forfeiture of rights in pending cases.

V

[62] The Constitutional Court reviewed the relevant legal context and identified the normative content attributed to the provisions under review by the Curia and the authority that issued the decision reviewed by the Curia.

[63] 1. The village caretaker or farm caretaker service is provided by the local government from its own revenues or, as is the case in most situations, from budgetary support, but free of charge for the residents. The village caretaker or farm caretaker service is therefore a free service of a social nature for the members of the local community. The subsidy used by the municipality is provided for in the annual budgetary Act with a view to achieving a vertical balance of public finances. The municipalities eligible for this subsidy are those which maintain the service in accordance with the professional rules laid down by law (see Annex 2, point III. 3 (e), of the Act on the Central Budget). The service is subject to dual State control: financial control by the Treasury and professional control by the competent government office.

[64] The application for the subsidy creates a legal relationship of budgetary support between the municipal government and the Treasury, which is responsible for the payment and control of the subsidy. The subsidy relationship is adapted to the cyclical nature of the budget. It shall be renewed every calendar year if the subsidy is reappropriated by the Act on the budget for that year and if the municipality again applies for it. The content of the legal relationship is made up of rights and obligations which fall within the scope of public finance law. Public finance law is part of finance law and is therefore subject to rules of public law. The overarching code in this area is the Public Finances Act.

[65] A general feature of public finance law is that it provides a fixed order for the management of budgetary appropriations. The subjects of public finance must make provision for appropriations and report on their execution as required by the Public Finances Act and other legislation. In this respect, neither the body managing the appropriations nor the audit body should have any freedom, subject to statutory exceptions. The practice of the Curia is in line with this (see, for example, judgement of the Curia No Kfv.IV.35.253/2015/5, pp. 3-4).

[66] 2. The local government's obligation to account for the use of budgetary support and its obligation to repay misused subsidies is also based on the provisions of the Public Finances Act.

[67] Subsection (1) of Section 60/A of the Public Finances Act defines the concept of misuse of subsidy and the legal consequences related to it. This rule has been in force without amendment since 1 January 2015. The belated declaration of the details of a vehicle used for the provision of village or farm caretaker services constitutes misuse on the budgetary side, even if the subsidy has been used for the intended purpose, that is, the service has been used by the beneficiary.

[68] 2.1 The question of statutory interpretation is which legal consequences are connected to the realisation of the hypothesis, that is, what is the exact content of the disposition.

[69] The Constitutional Court cannot take a position on this question of interpretation of the law, because it cannot review whether "the interpretation of the law by the courts is correctly in line with the generally accepted rules of legal doctrine {see, in particular, Decision 3003/2012. (VI. 21.) AB, Reasoning [4]; from recent practice, see for example Order 3198/2019 (VII. 16.) AB, Reasoning [11]; Order 3386/2019 (XII. 19.) AB, Reasoning [14] and [15]}..

[70] Therefore, the Constitutional Court reviewed the content attributed to the disposition of the norm by the competent authority or the courts. Pursuant to the wording of the Public Finances Act, in the event of misuse, the local government "shall immediately cancel and repay the subsidy or the part of the subsidy affected by the misuse" [Section 60/A (1) of the Public Finances Act]. The key question is whether the above-quoted rule allows for any discretion.

[71] 2.2 In line with the practice of the Curia in assessing the legality of public administrative decisions taken under discretionary powers, the authority may exercise discretionary powers if it takes a public administrative decision on the basis of a statute setting out the framework of the decision. In addition, discretion is also available where the legal provision defining the options for a decision does not specify the conditions and criteria for the decision. No discretion is available to the authority if the legislation does not provide for such discretion [for a summary, see Opinion 2/2015 (XI. 23.) KMK of the Special Panel of the Curia on Public Administration and Labour Matters].

[72] The final judgement of the Administrative and Labour Court and the final judgement of the Curia in the pilot proceedings interpreted the above-mentioned legal text in such a fashion that it leaves room for discretion, since the municipality must repay either the whole or part of the subsidy. This can only be decided on a discretionary basis, and it is the task of the administrative courts to provide the criteria for such a discretion if they are not apparent from the applicable law. The courts have interpreted Section 60/A (1) of the Public Finances Act as a rule setting out the framework for the legal consequence of misuse. Thus, a public administrative decision based on this provision constitutes a discretionary decision, even though the legal provision does not specify the conditions and criteria for taking such a decision.

[73] The reasoning of the final judgement of the Administrative and Labour Court and the final judgement of the Curia in the pilot proceedings set out the framework for the disposition and the criteria for the assessment by providing guidance for the new procedure. In the circumstances described, the municipality cannot be required to repay the full amount of the subsidy. The criterion for assessment is whether, despite the late notification of the details of

the new vehicle, the purpose of the subsidy has been achieved and the municipality has complied with the additional professional and other conditions.

[74] In fact, these decisions provide that in the case of unlawful use of State subsidy for village or farm caretaker services, the obligation to recover the subsidy must be proportionate to the gravity, the consequence and other specific characteristics of the infringement (hereinafter jointly referred to as the "gravity of the infringement"). According to the interpretation of the Curia, the late registration of the registration number of the vehicle used for the service, which was otherwise purchased with State subsidy, is not an infringement of such gravity as to justify, in the case of the municipality in question, the recovery of the subsidy received for the whole year.

[75] 2.3 Contrary to the above, the Hungarian State Treasury argued in its request for review that Section 60/A (1) of the Public Finances Act did not entitle the authority to exercise discretionary powers. The authority, "in the absence of a specific statutory authorisation and a statutory definition of the applicable methodology of proportionality, could not arbitrarily proportion the legal disadvantage to the gravity of the infringement" (decision of the Curia No Kfv.IV.35.568/2019/1, p. 15). If the misuse of the subsidy has continued throughout the year, the full amount of the subsidy must be repaid. Nevertheless, the practice of the Treasury is known before the Constitutional Court [see, for example, Decision 3189/2019 (VII. 10.) AB; Decision 3216/2019 (VII. 16.) AB; Decision 3214/2019 (VII. 16.) AB; Decision 3215/2019 (VII. 16.) AB; and Decision 3213/2019 (VII. 16.) AB], which was also revealed by the request for review in the main proceedings of the present case. The Hungarian State Treasury interprets Section 60/A (1) of the Public Finances Act read in conjunction with Annex 2, point V. 5 (g) of the Act on the Central Budget as allowing for the application of a legal consequence in accordance with which only the subsidy for the months concerned by the misuse must be repaid. Consequently, in accordance with the Treasury's interpretation, the congruence of Section 60/A (1) of the Public Finances Act precludes only a consideration of the gravity of the infringement, but does not preclude an assessment or consideration of the temporal nature of the infringement.

[76] 2.4 In summary: in accordance with the interpretation of the Treasury, the hypothesis of Section 60/A (1) of the Public Finances Act is not that the whole of the subsidy received for village or farm caretaker services must be repaid even if the municipality's error causes a letter of the registration number to be incorrectly entered in the service provider database for one day, but that the part of the subsidy for the months affected by the misuse must be repaid. By contrast, the final judgements of the Administrative and Labour Court and the Curia have ruled that the part of the subsidy for the period of misuse must be repaid in proportion to the gravity of the infringement.

[77] This question of interpretation of the law was decided by the final judgement of the Curia in January 2019 in the pilot proceedings, and this interpretation was also followed by the final judgement of the Administrative and Labour Court on 9 July 2019. The court thus fulfilled its mandate under Article 25 (2) of the Fundamental Law: it ruled on the legality of public administrative decisions after the parties to the public administrative proceedings seeking legal protection had exercised their right to apply to the court. The Treasury must follow the

guidelines for the new procedure, because the new procedure is provided for in Section 97 (4) of the Code of Public Administration Procedure and the separation of powers under Article C (1) of the Fundamental Law.

[78] 3. The legislator, however, transposed the contested rules into the Public Finances Act by Act LXVI of 2019 on the Foundation of the 2020 Central Budget of Hungary (hereinafter referred to as the "Amendment Act"), which was promulgated on 9 July 2019. The Constitutional Court first explained the purpose of Section 60/A (1a) of the Public Finances Act and then went on to review Section 111 (36) of the Public Finances Act.

[79] 3.1 Article 95 of the Amendment Act added a provision to Section 60/A of the Public Finances Act, namely Subsection (1a), explicitly limiting the discretionary powers of the public authority, with effect from 10 July 2019. According to the second sentence of Article 28 of the Fundamental Law, "[i]n the course of ascertaining the purpose of a law, consideration shall be given primarily to the preamble of that law and the explanatory memorandum of the draft for, or for amending, the law". The preamble and the explanatory memorandum to the proposed law are therefore the primary, but not exclusive, sources for determining the purpose of the legislation. The Amendment Act is a piece of "omnibus legislation" without a preamble. However, the Government which introduced the draft Act has added the following explanation to Article 95 of the Amendment Act: 'The draft Act narrows the review powers of the Treasury in the light of the Curia judgements in cases of misuse of State subsidy and, in this context, clarifies the scope of its recovery powers. In accordance with the judgements of the Curia, it would shift the Treasury's powers towards proportionality and discretion with regard to the recovery of misused State subsidy by the Treasury.'

[80] In order to ascertain the purpose of the amendment, the Constitutional Court also took into account the opinion of the Deputy State Secretary as *amicus curiae*, although it cannot be considered as a primary source of interpretation within the meaning of Article 28 of the Fundamental Law. The ministerial opinion confirms that '[t]he addition of the above new provision to the Public Finances Act was made on the basis of a proposal by the Treasury in connection with the Curia judgements on misused subsidies [...] If the exclusion of discretionary powers meant that, on the basis of a Treasury decision, the municipality would always be obliged to repay the full amount of the subsidy in the event of an infringement, this would render Section 60/A (1) of the Public Finances Act nugatory and without substance. The provision in Section 60/A (1a) of the Public Finances Act can only be interpreted in accordance with Section 60/A (1) of the Public Finances Act and cannot be understood as being contrary to the rule laid down in Section 60/A (1) of the Public Finances Act. The correct interpretation of Section 60/A (1a) of the Public Finances Act is that the Treasury is required to establish the exact proportion of misuse in the course of the review procedure, but that it has no further discretionary power in relation to the gravity and circumstances of the infringement and cannot exercise its power to impose a repayment obligation by way of penalty. [...] The legislature's purpose in enacting Section 60/A (1a) of the Public Finances Act was therefore not to require the Treasury, in the course of the review procedure, to decide to recover the entire amount of the subsidy in the event of misuse of the subsidy instead of the part of the subsidy affected by the misuse and, on the basis of that decision, to order the local authority to repay the entire

amount of the subsidy. Such an interpretation of Section 60/A (1a) of the Public Finances Act would be contrary to Section 60/A (1) of the Public Finances Act, would infringe the autonomy of local governments and would also reduce the scope for judicial review of decisions by the courts. In my view, it merely follows from the interpretation of the new provision laid down by the Amendment Act and of Section 60/A (1) of the Public Finances Act, as set out above, that the Treasury's powers in the review procedure to determine the amount of misused subsidy are limited and extend only to the determination of the exact proportion of the subsidy and that no exercise of powers of a punitive nature may take place. This does not infringe the right to a fair trial and the requirement of effective judicial protection in this area, since the Treasury's procedure and its findings are subject to judicial review even in the light of the new provision."

[81] Thus, taking into account the interpretation of the law given by the Curia in the pilot proceedings, the ministerial annotation (explanatory memorandum) appended to the Amendment Act, as well as the Government's position in the *amicus curiae* brief, the Constitutional Court found that although Section 60/A (1a) of the Public Finances Act, interpreted grammatically, prohibits the Treasury from exercising any discretion, the interpretation of the purpose of this prohibition relativises it. The legislator's intention with the phrase 'no discretionary powers' in the review procedures under Section 59 of the Public Finances Act was to ensure that the possible legal consequences of Section 60/A (1) of the Public Finances Act did not include the discretionary and proportionate content that the Curia has developed in its interpretation of the law, but that there was still room for the obligation to repay on a *pro rata* basis. This also means, however, that if the misuse of the subsidy, for example, failure to report the registration number of a new vehicle, has continued throughout the year, the Treasury is obliged to decide to repay the subsidy in full without discretion. The exercise of discretion is therefore not excluded but severely limited. This is supported by the primary and supplementary sources of interpretation and reaffirmed by the third sentence of Article 28 of the Fundamental Law, which states that '[w]hen interpreting the Fundamental Law or laws, it shall be presumed that they serve moral and economic purposes which are in accordance with common sense and the public good'.

[82] It follows from all the above that, at the initiative of the Hungarian State Treasury, which acted as the respondent authority in the main proceedings, the legislator intended to achieve the legal effect of the creation of Section 60/A (1a) of the Public Finances Act, so that Section 60/A (1) of the Public Finances Act could not be interpreted in the same manner as the Curia did in its final judgement in the pilot proceedings and as it is also stated in the final judgement on which the petition at issue is based. This change could have been foreseen by the Hungarian State Treasury, since it was at its initiative that the Public Finances Act was amended.

[83] 3.2 The contested part of Section 111 (36) of the Public Finances Act provides that "[...] Section 60/A (1a) of this Act, as laid down by Section 95 of Act LXVI of 2019 on the Foundation of the Central Budget of Hungary for 2020, shall also apply in pending public authority proceedings". This Subsection was inserted into the Public Finances Act by Section 102 (2) of the Amending Act with effect from 10 July 2019. The Government added to the amendment the explanation that it "establishes as a transitional provision of the Public Finances Act that in

the review procedure of the Treasury for misused State subsidy, the new provisions shall also apply in pending public administrative procedures".

[84] In relation to this challenged rule, the Constitutional Court recalls Section 15 (1) of Act CXXX of 2010 on Legislation (hereinafter referred to as the "Act on Legislation"). "Unless otherwise provided by law, the statutory provision shall apply to facts and legal relationships arising (a) after its entry into force and (b) to procedural acts commenced." This is therefore the rule which, if applied, would lead to the application of a different rule from the main rule of the Act on Legislation: Section 60/A (1) of the Public Finances Act cannot be interpreted in pending public administration proceedings in the same manner as the Curia did in its final judgement in the pilot proceedings and as it is in the final judgement on which the petition at issue is based. The legislator's aim was therefore not only to limit the scope of the deductible legal consequences in proceedings initiated after the entry into force of the Amendment Act, but also to intervene by way of legislation in proceedings which were pending at the time of its entry into force.

VI

[85] The petition is partially well-founded as set out hereunder.

[86] The Constitutional Court applied its settled practice, summarised in point IV of the Reasoning (Reasoning [35] et seq.), to the rules analysed in point V of the Reasoning (Reasoning [62] et seq.) and drew the conclusions that follow from them.

[87] 1. The Constitutional Court first compared Section 60/A (1a) of the Public Finances Act with the right to a fair hearing before a public authority [Article XXIV (1) of the Fundamental Law].

[88] 1.1 According to the Curia's petition, the rule at issue creates procedures in which decisions are not based on a full investigation and consideration of the facts, nor on a fair (just) application of the law, and the narrowing of the Treasury's review powers also causes a violation of fundamental rights.

[89] It follows from what is written in point IV/1.2 of the Reasoning (Reasoning [42] et seq.) and in point V/3.1 of the Reasoning (Reasoning [79] et seq.) that the limitation of discretion does not release the authority from the obligation to comply in its procedures with the content of the right to a fair hearing before a public authority as laid down in the Fundamental Law and as expanded by the Constitutional Court. It is not the exercise of discretion that makes the public authority's procedure "fair" (equitable, balanced) in the fundamental rights sense. A procedure preceding a public authority decision taken as a result of an exercise discretionary powers may be as fair or unfair as a procedure preceding a decision dispensing with any such exercise.

[90] One of the characteristics of public finance law, but one that can tolerate exceptions, is that it consists of fixed rules with little discretionary power. The Hungarian State Treasury essentially disputed the interpretation of the Curia in the pilot proceedings on the question of the extent to which Section 60/A (1) of the Public Finances Act allows for discretionary powers of the authorities. This question of interpretation of the law was decided by the Curia in the

exercise of its functions and powers under the Fundamental Law. The legislator, in order to further promote case law, inserted Section 60/A (1a) into the Public Finances Act. Henceforth, the Hungarian State Treasury may not exercise discretion in its procedures in the manner prescribed by the Curia.

[91] The limitation of discretion cannot be regarded as a systemic solution within the rules of the Public Finances Act, as the Constitutional Court has already pointed out. A specific feature of Section 60/A (1a) of the Public Finances Act is its explicit and categorical wording. This in itself does not lead to a direct violation of the right to a fair hearing before a public authority, because, as summarised in the reasoning of the decision in point IV/1.2 (Reasoning [42] et seq.), discretion is not a partial prerogative of this fundamental right and the limitation of discretion does not necessarily render the entire public authority procedure unfair from a fundamental rights perspective.

[92] 1.2 However, the Constitutional Court also emphasises that the Fundamental Law, which is the pillar of the legal system, cannot be insensitive to substantive justice even if it does not provide for the right to its unconditional enforcement. The principles, legally established concepts, rights and guarantees laid down in the Fundamental Law provide the basic network on which the legal system necessary for the enforcement of substantive justice is built, and which is suitable for it in the majority of cases. The right to a fair hearing before the public authorities [Article XXIV (1) of the Fundamental Law], which is the subject of this analysis, is a specific example of this, and is about fairness at the level of law. Although it does not guarantee, it promotes justice and fairness beyond the (substantive), the possible violation of which is felt directly and in a manner that is tailored to the party seeking legal protection in specific proceedings.

[93] Nor does the statutory limitation of discretion in the cases of public authorities in the group of cases mean that the authority may take a decision imposing a recovery obligation in which it does not disclose the evidence, does not assess it individually and as a whole, does not establish the facts in an unfounded manner, does not interpret the applicable law in accordance with the specific circumstances of the case and does not give adequate reasons for its decision. In other words, the application of Section 60/A (1a) of the Public Finances Act can only be carried out in a fair public administrative procedure.

[94] There was therefore no restriction of the fundamental right recognised by Article XXIV (1). The Constitutional Court was therefore not required to apply a test of limitation of fundamental rights.

[95] 2. The Constitutional Court has also compared Section 60/A (1a) of the Public Finances Act with the right to a fair trial [Article XXVIII (1) of the Fundamental Law].

[96] 2.1 According to the Curia's petition, the constitutional concerns in this respect arise because the challenged rule violates the right to effective legal protection, that is, the right to apply to the courts, and creates a situation as if there were an unlimited margin of appreciation. The latter leads to an unconstitutional narrowing of judicial review in the same way as when there is no margin of appreciation. Finally, because this rule must also be applied in pending

public administration proceedings, which have clearly been adopted in order to overrule previous court judgements.

[97] The Constitutional Court points out, in the light of the information summarised in point IV/2.2 of the Reasoning for the Decision (Reasoning [50]), that Article XXVIII (1) of the Fundamental Law does not presuppose a fundamental right to a fair trial in the substantive sense. Nor does this fundamental procedural right express a moral value judgement and is not adapted to the personal sense of justice of the adjudicating judge. The right to a fair trial protects the quality of the proceedings as a whole, which is unlimited because it is itself the result of legal discretion. Its content is made up of a subset of rights. One of these is the right of access to the courts, which in administrative matters is intended to enable the court, on application, to review the legality of the public administrative procedure and decision, not only in form but also in substance. The right of access to the courts does not therefore release the court from the law, but requires the court to measure the claims in question against the applicable substantive and procedural law and to identify and decide all relevant questions of law by interpreting the law.

[98] The Constitutional Court stresses that the right of recourse to the courts does not, however, preclude the legislator from creating new rules which, in the future, will force the courts to change their previously established practice. The application in pending cases does not follow from Section 60/A (1a) of the Public Finances Act, but from Section 111 (36) of the Public Finances Act, which the Constitutional Court reviewed in point VI/4 of the Reasoning for its Decision (Reasoning [105] et seq.). Section 60/A (1a) of the Public Finances Act does not in itself constitute a restriction on the right to apply to the courts for the following reasons.

[99] 2.2 The right to apply to the courts extends to the review by the administrative court of the merits of decisions of public authorities, whether or not made with discretionary powers. If so requested, the administrative court must, within the limits of the procedural law, subject both types of decision to a full review of the legality of form and substance. The objective in fundamental rights terms is the same for both: to ensure effective legal protection for parties to the public administrative proceedings. It should be pointed out that pursuant to Section 85 (5) of the Code of Public Administration Procedure, "in the context of the legality of a public administrative act carried out in the exercise of discretion, the court shall also review whether the administrative body exercised its powers within the limits of its discretionary powers, whether the criteria of discretion and their reasonableness can be ascertained from the document containing the public administrative act."

[100] Unlike the foregoing, in cases in which the Treasury does not exercise discretionary powers, the administrative court must monitor the legality of administrative acts on the basis of other criteria. The right of recourse to the courts also has a guarantee function in respect of these decisions, which should be as important as in the review of discretionary decisions. In this context, the Constitutional Court emphasises that the rule that the judicial authorities have no or only limited discretion in the drawing of legal consequences does not restrict the functions and powers of the judge hearing the case in the assessment of the evidence and the determination of the facts. It is the court, not the authority, which determines the facts of the judicial decision and, as in the case in point, applies the wording of the norm to them, that is,

interprets the law in the individual case and then incorporates them into a reasoned decision. In this particular case, this means a judicial review of whether any misuse has been committed and, if so, what the legal consequence is. The former activity (the assessment of illegality) is not subject to the margin of appreciation. In the latter (the deduction of the legal consequence), it applies. The administrative court decides on the claims in dispute, within the limits of the action and the procedural law. Consequently, Section 60/A (1a) of the Public Finances Act does not limit the adjudicator's discretion as regards the determination of the facts and the interpretation of the relevant legislation. Judicial review of a non-discretionary Treasury decision must also comply with the requirements of Article XXVIII (1) of the Fundamental Law and is not undermined by the content of the contested part of Section 60/A (1a) of the Public Finances Act, and the Constitutional Court therefore dismissed the related plea contained in the petition.

[101] 3. The Constitutional Court has found Section 60/A (1a) of the Public Finances Act in conflict with Article 25 (2) of the Fundamental Law.

[102] The Curia considered this rule to be contrary to the Fundamental Law because it prevents the administrative court under the law from making a decision in accordance with the unified judicial practice. It limits judicial review to the verification of formal legality. It does not permit review of the legality of the findings of fact and the weighing of evidence and equitable considerations.

[103] The Constitutional Court has already stated that the right to a fair trial is not violated by the challenged provision of the Public Finances Act. In doing so, it also dispelled the concerns of the Curia listed above. In addition, it should be pointed out that the panel stated in point IV/3 of the Reasoning for its Decision (Reasoning [51] et seq.) that Article 25 (2) of the Fundamental Law establishes types of functions and powers for the Hungarian judiciary. Among these is the duty to decide on the legality of public administrative decisions. The contested provision of the Public Finances Act lays down a rule for the decision-making of an administrative authority in one of its areas of competence: limited discretion. The rule concerning the authority is not directly and substantially related to the functions and competences of the court.

[104] The constitutional link between Article 25 (2) of the Fundamental Law and Section 60/A (1a) of the Public Finances Act is the right to apply to the courts, since the court can only exercise its duties and powers in public administrative matters if this fundamental right is enforced. However, this fundamental right has not been infringed. In the present situation, in the absence of a direct and substantial connection, Section 60/A (1a) of the Public Finances Act does not conflict with Article 25 (2) of the Fundamental Law. They operate side by side and are valid and effective in parallel.

[105] 4. The Constitutional Court lastly reviewed whether the part of Section 111 (36) of the Public Finances Act, which provides that Section 60/A (1a) of the Public Finances Act shall also apply in pending public administration proceedings, violates Article B (1) of the Fundamental Law.

[106] 4.1 In the light of the particularities of the present case, the panel had to decide on the constitutionality of the relationship between the enacting rule in accordance with which the new rule restricting discretion must also be applied in pending proceedings within the group of cases, and this leads to the application of another legal consequence by overriding final court or Curia (piloted) judgements. As a result, claimants who seek redress before the administrative court will be completely defeated in their previous litigation.

[107] In order to answer this question, the Constitutional Court applied its conclusions on the facts drawn from its previous practice, as summarised in the Reasoning for the Decision in point IV/4.2 (Reasoning [61] et seq.). It held that the provision of the Public Finances Act at issue is problematic from the point of view of the prohibition of retroactivity if the later normative rule must be applied to a situation that has already arisen, but which results in a new legal consequence of substantive law that is detrimental to the person concerned.

[108] 4.2 As stated in the judicial initiative (petition) {see point I/2.2 of the Reasoning for the Decision (Reasoning [10] et seq.)}, the facts, the material legal relationship created by the State subsidy, were established in 2016. The misuse of the subsidy in respect of the village caretaker or farm caretaker support occurred in that year. The public authority finding did not concern other years. Section 111 (36) of the Public Finances Act entered into force on 10 July 2019. Thus, the facts had already been established and the legal relationship had already come into existence years before the entry into force of the contested rule.

[109] It is Section 111 (36) of the Public Finances Act that derogates from the main rule on the deduction of material legal consequences. The limitation of discretion also applies to facts which predate the entry into force by a number of years, and the rule complained of must be applied to the facts.

[110] According to the final judgement of the Administrative and Labour Court and the final judgement of the Curia in the pilot proceedings, it is unlawful to attach to the misuse of the subsidy the legal consequence that the municipality must repay the entire amount of the subsidy for the year under review. Only a legal consequence proportionate to the gravity of the infringement can be established on a discretionary basis. The obligation to repay in full is disproportionate in comparison. It should be stressed that this is the benchmark in the cases pending on 10 July 2019. What constitutes a new legal consequence and whether it is unfavourable must be determined in relation to this. The Constitutional Court must respect this judicial interpretation of the law, because the Constitutional Court interprets the Fundamental Law and not the legislation.

[111] The contested part of Section 111 (36) of the Public Finances Act and Section 60/A (1a) of the Public Finances Act, which it applies, were undoubtedly not part of the law in force before 10 July 2019 and the public authority or judicial proceedings conducted until then. The content of those provisions cannot be understood as if they had always been included in the Public Finances Act. Indeed, the legislative provisions adopted by the legislator have their own temporal effect, unlike, for example, the constitutional requirement that they be aligned with the constitutional rule to which the Constitutional Court attaches them, without any independent temporal effect {see Order 3019/2019 (I. 21.) AB, Reasoning [19]; Decision

25/2017 (X. 17.) AB, Reasoning [22] to [25]). While a constitutional requirement cannot, by definition, be retroactive, the same cannot be said of a statutory provision.

[112] In the light of the foregoing, it can be concluded that the original (or "former") legal consequence contained in the final decisions was overruled by the scope of application of Section 60/A (1a) of the Public Finances Act in cases pending at the time of its entry into force. Whereas the judicial interpretation of the law excluded the recovery of the full amount of the subsidy, the enacting provision of the Amendment Act made this the only legal consequence that could be established. Thus, the contested part of Section 111 (36) of the Public Finances Act leads to a new legal consequence, different from the old one, in cases where a final judgement had provided for the original legal consequence.

[113] The legal consequence that may be inferred under Section 111 (36) of the Public Finances Act is *ad malam partem* in three respects. First, it is clear, even without a separate assessment, that it is more disadvantageous to repay all the subsidy with interest than a smaller part of it or none at all. This is true even if the disadvantage cannot be quantified precisely in Hungarian forints. On the other hand, even at an abstract level, the loss of the possibility of a legal remedy proportionate to the gravity of the infringement through the limitation of discretion is a forfeiture of rights. Thirdly, it is clearly unfavourable for a claimant who has been at least partially successful to lose the administrative action in its entirety. Thus, the new legal consequence that can be inferred from Section 111 (36) of the Public Finances Act has caused an adverse change leading to a forfeiture of rights.

[114] On the basis of the above, the Constitutional Court held that the contested part of Section 111 (36) of the Public Finances Act is contrary to the prohibition of retroactivity causing disadvantage. The facts were already established before the entry into force of the rule at issue; nevertheless, they must be applied in pending cases; this leads to a new legal consequence in the group of cases, different from the one in the final judgement of the administrative court, which causes a change resulting in a disadvantage and a forfeiture of rights for the claimant seeking legal protection before the administrative court.

[115] As a specific additional element of the present case, it should be pointed out that the contested legislative amendment has undermined the legal force of the judgements to the detriment of the parties to the public administrative proceedings in the pending administrative disputes. This was so in the sense that the application of the challenged rule has rendered the operative part and the reasoning of final administrative court judgements in public administration proceedings void. It should be noted that the rule complained of also eroded Section 97 (4) of the Code of Public Administration Procedure. It should also be noted that a decision in a resumed public administrative procedure contrary to the decision of the administrative court ordering a new procedure is null and void [see Section 123 (1) (f) of Act CL of 2016 on the General Public Administrative Proceedings Act]. The court, by claiming finality, issued a final and binding decision that the Treasury could not order the municipality to repay the subsidy in full. The result of the newly created legal provision is that the Treasury is obliged to order the municipality to repay the subsidy in full.

[116] In light of the above, the Constitutional Court held that the contested part of Section 111 (36) of the Public Finances Act violates the rule of law under Article B (1) of the Fundamental Law, because the *ad malam partem* prohibition of retroactive legislation, which is part of it, is contrary to the rule of law.

[117] 5. On the basis of the above, the Constitutional Court held that the contested part of Section 111 (36) of the Public Finances Act is incompatible with Article B (1) of the Fundamental Law. In this particular group of cases, it constitutes retroactive legislation which is prejudicial.

[118] The Constitutional Court has made use of the possibilities provided by Section 45 (4) of the Constitutional Court Act. In order to protect legal certainty, it annulled Section 111 (36) of the Public Finances Act with retroactive effect to its promulgation, in accordance with point 1 of the operative part, and at the same time stated in point 2 of the operative part that it is prohibited from being applied in the main proceedings pending before the Curia and in any case pending before any court. However, in point 3 of the operative part, the Constitutional Court dismissed the elements of the petition against Section 60/A (1a) of the Public Finances Act. It follows from this that Section 60/A (1a) of the Public Finances Act continues to apply in public authority proceedings, but only in those originally initiated after 9 July 2019.

VII

[119] The decision shall be published in the Hungarian Official Gazette pursuant to the first sentence of Section 44 (1) of the Constitutional Court Act.

Budapest, 28 April 2020

Dr. Tamás Sulyok, Chief Justice of the Constitutional Court

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

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

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

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

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

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

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

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

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

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

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

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

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

Dr. Tamás Sulyok, sgd., Chief Justice of the Constitutional Court, Dr. András Varga Zs., Justice of the Constitutional Court, prevented from signing