

Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E) (2) of the Fundamental Law

Upon the motion of the commissioner for fundamental rights on the interpretation of the Fundamental Law, the plenary session of the Constitutional Court – with concurring opinion by *dr. Egon Dienes-Oehm, dr. Imre Juhász, dr. Béla Pokol, dr. István Stumpf* and *dr. András Varga Zs.* and with the dissenting opinion of *dr. László Salamon* – has adopted the following

d e c i s i o n:

The Constitutional Court may examine upon a relevant motion – in the course of exercising its competences – whether the joint exercise of powers under Article E) (2) of the Fundamental Law would violate human dignity, another fundamental right, the sovereignty of Hungary or its identity based on the country's historical constitution.

The Constitutional Court publishes this Decision in the Hungarian Official Gazette.

Reasoning

I

- [1] 1. On the basis of Section 38 para. (1) of the Act CLI of 2011 on the Constitutional Court (hereinafter: the ACC), the commissioner for fundamental rights initiated in his own competences the interpretation of Article XIV (1)–(2) and Article E) (2) of the Fundamental Law.
- [2] According to the motion, the concrete issue of constitutional law relevant to the case is related to the European Union's Council Decision (EU) 2015/1601 of 22 September 2015 (hereinafter: "EUC Decision"), establishing provisional measures in the area of international protection for the benefit of Italy and Greece. The petitioner holds that it is necessary to interpret the provisions of the Fundamental Law in order to "be able to secure the operation of Hungarian institutions and bodies in compliance with the Fundamental Law."
- [3] The petitioner presented the provisions of the EUC Decision ordering the transfer of 1294 persons to Hungary in a procedure, which is – in the opinion of the petitioner – "implemented without the comprehensive examination on the merits of the individual situations of the applicants", it is of collective nature, and it deters from "the usual

legal approach of the Union's legal order based on the rigorous protection of fundamental rights and human dignity."

- [4] The concrete constitutional issue is formulated by the petitioner as follows.
- [5] Does the unconditional prohibition on the collective expulsion of foreigners, regulated in Article XIV (1) of the Fundamental Law, apply to the instrumental acts performed by the bodies or institutions of the Hungarian State as necessary for the implementation of an unlawful collective expulsion executed by another State, or does this prohibition only apply to those cases when foreigners must leave the territory of Hungary as a specific result of the public authority act of Hungarian bodies applying the law?
- [6] 1.1. With regard to the first question, the petition explains that the prohibition on the collective expulsion of foreigners, regulated in Article XIV (1) of the Fundamental Law "puts restraints first and foremost on the actions of the Hungarian authorities." The petitioner notes, at the same time, that the relevant prohibition is also extended to facilitating measures that can be regarded as collective expulsions by other States. The petitioner made a reference to the draft codification of the international legal instrument on the rules of expelling foreigners, adopted in 2014 by the International Law Commission of the United Nations, containing the regulations in force of customary international law. According to this document, the formal act of a State calling upon a foreigner to leave the territory of the country is considered as expulsion. In the opinion of the petitioner, it covers not only the *principle of non-refoulement* included in the Geneva Convention on Refugees, i.e. sending back the asylum seekers to a country where they face serious threats to their life, but also the cases when they are forwarded to a safe country.
- [7] The petitioner made references to several international organisations (United Nations Commission on Human Rights, Committee of Ministers of the Council of Europe, Committee on the Elimination of Racial Discrimination), courts (Inter-American Court of Human Rights, European Court of Human Rights) and conventions (Articles 13 and 14 of the International Covenant on Civil and Political Rights, the Geneva Convention of 1951 relating to the Status of Refugees, the New York Protocol of 1967) that support the need for an individualised, objective and reasonable examination, accompanied with the prohibition of collective expulsion as well as the right of asylum seekers to stay lawfully in the relevant State until the end of the procedure.
- [8] The petitioner argued that even a person who entered the territory of the State illegally may stay there lawfully until having a decision passed on their application for asylum. The petitioner holds that the asylum seekers' right of stay, i.e. the right to remain until the end of the asylum procedure in the country where they have filed their application is a fundamental guarantee. The petitioner concluded from the above that "the rules of international law grant a right for the asylum seekers waiting for being transferred to stay in Italy or in Greece until the end of the asylum

procedure." This lawful stay – in the opinion of the petitioner – would be interrupted by the planned measure of the EU.

- [9] The commissioner for fundamental rights referred to the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection and to Regulation (EU) No 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (hereinafter: "Dublin III Regulation"), and presented in details the rules of transfer contained therein, based on individual assessment and approval by the receiving State. In the petitioner's opinion, the EUC Decision is in conflict with the Dublin III Regulation. Furthermore he made a reference to Article 47 and Article 19 (1) of the Charter of Fundamental Rights expressly prohibiting collective expulsion.
- [10] The petitioner also referred to Article 47 of the International Law Commission's Draft articles on the Responsibility of States for Internationally Wrongful Acts, according to which where a State contributes to the wrongful act of another State, the responsibility of each State may be invoked in relation to that act. With regard to the case, the petitioner holds that "transfer cannot be exercised by a Member State without the reception act of another Member State: the latter is an indispensable instrumental act of the former one". In the context of the EUC Decision, the commissioner for fundamental rights concludes – first in a hypothetical form (page 7), then in a declarative form (page 8) – that in the case of persons seeking international protection, arriving to the territory of Hungary from Italy and Greece "the collective expulsion would be – *prima facie* – implemented by these two Member States in the scope of cases regulated by the decision [...] [when] [asylum seekers] are transferred to the territory of the country without their consent and without comprehensively assessing their individual circumstances, personal and legal situation."
- [11] Finally the petitioner made a reference to the case law of the ECHR, and asked the Constitutional Court to interpret the content of Article XIV (1) of the Fundamental Law by also taking into account the case law of the Strasbourg Court (*Henning Becker v. Denmark*, *Hirsi and others v. Italy*).
- [12] 1.2 The other question of the petition consists of three items, formulating questions in the contexts of three major issues of constitutional law. These items are as follows:
- [13] a) Are the bodies and the institutions of the State of Hungary, in accordance with Article E) (2) of the Fundamental Law, entitled or obliged to implement measures adopted in the framework of the inter-State cooperation realised in the European Union if such measures are in conflict with the provisions of the Fundamental Law of Hungary regarding the contents of fundamental rights? Is it possible to deduct from the provisions of the Fundamental Law, provided that the Hungarian institutions and

bodies are not entitled or obliged to implement such measures, which Hungarian institution may declare that?

- [14] b) Can the exercising of competences, linked to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties on the basis of Article E) (2) of the Fundamental Law, restrict the implementation of a legal act of the Union not based on a competence transferred by Hungary to the European Union on the basis of the Founding Treaties concluded with the other Member States? Is it possible to deduct from the provisions of the Fundamental Law, provided that the Hungarian institutions and bodies are not entitled or obliged to implement such measures, which Hungarian institution may declare that?
- [15] c) Can the provisions of Article E) and Article XIV of the Fundamental Law be interpreted in a way of authorising or restricting Hungarian institutions and bodies to allow, through their institutional procedure, in the legal framework of cooperation within the European Union, the transfer of a significant group of foreign persons staying lawfully in another Member State of the European Union without the assessment of the individual and personal situation of the persons that form the group, without the consent or the indicated will of the persons concerned, by way of selecting the persons concerned from a larger group without the application of objectively prescribed criteria?
- [16] In relation to the first item, the commissioner for fundamental rights explained that for exercising public authority by the European Union in the territory of Hungary "Article E) (2) provides a steady constitutional ground", but at the same time, all the limitations incorporated in this clause may raise barriers to it on a continuous basis, as Article E) (2) itself provides for the constitutional limitations of the authorisation for exercising joint EU competences together with other Member States. Just as the bodies of the Hungarian State, the European Union can only exercise public authority in Hungary within the limits specified by the Fundamental Law, therefore Article E) (2) can also be regarded as a reservation for the protection of fundamental rights.
- [17] In the opinion of the petitioner, "on the basis of Article E) (2) of the Fundamental Law, the Hungarian constitutional institutions and bodies are only bound to implement the legal acts of the European Union if those acts are based on the authorisation of the Founding Treaties of the European Union. Accordingly, the Hungarian institutions and bodies are not constitutionally obliged to obey the so called *ultra vires* regulations, directives and decisions, i.e. the ones that go beyond their scope of competences, as they transgress the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties." The commissioner for fundamental rights holds that as it is unconstitutional when the European Union exercises a competence by going beyond the "necessary extent" of the competences vested in the Union, it is indispensable to explore the substance of necessary extent. In the petitioner's opinion, the formulation of the *ultra vires* barrier in Article E) (2)

makes it a question of constitutionality to establish whether the decisions or measures of the Union such as the EUC Decision go beyond the competences vested on the Union in the Founding Treaties.

- [18] In this context, the petitioner made a reference to the German and the Czech constitutional courts as well as to the Maastrich-judgement of the Supreme Court of Denmark, and to the fact that in 2014 the German Constitutional Court asked for a preliminary ruling by the Court of Justice of the European Union about the *ultra vires* nature of the decision by the Governing Council of the European Central Bank.
- [19] In the context of all the above, the commissioner for fundamental rights concluded that "also the Hungarian constitutional institutions, first and foremost [...] the Constitutional Court" are bound to safeguard the compliance with the *ultra vires* prohibition, as a question of constitutional law. The petitioner holds that in the course of exercising its competences the Constitutional Court may establish the inapplicability of legal acts of the Union, as they have been adopted in the absence of a relevant competence of the EU, using as an example the EUC Decision indicated in the first question.
- [20] As stated by the petitioner, the "necessary extent" of the delegation of powers contained in Article E) (2) is subject to debate, thus "several potential and constitutionally acceptable forms of actions by the bodies of the State can be deducted from it, with regard to the joint exercise of competences embodied in a norm of the Union similar to Council decision 1601/2015."
- [21] Finally, the petitioner made a reference to the fact that asylum law on EU-level and on the level of the Member States is determined by the conventions under international law, also referred to by the petitioner (Cp. Article 78 of TFEU, Article 18 of the Charter of Fundamental Rights). In the petitioner's opinion, the European Union has no competence, in addition to the legal basis found in Title V Chapter 2 of the Founding Treaties, "to adopt regulations affecting the staying of certain groups of foreigners in the territory of the Member States". Consequently, it is questionable whether Hungary can constitutionally exercise the "competences embodied in a norm similar" to the EUC Decision.

II

- [22] The relevant provision of the Fundamental Law, the interpretation of which has been requested:
- "Article E) (2) In order to participate in the European Union as a Member State, and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations set out in the founding treaties, exercise some of its competences deriving from the Fundamental Law jointly with other Member States, through the institutions of the European Union."

"Article XIV (1) Hungarian citizens shall not be expelled from the territory of Hungary and may return at any time from abroad. Foreigners staying in the territory of Hungary may only be expelled on the basis of a lawful decision. Collective expulsion shall be prohibited.

(2) No one shall be expelled or extradited to a State where he or she would be in danger of being sentenced to death, being tortured, or being subjected to other inhuman treatment or punishment."

III

- [23] 1. The Constitutional Court's scope of competences is regulated in Article 24 (2) of the Fundamental Law, however the competence of interpreting the provisions of the Fundamental Law is not listed among the items from a) to h). Nevertheless, according to item g), it shall exercise further powers laid down in a cardinal act. In line with that, Section 38 of the ACC provides for the competence of interpreting the Fundamental Law. The petitioner initiated the Constitutional Court's procedure on the basis of Section 38 (1) of ACC. Accordingly, "[o]n the petition of Parliament or its standing committee, the President of the Republic, the Government, or the Commissioner of the Fundamental Rights, the Constitutional Court shall provide an interpretation of the provisions of the Fundamental Law regarding a concrete constitutional issue, provided that the interpretation can be directly deduced from the Fundamental Law.." Consequently, on the basis of the text of ACC, the interpretation of the Fundamental Law can only be initiated by specific bodies (persons) in motions of specific content. The Constitutional Court shall examine whether the petition originates from a body or person entitled to file a motion, if it is aimed at interpreting a concrete provision of the Fundamental Law, if it is related to a concrete constitutional issue and whether the interpretation can be directly deduced from the Fundamental Law. [Decision 8/2014 (III. 20.) AB, Reasoning [20]-[27]].
- [24] 2. The Constitutional Court established that the petition was filed by the commissioner for fundamental rights, thus it has been submitted by a person entitled to do so.
- [25] The Constitutional Court also established that the petition is aimed at the interpretation of the Fundamental Law, i.e. it specifies the concrete provision of the Fundamental Law to be interpreted.
- [26] The Constitutional Court examined further conditions of interpreting the Fundamental Law – i.e. the existence of a concrete constitutional issue and the direct deductibility of the interpretation from the Fundamental Law – with due account to the fact that it has always applied this competence in the narrow sense, and also in the present case, the Court held that without this strict approach the constitutional

interpretations would pose a threat of the Constitutional Court undertaking the responsibility of legislative, and moreover, of the executive powers as well {Decision 17/2013. (VI. 26.) AB, Reasoning [10]}.

- [27] The commissioner for fundamental rights submitted several questions related to constitutional law, grouped into two points. With due account to the above, the Constitutional Court shall examine each question separately.
- [28] 3. The first question asked by the petitioner from the Constitutional Court was whether the unconditional prohibition on the collective expulsion of foreigners, regulated in Article XIV (1) of the Fundamental Law, applies to the instrumental acts performed by the bodies or institutions of the Hungarian State as necessary for the implementation of an unlawful collective expulsion executed by another state, or does this prohibition only apply to those cases when foreigners must leave the territory of Hungary as a specific result of the public authority act of Hungarian bodies applying the law.
- [29] In accordance with Section 58 (3) of ACC and Section 63 of the Rules of Procedure, the Constitutional Court separated, with an independent ruling, the motion on the interpretation of Article XIV of the Fundamental Law, as a specific contested issue, from the motion on the interpretation of Article E) of the Fundamental Law, since it held appropriate for the adjudication of the case to examine them on the merits and assess them separately.
- [30] 4. Within the second issue mentioned in the motion, the commissioner for fundamental rights raised three constitutional problems in three items. In this regard, the Constitutional Court established that the first two items are related to concrete constitutional issues directly deductible from the Fundamental Law, while the third item can only be addressed by the Constitutional Court in certain respects.
- [31] The Constitutional Court holds that the first item of the motion's second question essentially refers to the reservation of fundamental rights (i.e. whether a legal act of the Union can violate fundamental rights), while the second item concerns the evaluation of the so called *ultra vires* legal acts of the Union. These two concerns are clearly considered as constitutional issues to be examined by the Constitutional Court directly at the level of the Fundamental Law, as the basis of the legal system of Hungary. The issue raised in the third item can only be interpreted by the Constitutional Court in the framework of the first two problems, i.e. within the interrelated context of the fundamental rights reservation and the *ultra vires* acts, as it is the only level of abstraction satisfying the condition of concreteness under Article 38 (1) of ACC. With due regard to the above, the Constitutional Court shall explain its response to the third item in its response to the first two items.
- [32] 5. The Constitutional Court is aware of the fact that from the point of view of the Court of Justice of the European Union the EU law is defined as an independent and

autonomous legal order (Cp. C-6/64 *Costa v ENEL* [1964] ECR 585). However, the European Union is a legal community with the power – in the scope and the framework specified in the Founding Treaties and by the Member States – of independent legislation and of concluding international treaties in its own name, and the core basis of this community are the international treaties concluded by the Member States. As the contracting parties are the Member States, it is their national enforcement acts that ultimately determine the extent of primacy to be enjoyed by EU law against the relevant Member State's own law in the Member State concerned (Cp. BVerfGE 75, 223 [242]). There is no difference in this respect whether the norm defining the way of the EU law's enforcement can be found in the relevant Member State's constitution or constitutional law (e.g. in France, Article 55 of the Constitution; in Austria, Federal Constitutional Act on the Accession of Austria to the European Union, 744/1994; in Spain, Article 96 (1) of the Constitution), in the Act ratifying the accession (e.g. in Great Britain, European Communities Act 1972), through the constitutional court's interpretation of the Act ratifying the accession (e.g. in Germany), or it has been formulated through solutions of case law (e.g. in Italy, see Corte Costituzionale, 170/1984).

- [33] Furthermore, as the Constitutional Court considers the constitutional dialogue within the European Union to be of primary importance [Cp. Decision 61/2011. (VII. 13.) AB, Decision 30/2015. (X. 15.) AB], it examined the positions taken by the Member States concerning *ultra vires* acts and the reservation of fundamental rights.
- [34] Provisions on the limitations of the joint exercise of competences can be found in the constitutional law of several other Member States of the European Union. {See for example Kingdom of Denmark: Højesteret, 6 April 1998, I 361/1997, 9.8; Republic of Estonia: Riigikohus, 12 July 2012, 3-4-1-6-12, 128, 223; Republic of France: Conseil Constitutionnel, Nr. 2006-540 DC, 27 July 2006, 19 and Nr. 2011-631 DC, 9 June 2011, 45; Conseil d'État, 8 February 2007, Nr. 287110 <Ass.>, *Société Arcelor Atlantique et Lorraine*, EuR 2008, 57, 60skk; Ireland: Supreme Court of Ireland, *Crotty v. An Taoiseach*, <1987>, I.R. 713 <783>; S.P.U.C. <Ireland> Ltd. v. Grogan, <1989>, I.R. 753 <765>; Republic of Italy: Corte Costituzionale, Nr. 98/1965, *Acciaierie San Michele*, EuR 1966, 46; Nr. 183/1973, *Frontini*, EuR 1974, 255; Nr. 170/1984, *Granital*, EuGRZ 1985, 98; Nr. 232/1989, *Fragd*; Nr. 168/1991; Nr. 117/1994, *Zerini*; Republic of Latvia: *Satversmes tiesa*, 7 April 2009, 2008-35-01, 17; Republic of Poland: Trybunał Konstytucyjny, 11 May 2005, K 18/04, 4.1., 10.2.; 24 November 2010, K 32/09, 2.1. skk.; 16 November 2011, SK 45/09, 2.4., 2.5.; Kingdom of Spain: Tribunal Constitucional, 13 December 2004, DTC 1/2004, 2, EuR 2005, 339 <343> and 13 February 2014, STC 26/2014, 3, HRLJ 2014, 475, 477sk; Czech Republic: Ústavní Soud, 8 March 2006, Pl. ÚS 50/04, VI.B.; 3 May 2006, Pl. ÚS 66/04, 53; 26 November 2008, Pl. ÚS 19/08, 97, 113, 196; 3 November 2009, Pl. ÚS 29/09, 110skk; 31 January 2012, Pl. ÚS 5/12, VII.; United Kingdom: High Court, 18 February 2002, *Thoburn v. Sunderland City Council*,

<2002> EWHC 195 <Admin>, 69; UK Supreme Court, 22 January 2014, *R v. The Secretary of State for Transport*, <2014> UKSC 3, 79, 207; 25 March 2015, *Pham v. Secretary of State for the Home Department*, <2015> UKSC 19, 54, 58, 72 bis 92] Cp. 2 BvR 2735/14. [47]}

- [35] According to the Supreme Court of Estonia, "The sovereignty clause of the Estonian Constitution is strict in wording, providing that the independence and sovereignty of Estonia are timeless and inalienable. [...] If it becomes evident that the new founding treaty of the European Union or the amendment to a founding treaty of the European Union gives rise to a more extensive delegation of the competence of Estonia to the European Union and a more extensive interference with the Constitution, it is necessary to seek the approval of the holder of supreme power, i.e. the people, and presumably amend the Constitution once again." [Cp. Judgement No. 3-4-1-6-12. (12 July 2012), paragraphs 128 and 223]
- [36] According to the decision of the French Constitutional Council, "the transposition of a Directive cannot run counter to a rule or principle inherent to the constitutional identity of France, except when the constituting power consents thereto". [Cp. Decision No. 2006-540 DC of 27 July 2006, this item has been confirmed by Decision No. 2011-631 DC of 9 June 2011, paragraph 45]
- [37] The Supreme Court of Ireland explained in the *Crotty v. An Taoiseach* case (9 April 1987) that "[t]o hold that the first sentence of Article 29, s. 4, sub-s. 3 does not authorise any form of amendment to the Treaties after 1973 without a further amendment of the Constitution would be too narrow a construction; to construe it as an open-ended authority to agree, without further amendment of the Constitution, to any amendment of the Treaties would be too broad."
- [38] The Constitutional Court of Latvia established clearly that "the Constitutional Court recognizes that the State of Latvia is based on such fundamental values that, among the rest, include basic rights and fundamental freedoms, democracy, sovereignty of the State and people, separation of powers and rule of law. The State has the duty to guarantee these values and they cannot be infringed by introducing amendments to the Satversme, these values being introduced by law. Consequently, delegation of competencies cannot exceed the rule of law and the basis of an independent, sovereign and democratic republic based on the basic rights. Likewise, it cannot influence the right of citizens to decide upon the issues that are substantial for a democratic state." (Cp. Case No. 2008-35-01, 7 April 2009)
- [39] Several decisions of the Constitutional Court of Poland have dealt with the issue affected in the present case. As established in one of its decisions, "[t]he accession of Poland to the European Union did not undermine the supremacy of the Constitution over the whole legal order within the field of sovereignty of the Republic of Poland. The norms of the Constitution, being the supreme act which is an expression of the Nation's will, would not lose their binding force or change their content by the mere

fact of an irreconcilable inconsistency between these norms and any Community provision. In such a situation, the autonomous decision as regards the appropriate manner of resolving that inconsistency, including the expediency of a revision of the Constitution, belongs to the Polish constitutional legislator. The process of European integration, connected with the delegation of competences in relation to certain matters to Community (Union) organs, has its basis in the Constitution. The mechanism for Poland's accession to the European Union finds its express grounds in constitutional regulations and the validity and efficacy of the accession are dependent upon fulfilment of the constitutional elements of the integration procedure, including the procedure for delegating competences." (K 18/04, 11 May 2005) The Court also elaborated in another case that "incurring international liabilities and managing them do not lead to the loss or limitation of the State's sovereignty, but it is its confirmation, and the membership in the European structures does not, in fact, constitute a limitation of the State's sovereignty, but it is its manifestation. [...] According to Article 4 (1) and Article 5 (2) of the Treaty on the European Union, the Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties and competences not conferred upon the Union remain with the Member States. [...] Article 352 (1) of the Treaty on the Functioning of the European Union (hereinafter: TFEU) may not be understood as the basis for granting competences to the Union which have not yet been conferred, and thus the provisions referred to in Article 352 (1) of the TFEU may not create any competences which have not yet been conferred. [...] It is the Parliament that devises appropriate solutions concerning the fulfilment of constitutional requirements which are indispensable due to the principle of protection of the State's sovereignty in the process of European integration and possible specification of requirements which allow to avoid the consequences of the difference of opinions in that respect between the government and the Parliament." (See Case No. K 32/09 of 24 November 2010) In a third decision the Constitutional Tribunal of Poland established that "what follows from Article 91 (3) of the Constitution is the primacy of the norms of EU regulations in the event of their unconformity with statutes. By contrast, the Constitution retains its superiority and primacy over all legal acts which are in force in the Polish constitutional order, including the acts of EU law. The said position of the Constitution is enshrined in Article 8 (1) of the Constitution, and has been confirmed by the previous jurisprudence of the Constitutional Tribunal. In the judgement concerning the Treaty of Accession (Ref. No. K 18/04), the Constitutional Tribunal underlined that the Constitution remains – due to its special significance – "the supreme law of the Republic of Poland" in relation to all international agreements binding the Republic of Poland. This also refers to ratified international agreements concerning the delegation of competence "in relation to certain matters". The Constitution takes

precedence as regards having effect and being applied in the territory of the Republic of Poland. Due to the indicated status of the Constitution as the supreme law of the Republic of Poland, it is admissible to examine whether the norms of EU regulations are consistent therewith." (See the Case No. SK 45/09 of 16 November 2011)

[40] As laid down by the Spanish Constitutional Court, "the operation of the transfer of the exercise of competences to the European Union and the consequent integration of Community legislation into our own impose unavoidable limits to the sovereign faculties of the State, acceptable only when European legislation is compatible with the fundamental principles of the social and democratic State of Law established by the national Constitution. Consequently, the constitutional transfer enabled by Article 93 of the Spanish Constitution is subject to material limits imposed on the transfer itself. Said material limits, not expressly included in the constitutional precept, but which implicitly result from the Constitution and from the essential meaning of the precept itself, are understood as the respect for the sovereignty of the State, or our basic constitutional structures and of the system of fundamental principles and values set forth in our Constitution, where the fundamental rights acquire their own substantive nature [...]. The preamble of TEU sets forth that 'it is founded on the indivisible values of human dignity, freedom, equality and solidarity', and none of the provisions set forth therein 'may be interpreted as limiting or detrimental to the human rights and fundamental freedoms recognized [...] by the constitutions of the Member States' [...] Consequently, the primacy proclaimed in the Treaty which lays down a Constitution for Europe operates with regard to a legislation which is built on the common values of the constitutions of the States integrated into the Union and their constitutional traditions. (Case No. DTC 1/2004 of 13 December 2004)

[41] The Constitutional Court of the Czech Republic established that "its jurisdiction extends, in principle, also to all Czech domestic norms which, pursuant to Article 10a and Article 1 (2) of the Constitution carry out the Czech Republic's obligations towards the EU. The Czech Republic's accession to the EU on the basis of Article 10a resulted in Constitutional Court's jurisdiction being restricted to a certain extent, just as was the case with other State bodies. In view of the doctrine of the European Court of Justice (ECJ) on the supremacy of Community law, the Constitutional Court can exercise its jurisdiction in relation to Community law norms only under certain circumstances. [...] In its judgement No. Pl US 50/04 of 8 March 2006, the Constitutional Court refused to recognize the ECJ doctrine insofar as it claims absolute primacy of EC law. It stated that the delegation of a part of the powers of national organs upon organs of the EU may persist only so long as these powers are exercised by organs of the EU in a manner that is compatible with the preservation of the foundations of State sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the State based on substantive law. [...] Member States enjoy freedom at least to the extent of ensuring that, from among the

choice of means available to them under Community law, they select such means as are consistent with their respective constitutions and avoid those in conflict therewith." (See Case No. ÚS 66/04 of 3 May 2006) In another decision the Constitutional Court of the Czech Republic held that "the transfer of powers of bodies of the Czech Republic to an international organization under Article 10a of the Constitution of the Czech Republic (the "Constitution") cannot go so far as to violate the very essence of the republic as a democratic State governed by the rule of law, founded on respect for the rights and freedoms of human beings and of citizens, and to establish a change of the essential requirements of a democratic State governed by the rule of law." (See Case No. ÚS 19/08 of 26 November 2008)

[42] As stated in one of the decisions of the England and Wales High Court (Administrative Court): "The 'limitation of sovereignty' [...] arises only in the context of Community law's substantive provisions. The case is concerned with the primacy of those substantive provisions. It has no application where the question is, what is the legal foundation within which those substantive provisions enjoy their primacy, and by which the relation between the law and institutions of the EU law and the British State ultimately rests. The foundation is English law." {See [2002] EWHC 195 (Admin)}

[43] In accordance with the requirement of constitutional dialogue between the Member States, in one of its decisions the Supreme Court of the United Kingdom made a reference to a decision of the German Federal Constitutional Court: "There is in addition much to be said for the view, advanced by the German Federal Constitutional Court in its judgment of 24 April 2013 on the Counter-Terrorism Database Act, 1 BvR 1215/07, para 91, that as part of a co-operative relationship, a decision of the Court of Justice should not be read by a national court in a way that places in question the identity of the national constitutional order [*Im Sinne eines kooperativen Miteinanders zwischen dem Bundesverfassungsgericht und dem Europäischen Gerichtshof ... darf dieser Entscheidung keine Lesart unterlegt werden, nach der diese offensichtlich als Ultra-vires-Akt zu beurteilen wäre oder Schutz und Durchsetzung der mitgliedstaatlichen Grundrechte in einer Weise gefährdete ..., dass dies die Identität der durch das Grundgesetz errichteten Verfassungsordnung in Frage stellte*] (As part of a cooperative relationship between the Federal Constitutional Court and the European Court of Justice [...], this decision must not be read in a way that would view it as an apparent *ultra vires* act or as if it endangered the protection and enforcement of the fundamental rights in the Member States [...] in a way that questioned the identity of the Basic Law's constitutional order)" (See *State v. Secretary of State for Transport*, 22 January 2014) The Supreme Court of the United Kingdom laid down in the case *Pham v. Secretary of State for the Home Department* (25 March 2015) that "[...] the recipe for avoiding any problem is that all concerned should act with mutual respect and with caution in areas where Member States' constitutional identity is or may be engaged – particularly so where, as in the present context, great

care has been taken to emphasise this by declarations accompanying the relevant Treaty commitments. That reflects the spirit of co-operation of which both the *Bundesverfassungsgericht* and this court have previously spoken."

- [44] As explained by the German Federal Constitutional Court in its decision on the Treaty of Lisbon: "European unification on the basis of a treaty union of sovereign States may not be achieved in such a way that not sufficient space is left to the Member States for the political formation of economic, cultural and social living conditions. This applies in particular to areas which shape the citizens' living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as to political decisions that rely especially on cultural, historical and linguistic perceptions and which develop within public discourse in the party political and parliamentary sphere of public politics. [...] The Federal Constitutional Court always examines whether legal instruments of the European institutions and bodies keep within the boundaries of the sovereign powers accorded to them by way of conferral, whilst adhering to the principle of subsidiarity under Community and Union law in accordance with Article 5.3 first and second sentence of the Treaty on European Union in the version of the Treaty of Lisbon. Furthermore, the Federal Constitutional Court reviews whether the inviolable core content of the constitutional identity of the Basic Law pursuant to Article 23 (1) third sentence in conjunction with Article 79 (3) of the Basic Law is respected by way of these acts of the Union. The exercise of this review power, which is rooted in constitutional law, follows the principle of the Basic Law's openness towards European Law, and it therefore also does not contradict the principle of sincere cooperation. Without this review competence, along with progressing European integration, the fundamental political and constitutional structures of sovereign Member States, which are recognised by Article 4 (2) first sentence of Lisbon TEU, cannot be safeguarded in any other way. In this respect, constitutional identity and guaranteeing it under Union law go hand in hand." (BverfG, 2 BvE 2/08 of 30 June 2009)
- [45] Within the framework of the European constitutional dialogue, the Court of Justice of the European Union also pays respect to the competences of Member States and takes account of their constitutional demands [C-376/98, *Germany versus Parliament and Council* (Tobacco advertisement judgment), 2000, ECR I-2247.; C-36/02., *OMEGA Spielhallen- und Automatenaufstellungs-GmbH versus Oberbürgermeisterin der Bundesstadt Bonn*; C-404/15 *Aranyosi and Căldăraru* ECLI:EU:C:2016:198].
- [46] On the basis of the review of case law of the Member States' supreme courts performing the tasks of constitutional courts and of the Member States' constitutional courts, the Constitutional Court established that within its own scope of competences, on the basis of a relevant petition, in exceptional cases and as a resort of *ultima ratio*, i.e. along with paying respect to the constitutional dialogue between

the Member States, it can examine whether exercising competences on the basis of Article E) (2) of the Fundamental Law results in the violation of human dignity, the essential content of any other fundamental right or the sovereignty (including the extent of the competences transferred by the State) and the constitutional self-identity of Hungary.

- [47] 6. With regard to the reservation of fundamental rights, the Constitutional Court established that any exercise of public authority in the territory of Hungary (including the joint exercising of competences with other Member States) is linked to fundamental rights. This was also the case at the moment of Hungary's accession to the European Union, and the level of the fundamental rights' constitutional protection was not affected by the accession to the European Union.
- [48] The Constitutional Court underlines that according to Article I (1) of the Fundamental Law, it is the primary obligation of the State to protect the inviolable and inalienable fundamental rights of MAN. As the protection of fundamental rights is a primary obligation of the State, it shall precede the enforcement of everything else. Accordingly, the Member State's liability cannot be exempted at the European Court of Human Rights either, by making a reference to implementing the law of the EU (Cp. *Matthews v. United Kingdom*, 18 February 1999).
- [49] As demonstrated in the opinion of the German Constitutional Court, detailed in the so called *Solange-decisions*, due to the institutional reforms, the Charter of Fundamental Rights and the Court of Justice of the European Union, the European Union, in most cases, can grant the same level of protection for fundamental rights as the level secured by the national constitutions, but at least a protection of adequate level [Cp. the so-called *Solange II. Decision of the German Constitutional Court* ([1987] 3 CMLR 225)]. Consequently, the review competence reserved for the Constitutional Court must be applied with due account to the obligation of cooperation, by paying respect to the enforcement of EU law as far as possible (See the German Constitutional Court's Decision No. 2 BvR 2735/14. of 15 December 2015.). The Constitutional Court, however, cannot set aside the *ultima ratio* protection of human dignity and the essential content of fundamental rights, and it must grant that the joint exercising of competences under Article E) (2) of the Fundamental Law would not result in violating human dignity or the essential content of fundamental rights.
- [50] 7 With regard to the petitioner's motion related to transgressing the scope of competences, the Constitutional Court notes that when the *ultra vires* nature of an act under EU law occurs, – on the basis of Article 6 of the Protocol that forms an integral part of the Founding Treaties – the National Assembly and – in accordance with Article 16 (2) of TEU – the Government, representing Hungary in the Council empowered to adopt legislation in the Union, may take the steps available and deemed necessary in the given situation.

- [51] Furthermore, according to the Act XXXVI of 2012 on the National Assembly and the National Assembly's Resolution No. 10/2014. (II. 24.) OGY on certain standing orders, upon the initiative of the Committee of European affairs, the National Assembly of Hungary or the Government of Hungary may file a claim with the Court of Justice of the European Union alleging the violation of the principle of subsidiarity by the legislative act of the European Union.
- [52] In the following, the Constitutional Court shall interpret Article E) (2) of the Fundamental Law with due account to the above.
- [53] In this respect the Constitutional Court establishes that Article E) (2) of the Fundamental Law allows Hungary, as a Member State of the European Union, to exercise some of its competences through the institutions of the European Union. This joint exercising of competences, nevertheless, is not unlimited, as Article E) (2) of the Fundamental Law not only grants the validity of EU law in respect of Hungary, but at the same time it imposes limitations on the transferred and jointly exercised competences.
- [54] By interpreting the Fundamental Law's National Avowal and its Article E) (2), with due account to Article 4 (2) of one of the international treaties referred to in Article E) (2), the TEU, the Constitutional Court establishes two main limitations upon the joint exercising of competences. On the one hand the joint exercising of a competence shall not violate Hungary's sovereignty (sovereignty control), and on the other hand it shall not lead to the violation of constitutional identity (identity control).
- [55] Respecting and safeguarding the sovereignty of Hungary and its constitutional identity is a must for everybody (including the National Assembly contributing to the European Union's decision-making mechanism and the Government directly participating in that mechanism), and, according to Article 24 (1) of the Fundamental Law, the principal organ for the protection is the Constitutional Court.
- [56] The Constitutional Court emphasizes that the direct subject of sovereignty- and identity control is not the legal act of the Union or its interpretation, therefore the Court shall not comment on the validity, invalidity or the primacy of application of such Union acts.
- [57] In the following, the Constitutional Court shall briefly explain the contents of sovereignty- and identity control in the context of Article E) (2) of the Fundamental Law and the concrete constitutional issue specified in the third item of the petition's second question.
- [58] 7.1. With regard to sovereignty control, the Constitutional Court notes the following.
- [59] According to Article B) of the Fundamental Law, in Hungary, the source of public power shall be the people, and power shall be exercised by the people through elected representatives or, in exceptional cases, directly. The exercised state authority is not an unlimited power; the Parliament may only act in the framework of the Fundamental Law and the provisions of the Fundamental Law set limits upon its

powers [Cp. Decision 2/1993. (I. 22.) AB, ABH 1993, 33, 36.]. As long as Article B) of the Fundamental Law contain the principle of independent and sovereign statehood and indicates the people as the source of public power, these provisions shall not be emptied out by the Union-clause in Article E).

[60] Since by joining the European Union, Hungary has not surrendered its sovereignty, it rather allowed for the joint exercising of certain competences, the maintenance of Hungary's sovereignty should be presumed when judging upon the joint exercising of further competences additional to the rights and obligations provided in the Founding Treaties of the European Union (the principle of maintained sovereignty). Sovereignty has been laid down in the Fundamental Law as the ultimate source of competences and not as a competence. Therefore the joint exercising of competences shall not result in depriving the people of the possibility of possessing the ultimate chance to control the exercising of public power (realised either in joint or in individual – Member State – form). This is supported by the rule on approval by the Parliament granted in Article E) (4) of the Fundamental Law and – exceptionally – by exercising the right to referendum as regulated in Article XXIII (7) of the Fundamental Law.

[61] 7.2 With regard to identity control, the Constitutional Court notes the following.

[62] According to Article 4 (2) TEU, "the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."

[63] The protection of constitutional identity should be granted in the framework of an - informal cooperation with EUC based on the principles of equality and collegiality, with mutual respect to each other, similarly to the present practice followed by several other Member States' constitutional courts and supreme judicial bodies performing similar functions.

[64] The Constitutional Court of Hungary interprets the concept of constitutional identity as Hungary's self-identity and it unfolds the content of this concept from case to case, on the basis of the whole Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of our historical constitution – as required by Article R) (3) of the Fundamental Law.

[65] The constitutional self-identity of Hungary is not a list of static and closed values, nevertheless many of its important components – identical with the constitutional values generally accepted today – can be highlighted as examples: freedoms, the division of powers, republic as the form of government, respect of autonomies under public law, the freedom of religion, exercising lawful authority, parliamentarism, the equality of rights, acknowledging judicial power, the protection of the nationalities living with us. These are, among others, the achievements of our historical

constitution, the Fundamental Law and thus the whole Hungarian legal system are based upon.

- [66] The protection of constitutional self-identity may be raised in the cases having an influence on the living conditions of the individuals, in particular their privacy protected by fundamental rights, on their personal and social security, and on their decision-making responsibility, and when Hungary's linguistic, historical and cultural traditions are affected.
- [67] The Constitutional Court establishes that the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood. Therefore the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State. Accordingly, sovereignty and constitutional identity have several common points, thus their control should be performed with due regard to each other in specific cases.
- [68] 7.3 The petitioner's question related to the transferring of third country nationals in the context of the European Union can be answered by the Constitutional Court in the framework of this procedure aimed at the interpretation of the Fundamental Law as follows.
- [69] If human dignity, another fundamental right, the sovereignty of Hungary (including the extent of the transferred competences) or its self-identity based on its historical constitution can be presumed to be violated due to the exercising of competences based on Article E) (2) of the Fundamental Law, the Constitutional Court may examine, on the basis of a relevant petition, in the course of exercising its competences, the existence of the alleged violation.
- [70] 8. The publication of the Decision of the Constitutional Court in the Hungarian Official Gazette is based upon the first phrase of Article 44 (1) of the ACC.

Budapest, 30 November 2016

Dr. Tamás Sulyok (signed),
President of the Constitutional Court
Judge Rapporteur

Dr. István Balsai (signed),
Judge of the Constitutional Court

Dr. Egon Dienes-Oehm (signed),
Judge of the Constitutional Court,

Dr. Imre Juhász (signed),
Judge of the Constitutional Court

Dr. Béla Pokol (signed),
Judge of the Constitutional Court,

Dr. Tamás Sulyok (signed),
President of the Constitutional Court
on behalf of
dr. László Salamon
Judge of the Constitutional Court
impeded in signing

Dr. István Stumpf (signed),
Judge of the Constitutional Court

Dr. Péter Szalay (signed),
Judge of the Constitutional Court

Dr. Mária Szívós (signed),
Judge of the Constitutional Court,

Dr. András Varga Zs. (signed),
Judge of the Constitutional Court

Concurring opinion by *Dr. Egon Dienes-Oehm*, Judge of the Constitutional Court

- [71] I agree with the Constitutional Court with respect to the holdings of the decision related to the joint exercising of competences under Article E) (2) of the Fundamental Law, declaring the general specification of its review competence.
- [72] However, the reasoning does not give an exhaustive list of the limitations in concrete cases of the review competence specified in general, allowing for several potential interpretations in this respect.
- [73] 1. In this concurring opinion, for the purpose of excluding certain potential interpretations, I give a summary of the limitations originating in the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), the Fundamental Law and the Act CLI of 2011 on the Constitutional Court (ACC) that, in concrete cases, restrict – or can restrict – the review competence generally specified in the holdings of the decision. I agree with the holdings with these reservations on the limitations of interpretation concerning concrete cases, thus my agreement is valid together with the contents of this concurring opinion.
- [74] a) First of all, I would like to point out that the petition aimed at establishing the *ultra vires* nature of the Union's legal act can only result in an obligation of review by the Constitutional Court with temporal limitations, according to the law in force and upon

the petition of a person entitled to file a motion. (Cp. Section 7 of the reasoning, [50]—[69]))

- [75] According to the Founding Treaty of the European Union, only the European Commission is entitled to propose EU legislation and the detailed provisions thereof. EU laws are created and adopted on the basis of this proposal by the Council and the European Parliament together (regular legislative process) or by the Council alone (only consulting with the Parliament) at the end of a usually lengthy process, with the participation of the Member States and in principle with majority voting (in certain cases with unanimity). The law can be a regulation or decision directly enforceable in the Member States, or a directive that requires transposition into the Member States' national law and enforceable in the framework and form of national legislation.
- [76] Any legal debate after the adoption of the piece of EU legislation – including the legal interpretation alleging the transgressing of the Union's competences – falls solely and exclusively into the scope of competence of the Court of Justice of the European Union (CJEU) in accordance with Article 244 of TFEU. Consequently, the constitutional courts of the Member States and their fora of supreme courts, in the case of a court procedure already commenced at CJEU, do not have legal instruments to influence the European Union and the legal debate that forms the subject matter of a procedure on transgressing competences. It is a question to be addressed independently, what are the conditions upon which the Member States' constitutional courts or supreme courts can still play a role in preventing the transgressing of competences. As far as the practical options are concerned, these supreme national fora safeguarding constitutionality either take part in the so called preliminary ruling procedure of CJEU (Article 267 of TFEU), or – again in a preliminary way – attempt to solve their problems of *ultra vires* nature in the framework of the European constitutional dialogue, among others by making a reference to the acknowledgement of national identity in the Founding Treaty. [Article 4 (2) of TEU]
- [77] Of course, the Constitutional Court shall not review the judicial acts of the Union either.
- [78] b) According to Article 24 (2) of the Fundamental Law and Chapter II of ACC, the conceptual definitions of the procedures that fall into the Constitutional Court's scope of duties and competences also narrow down significantly the scope of potential competences of the constitutional court to be resorted, in line with the holdings of the decision, by the entitled persons in the context of Article E) (2) of the Fundamental Law.

- [79] It should be noted, first of all, that as the sources of EU law directly enforceable in the Member States without any measure taken by the Member States are not "legal regulations" according to Article 24 (2) of the Fundamental Law and Sections 23–31 of ACC, they cannot form the subject matter of preliminary or posterior review, and the same applies to constitutional complaints as well. At the same time, however, with regard to the relevant EU laws, the provision on the examination of conflicts with international treaties (Section 32 of ACC) shall also be excluded on a conceptual basis. In my opinion, neither would Article E) (3) of the Fundamental Law – acknowledging the general mandatory rules of conduct of the European Union, resulting in the applicability of those rules in Hungary – save the situation.
- [80] Consequently, I hold that the possibility of reviewing EU legislation of *ultra vires* nature – with the exception of Hungarian legal regulations transposing a directive of the EU – can only be based upon Section 38 (1) of ACC. Nevertheless, the temporal limitation discussed in the previous section of my concurring opinion is also relevant with regard to the legal effect of the petitions filed under this title by the entitled persons for the interpretation of the Fundamental Law, and as a particularity of this kind of procedure, no legal consequences will be applicable in this case.
- [81] 2. I accepted the note mentioned in Section 7.1 (Reasoning, [58]–[60]) of the reasoning of the decision, with the interpretation that it can be regarded as a procedural requirement providing guidance for the Constitutional Court's future activity in the field of sovereignty-control. It can play a role during the constitutional review of assessing the presumption of maintained sovereignty in the case of transferring new (further) competences for joint exercising as compared to the provisions under the present Founding Treaties, such review being also supported by the Constitutional Court in the form of specifying the basis of the identity control mentioned in Section 7.2 (Reasoning, [61] –[67]) of the reasoning of the decision.
- [82] Let me also note in that respect that, in my opinion, the cases where this review requirement can be taken into account are exceptional ones. Such cases may include for example the development of EU law regulations in the field of expected future policies related to border control, asylum and immigration in Chapter 2 of Title V of TFEU on the area of freedom, security and justice. The possibilities offered by way of the provisional authorisation provided in Article 78 (3) of TFEU for the case of an emergency situation of uncontrolled mass migration characterised by a sudden inflow of nationals of third countries have proven to be inappropriate for the management of the crisis, therefore new regulations are needed. In the course of developing such regulations in the near future, the questions of Member States'

competences transferred for joint exercising and of powers remaining exclusively in national competences would surely arise.

Budapest, 30 November 2016

Dr. Egon Dienes-Oehm (signed),
Judge of the Constitutional Court

Concurring opinion by *Dr. Imre Juhász*, Judge of the Constitutional Court

- [83] Although I agree with the holdings of the decision and with the overwhelming majority of the statements made in the reasoning, I hold it necessary to note the following:
- [84] 1. I cannot identify with the ruling of the Constitutional Court – adopted in this case by the rapporteur under No. X/3327-31/2015 on the basis of Section 58 (3) of ACC – separating the petitioner's claim on interpreting Article XIV of the Fundamental Law. I hold that the petition contains appropriate arguments raised – in my opinion on due grounds – by the commissioner for fundamental rights with regard to his constitutional concerns about the EUC Decision, and the Constitutional Court should have already addressed these concerns in the present decision, after examining its own scope of competence. In my view the separation – which is in fact postponing the adoption of the decision for indefinite time – is indeed questionable in the light of the fact that the EUC Decision is applicable to the persons who arrive(d) to the territory of Italy or Greece between 25 September 2015 and 26 September 2017, as well as to those applicants who have arrived to the territory of the Member States since 24 March 2015.
- [85] 2. Item 6 of Section III of the reasoning (Reasoning, [47]–[49]) establishes, by way of reference to the so called Solange II Decision of the German Constitutional Court, that the European Union – through the institutional reforms, the Charter of Fundamental Rights and Court of Justice of the European Union – can guarantee the same level of protection for fundamental rights as the level secured by the Member States' constitutions, but at least a protection of adequate level.
- [86] In my opinion, the level of protecting fundamental rights as secured by the law of the European Union should have been analysed more deeply, on the basis of Hungarian constitutionality. Such a comparison could have offered a chance for performing a

more complex examination of sovereignty and self-identity based on the historical constitution as well as of the fundamental human rights enshrined in the Fundamental Law. Without the analysis that I miss, it seems that the reasoning of the decision simply takes over the position that had been taken by the German Federal Constitutional Court. Furthermore, the missing analysis should have mentioned that due to the passing of time (the Solange II Decision was adopted in 1986 when the European Union did not even exist) and the enlargement of the EC and then the EU, new directions of examination in time and space have become necessary.

[87] I hold that the fundamental rights' protection level of the European Union cannot be specified in an exact way, and the present state of fundamental rights' protection is not without debates and it rises questions that are yet unanswered. For example: – The protection of fundamental rights through the Charter of Fundamental Rights can only be interpreted in the context of EU law; therefore it can only be referred upon against a Member State measure if that measure implements the law of the Union. Obvious examples are maintaining and addressing the force of the Beneš-decrees based on the principle of collective guilt;– reluctance against protecting autochthon national minorities by the Union;– application of a double standard with regard to the test of fundamental rights in case of Member States joined earlier and the ones joined later; – the relation between CJEU and ECtHR is unclear in many respects (preserved by the non-accession of the EU to the ECtHR) and some of their decision-making competences are diverging. It is worth noting what the CJEU said in the joined asylum cases C-411/10 and C-493/10: although the Dublin II system is based upon the principle of mutual trust, it may easily happen that the treatment of asylum seekers in a given Member State is in conflict with the Charter of Fundamental Rights, therefore the CJEU allows the court of a Member State to decide whether in the other Member State the necessary minimum fundamental rights are granted, and – with account to the above – whether the asylum seeker can be transferred into this country. It also means that, along this line of thought, the cooperation in asylum matters with a Member State shall only last until a systematic violation of fundamental rights is alleged by another Member State (aptly called "horizontal Solange" by *Iris Canor* in her study published in CML Rev 2013/2).

[88] As demonstrated above, making any, not adequately matured statement about presuming the sufficient ("at least adequate") level of fundamental rights' protection by the Union can lead to impetuous and expeditious conclusions.

Budapest, 30 November 2016

Dr. Imre Juhász (signed),

Judge of the Constitutional Court

Concurring opinion by *Dr. Béla Pokol*, Judge of the Constitutional Court

- [89] I support the decision as a document showing the Hungarian Constitutional Court closing up those European constitutional courts that have put the protection of sovereignty and constitutional identity into the focus, in contrast with the Union's legal acts. This should have been done by the Hungarian Constitutional Court a long ago, and the present decision is a significant step in this direction. It was indeed a very important step to take, as the provisions, and in particular the National Avowal, of the Fundamental Law of Hungary – contrary to many other European constitutions – have raised above all the national independence of Hungary and the safeguarding of State sovereignty in several declarations and value-statements. Nevertheless, those many years of delay could have offered a chance for us to learn from the experiences gained in this field by other constitutional courts and to develop our solutions in this field by taking into account these experiences.
- [90] It should be noted that the domestic actions of protecting sovereignty and constitutional identity by the constitutional courts against the legal acts of the Union have been institutionalised in each country in two phases, and establishing in the country concerned the mechanism of taking action as an abstract possibility is separated from the decision on declaring the prohibition of application against the concrete act of the Union. Until now in many European countries only the possibility of the constitutional courts' abstract right of resistance against the legal acts of the Union has been established, but concrete actions against such acts have taken place only exceptionally. For example, in the Czech Republic where in 2012 the judges of the constitutional court prohibited the implementation of a decision of the European Court of Justice within the country. One of the reasons of such a paralytic state is that reviewing a legal act of the Union by the constitutional court and declaring the prohibition of its application in the country concerned may imply concerns of foreign policy and international financial consequences, the weighing of which requires a government with a well prepared foreign policy staff rather than the judges themselves of the constitutional court.
- [91] This is the reason why I argued in the decision's debate on establishing the exclusive initiating right of the Government along with the possibility of commencing our procedure for the protection of sovereignty and the constitutional identity against specific legal acts of the Union. This way, the commencement of the Constitutional Court's procedure would always be preceded by the preliminary examination of an

appropriate foreign policy expert staff, relieving the judges of the Constitutional Court of the burden of considering the potential disadvantages that may affect the country as a consequence of their decision. If, on the basis of weighing the political and economic circumstances of the Union, the Government's motion "triggers" the procedure, then the judges of the Constitutional Court shall only take into account pure constitutional concerns, without the burden of calculating the consequences at the levels of foreign policy and world economy. Of course, the Government's motion against the legal act of the Union can be rejected in such a case as well, but then – due to the division of responsibilities – the judges of the Constitutional Court shall only take into account the aspects of constitutional law.

[92] In contrast with the above, the holdings of the present decision declared the motioning of the Constitutional Court's procedure against the legal acts of the Union as a possibility in the course of exercising all of its competences. It can be initiated in the widest scope, for example in the framework of constitutional complaints. In other European countries, such a very wide abstract possibility resulted in the fact that this procedure of the constitutional courts does not actually work. We should have learned a lesson from that after waiting for so many years with hitting this road. Bearing in mind the reality, on the basis of the above arguments, the right of initiating the procedure should have only be given to the Government. Due to the wide wording of the decision, this petitioning right will be available for an extensive scope of litigating citizens or the judges of simple courts, while the Government – possessing real competence in this respect – can only do this by way of the extended interpretation of the Constitutional Court. In my opinion, the extended interpretation of Section 23 (3) of the Act on the Constitutional Court provides a possibility for the Government to do this. If we consider the Union's legal act transgressing the Founding Treaties of the EU to be a new international obligation, then we can accept the Government's motion aimed at the preliminary review of this act by the Constitutional Court. Although according to Section 23 (4), such a review can be initiated by the President of the Republic and the Government, the necessary prior assessment of a wide scope of foreign policy context – and this is a kind of competence the Government possesses – requires granting an exclusive right for the Government to initiate it.

[93] As a consequence, in my concurring reasoning, I missed a more elaborate consideration in the decision of the experiences gained by the European constitutional courts. However, the development of a better founded control by the Constitutional Court of the legal acts of the Union – due to recent critical periods of the EU's decision-making processes – seems to be more important for us now than it

was for the countries that hit this road many years ago. We cannot expect any future decrease of the flow of millions of migrants targeting Europe, and the deep conflicts in the parallel societies of the big Western cities warn us what we have to protect Hungary from. Considering the tensions we see today within the European Union, the need to protect Hungary from the proliferation of tensions from the Western part of the Union can result in the future primary importance of the Hungarian Constitutional Court's procedure of sovereignty- and constitutional identity control, the foundations of which have been laid down in this decision. This is why I still supported the decision despite of all of my reservations.

Budapest, 30 November 2016

Dr. Béla Pokol (signed)

Judge of the Constitutional Court

Concurring opinion by *Dr. István Stumpf*, Judge of the Constitutional Court

[94] 1. "The Hungarian nation has always held loyally to her own constitutional independence and has always born an unrelenting resentment towards any attempts by the government, and especially certain of its administrators, to disregard or even eliminate the Hungarian constitution in addition to absorbing the country [...] for this loyal devotion and this unrelenting resentment towards absorption is in fact passed on from one generation to the next amongst the Hungarians, and it is just as vigorous now and it was a hundred years ago, and, if the grace of the Almighty stays with us, it will still be vigorous centuries later" – wrote *Ferenc Deák* in his Easter Article of 16 April 1865.

Identifying myself with this thought, I hold that it is a very important objective of Hungary – along with its participation in the European Union as a Member State – to protect its national sovereignty and the nation's constitutional identity. The Constitutional Court as the supreme body for the protection of the Fundamental Law is an authentic interpreter of the Fundamental Law. Consequently, the Constitutional Court – acting in its scope of competence granted in the Fundamental Law and in cardinal acts, and at the same time in compliance with the principle of sincere cooperation between the Union and the Member States [Article 4 (3) of TEU], engaged in a constitutional dialogue with the Court of Justice of the European Union – has a key role in maintaining the possibility of reviewing and establishing unconstitutionality against the *ultra vires* acts in the contexts of the independent and democratic State under the rule of law [Article B) (1) of the Fundamental Law] and of the exercising of competences transferred to the European Union [Article E) (2) of the

Fundamental Law] ("integration reservation"). In establishing the constitutional principles and values worth of actual constitutional protection, a special emphasis should be put on the historical dimension, Hungary's constitutional tradition, the achievements of the historical constitution.

Taking the above aspects into account, I can accept the Constitutional Court's decision, but only with noting the following remarks.

[95] 2. In the holdings of the decision adopted in the procedure of interpreting the Fundamental Law, the Constitutional Court makes a statement that seems to be a novelty, however – in my understanding – it is evident. This statement is essentially about the right of the Constitutional Court to examine the violation of the Fundamental Law during the exercising of its competences. According to the decision, the review would be directed at establishing whether "the joint exercising of competences under Article E) (2) of the Fundamental Law" violates the Fundamental Law (or certain rules incorporated in or deducted from the Fundamental Law). The mere fact of exercising certain competences together with other Member States, through the institutions of the European Union, "on the basis of Article E) (2) of the Fundamental Law" i.e. originating from the Fundamental Law, as the "joint exercising of competences" allowed by the Fundamental Law could hardly violate the Fundamental Law (hardly violating "human dignity, another fundamental right, the sovereignty of Hungary or its identity based on the country's historical constitution"). Article E) (2) of the Fundamental Law settles the issue itself of the transfer of exercising competences, granting the exercising of powers jointly with the other Member States, therefore it is essentially only a clause of accession. At the same time, Article E) (2) of the Fundamental Law does not contain provisions on the nature of EU law, its relation to the legal system of Hungary, its force and its application, consequently it does not qualify as an integration clause of European law. In the absence of any position taken in the Fundamental Law concerning the latter fundamental issue, it is the duty of the Constitutional Court, acting in the protection of the independent and democratic State under the rule of law, to say something about the Union's law, its position in the legal system of Hungary and about the "integration reservation" in the context of the "constitutional law of the integration". [In this regard, the Constitutional Court should reconsider its judicial practice related to establishing the place of EU law in the legal system of Hungary, from the Decision 1053/E/2004. AB, through the Decisions 72/2006. (XII. 15.) AB, 9/2007. (III. 7.) AB and 143/2010. (VII. 14.) AB up till today.]

[96] Returning back to the holdings of the decision, the Constitutional Court may of course review on the basis of a relevant petition whether "the joint exercising of competences under Article E) (2) of the Fundamental Law" itself violate the Fundamental Law. However, in my opinion, it would be more reasonable to review the conformity with the Fundamental Law of the legal acts adopted by way of the joint exercising of competences, rather than "the joint exercising of competences under Article E) (2) of the Fundamental Law". Indeed, the petition by the commissioner for fundamental rights requested the interpretation of the Fundamental Law in this respect, as confirmed by the reasoning of the decision in Section III.4: "The Constitutional Court holds that the first item of the motion's second question essentially refers to the reservation of fundamental rights (i.e. whether a legal act of the Union can violate fundamental rights), while the second item concerns the evaluation of the so called *ultra vires* legal acts of the Union." (Reasoning [39]) Although the reasoning deals with these questions asked in the petition, the tenor of the decision does not essentially address these questions – it only reaches a self-evident conclusion.

[97] 3. According to the holdings of the decision "the Constitutional Court may examine upon a relevant motion – in the course of exercising its competences – whether the joint exercise of powers under Article E) (2) of the Fundamental Law would violate" the Fundamental Law. Looking on the competences of the Constitutional Court specified in Article 24 (2) of the Fundamental Law, one may find that the legislator defined the subject of the review with regard to each and every procedure by the Constitutional Court: legal regulation or judicial decision. In the procedures of normative control [Article 24 (2) a)–c) and e) of the Fundamental Law], the Constitutional Court's scope of competence includes the review of the legal regulations' conformity with the Fundamental Law. Article T) (2) of the Fundamental Law specifies clearly the meaning of legal regulations according to the Fundamental Law: "Legal regulations shall be Acts, government decrees, prime ministerial decrees, ministerial decrees, decrees of the Governor of the National Bank of Hungary, decrees of the heads of autonomous regulatory organs and local government decrees. In addition, decrees of the National Defence Council adopted during a state of national crisis and decrees of the President of the Republic adopted during a state of emergency shall also be legal regulations." Consequently, the legal acts of the European Union cannot formally be subject to normative control procedures. In addition, neither can such acts be examined in the procedures of reviewing judicial decisions, interpreting the Fundamental Law or reviewing the conflict of legal

regulations with an international treaty. Thus the Constitutional Court should have taken a position in the question what is the actual scope of competence and the procedure in which the Constitutional Court can examine the integration reservation.

- [98] According to the relevant provisions of ACC, all types of constitutional complaints – that form the overwhelming majority of the Constitutional Court's procedures – can only be submitted in the case of the violation of a right granted in the Fundamental Law; abstract constitutional values, such as the "sovereignty of Hungary" or its "identity based on the country's historical constitution" cannot form the basis of a petition – as far as the present legal framework is concerned. Let me note that so far the Constitutional Court consistently held that "Article E) of the Fundamental Law does not grant a fundamental right, the violation of which could be a direct basis of a constitutional complaint". Decision {3041/2014. (III. 13.) AB, Reasoning [25]; Decision 3113/2016. (VI. 3.) AB, Reasoning [13]}
- [99] In my opinion, the Constitutional Court – in the investigated context – can perform the protection of Hungary's sovereignty and constitutional identity when – for example at the time of amending a Founding Treaty – the empowered bodies of the Hungarian State request a review about the level of competence transfer to the bodies of the Union that could be in conformity with the Fundamental Law [Cp. Section 23 of ACC].
- [100] Of course a complaint under Article 24 (2) *d*) of the Fundamental Law can be submitted in any case, including cases where the court applied an act of the Union. In accordance with Article 24 (3) *b*) of the Fundamental Law, the Constitutional Court shall annul the judicial decision being in conflict with the Fundamental Law – let it be one passed with the application of a legal act of the Union.
- [101] 4. The Constitutional Court should reconsider the fact that if it still examined, "on the basis of a relevant petition" (without regard to the subject of its procedure as specified in the Fundamental Law) the *ultra vires* nature of a legal act of the Union, then it would actually be engaged in reviewing the invalidity of that act. (This would be the case, despite of the majority reasoning stating in Section III.7 that "the direct subject of sovereignty- and identity control is not the legal act of the Union or its interpretation, therefore the Court shall not comment on the validity, invalidity or the primacy of application of such Union acts" (Reasoning [56]). Indeed, at the moment when the Constitutional Court engages in defining, in the context of a concrete legal act of the Union, what should be protected – with regard to the Union act – on the basis of Hungary's sovereignty or its identity based on its historical constitution, this would be an indirect judgement formed on the *ultra vires* nature, i.e. the invalidity of

the Union act.) Thus, when the Constitutional Court acts like described above, it can hardly refer in the beginning of Section III.7 to the right of other Hungarian bodies (National Assembly, Government) to turn to the European Court of Justice. The reason behind this, in my opinion, is the fact that in such cases, on the basis of Article 267 of TEU, the Constitutional Court itself should initiate the procedure of the European Court of Justice.

[102] 5. There are further statements in the reasoning of the majority decision I do not agree with.

[103] 5.1. Section III.7 of the decision would deduct from Article 4 (2) of TEU that "Respecting and safeguarding the sovereignty of Hungary and its constitutional identity is a must for everybody (including the National Assembly contributing to the European Union's decision-making mechanism and the Government directly participating in that mechanism), and, according to Article 24 (1) of the Fundamental Law, the principal organ for the protection is the Constitutional Court". However, it is worth noting that the quoted provision of TEU does not impose an obligation on everyone or on the bodies of the Hungarian State, but it protects the Member States from interventions by the Union: "The Union shall respect the [...] Member States(') [...] national identities". Of course the whole of the Fundamental Law is binding upon the National Assembly and the Government, but this is fact without regard to any provision of TEU.

[104] 5.2. According to the relevant part of the majority decision on sovereignty control (III. 7.1., Reasoning [58]–[60]), "the joint exercising of competences shall not result in depriving the people of the possibility of possessing the ultimate chance to control the exercising of public power (realised either in joint or in individual – Member State – form). This is supported by the rule on approval by the Parliament granted in Article E) (4) of the Fundamental Law and – exceptionally – by exercising the right to referendum as regulated in Article XXIII (7) of the Fundamental Law." Although in principle I do support such a wide scale enforcement of popular sovereignty, I have difficulties with identifying with the last half sentence's place in the reasoning. It could hardly mean that in individual cases the voters could review the measures by the bodies of the European Union with regard to the question of the joint exercising of Union powers undertaken in the accession treaty confirmed by two-thirds of the members of Parliament and concretely incorporated in the Fundamental Law. Indeed, the direct exercising of power by the people is precluded by the Fundamental Law in

an array of questions [Article 8 (3)], including the prohibition of holding a national referendum on an obligation resulting from an international treaty [item *d*]). It would be a contradiction in principle if a referendum could review Union measures in individual cases, while the voters cannot exercise this right with regard to any international treaty having no constitutional incorporation and two-thirds confirmation.

[105] 5.3. I agree with the statement made in Section III.7.3 of the majority reasoning that "the Constitutional Court of Hungary interprets the concept of constitutional identity as Hungary's self-identity and it unfolds the content of this concept from case to case, on the basis of the whole of the Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of our historical constitution – as required by Article R) (3) of the Fundamental Law" (Reasoning [64]).

[106] This is why I consider the following statement made in the second next paragraph of the majority decision to be unacceptable: "The protection of constitutional self-identity may be raised in the cases having an influence on the living conditions of the individuals, in particular their privacy protected by fundamental rights, on their personal and social security, and on their decision-making responsibility". This statement has been taken without examination from the decision of the German Federal Constitutional Court quoted earlier in the reasoning (BverfG, 2 BvE 2/08, 30 June 2009), in the absence of any argument based on the Fundamental Law of Hungary.

[107] Similarly, I cannot identify with the following paragraph of the majority reasoning: "The Constitutional Court establishes that the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, independent statehood. Therefore the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State." This approach would actually tear apart Hungary's constitutional identity from the text of the Fundamental Law, creating a kind of invisible Fundamental Law to be protected by the Constitutional Court – with a content interpreted according to an uncertain methodology, even by referring to imported foreign legal products – independently from the Fundamental Law. That would be contrary to the Fundamental Law. I am firmly convinced that the Constitutional Court should enforce Hungary's

constitutional identity on the basis of, and faithfully to the Fundamental Law, within the limits specified therein.

Budapest, 2016. november 30.

Dr. István Stumpf (signed),
Judge of the Constitutional Court

Concurring opinion by *Dr. András Varga Zs.*, Judge of the Constitutional Court

[108] I fully agree with the holdings of the Decision and with its reasoning. However, the reasoning is too laconic with regard to two important statements: the legal nature of Hungary's constitutional identity and the presumption of reserving sovereignty to be followed in the course of interpreting the law of the European Union. Therefore I hold it necessary to unfold the consequences that – in my opinion – result from the above.

[109] 1. The Constitutional Court established in Section III.7.2. of the reasoning that "the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, independent statehood. Therefore the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State." (Reasoning [67]) However, the decision failed to explain the legal basis of this statement.

[110] Constitutional self-identity is not a universal legal value, it is a feature of specific States and of their communities, of the nation, that does not apply (the same way) to other nations. In the case of Hungary, national identity is in particular inseparable from constitutional identity. The constitutional governance of the country has been one of the core values the nation has always stuck to, and that has been a living value even at the times when the whole or the majority of the country was occupied by foreign powers. This legal value has been manifested and presented in legal regulations: freedoms and the limitation of power (the Golden Bull), respect for autonomies under public law (Tripartitum), freedom of religion (the Laws of Torda), lawful exercising of power (Pragmatica Sanctio), parliamentarism, equal rights (Laws of April 1848), separation of powers, acknowledging judicial power, protection of minorities (Laws of the Compromise). These are the achievements of our historical constitution, the Fundamental Law and thus the whole Hungarian legal system is

based upon. Since the values that make up the self-identity have come into existence on the basis of historical constitutional development, they are legal facts that cannot be waived neither by way of an international treaty nor with the amendment of the Fundamental Law, because legal facts cannot be changed through legislation.

[111]2. Based on the said legal nature of self-identity, the protection of Hungary's sovereignty is also the protection of self-identity at the same time. With regard to the European Union, one may conclude that Hungary's constitutional self-identity had been existed even before our accession to the Union as a Member State. Accordingly, the accession treaty cannot be interpreted as a waiver by Hungary of its constitutional identity. The reasoning refers to this by establishing in Section III.7.1. that "the maintenance of Hungary's sovereignty should be presumed when judging upon the joint exercising of further competences additional to the rights and obligations provided in the Founding Treaties of the European Union (the principle of maintained sovereignty)" (Reasoning [60]).

[112]As the Fundamental Law based on self-identity formed upon our historical constitution is a legal tool for the protection of self-identity, the Constitutional Court, just as any other State body, should interpret strictly the presumption of the maintenance of sovereignty. If there are arguments in favour of keeping the exercising of a competence within the sovereignty of the Member State, then it should be presumed that Hungary has not transferred the competence to the European Union, even when there are other arguments in favour of such transfer. The Constitutional Court should examine on the basis of a relevant petition whether the joint exercising of the competence has taken place by paying respect to Article E) (2) and (4). The review may even conclude that the obligatory rule of conduct adopted according to Article E) (3) extends the force of the international treaty allowing the joint exercising of competences to such extent that acknowledging its binding force would require the repeated application of paragraph (4), a new authorisation based on the votes of two-thirds of the Members of Parliament.

Budapest, 30 November 2016

Dr. András Varga Zs. (signed),
Judge of the Constitutional Court

I second to section 2 of the concurring opinion.

Budapest, 30 November 2016

Dr. Béla Pokol (signed),
Judge of the Constitutional Court

Dissenting opinion by *Dr. László Salamon*, Judge of the Constitutional Court

[113] I hold that the majority decision of the Constitutional Court is unsatisfactory as, in my opinion, the decision fails to provide a complete answer to the questions aimed at the interpretation of the Constitution, as asked by the commissioner for fundamental rights.

[114] The reasoning of the decision contains in details the approaches of principle that form the basis of the addressability of the questions asked by the commissioner for fundamental rights. I substantially agree with these. However, from these bases of principle, the decision fails to reach conclusions related to the questions of the commissioner for fundamental rights.

[115] 1. Question 2/a) of the commissioner for fundamental rights was aimed at finding out whether the bodies and the institutions of the State of Hungary are entitled or obliged to implement measures adopted in a competence exercised jointly with the other Member States of the European Union if such measures are in conflict with the provisions of the Fundamental Law of Hungary regarding the contents of fundamental rights. The commissioner for fundamental rights requested an answer to this question in the framework of the interpretation of Article E) (2) of the Fundamental Law.

[116] As Article E) (2), asked to be interpreted, is about – nothing more than – the transfer of competences, originating from the Fundamental Law, into joint exercising with the Member States of the Union, the mere fact whether it is possible to interpret a constitutional issue in connection with this Article is questionable. Should the answer to this question be positive, it can be established that – on the basis of the decision's correct approaches of principle, and with due account to the evident fact that neither of the State bodies and institutions can act in a way conflicting the Fundamental Law – implementing a measure, adopted in the framework of the inter-state cooperation realised in the European Union, violating the provisions of the Fundamental Law on the content of fundamental rights, is prohibited by the Fundamental Law as far as the law of Hungary is concerned. I hold that drawing this conclusion is an essential part of answering the above question of the commissioner for fundamental rights.

[117] 2. Question 2/b) of the commissioner for fundamental rights is substantially aimed at finding out whether the enforcement of the Union legal act is affected by the fact of being adopted in the absence of competence, i.e. *ultra vires*. Based on the decision's correct foundations of principle, the evident answer to this question is that it is indeed affected, as the Union is not entitled to adopt, beyond its scope of competence, a legal act mandatorily applicable in the Member States. This follows from the prohibition itself mentioned in Article E (3) of the Fundamental Law [i.e. that a mandatory rule of conduct can only be established within the limits of the framework specified in Article E (2) of the Fundamental Law], and it is also deductible from the Founding Treaties. Any legal act, intended to be mandatorily applicable in the Member States, adopted without regard to these rules would violate State sovereignty – Article B (1) of the Fundamental Law of Hungary ("Hungary is an independent democratic state under the rule of law") –, acknowledged and protected by international law. I hold that, when confronted with such acts, all State bodies of Hungary must act, within their available scope of competence, in conformity with the protection and by respecting Hungary's sovereignty and constitutional identity. In addition to establishing its own competence of review, the Constitutional Court should also declare the applicability of this requirement to the whole of the State's system.

[118] 3. In my view, the procedures to be followed by State bodies and institutions, as well as their attitude to the situations mentioned above cannot be linked to a preliminary procedure by the Constitutional Court. For that matter, this is neither expressly stated, nor contested by the decision itself.

Budapest, 30 November 2016

Dr. Tamás Sulyok (signed),

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
dr. László Salamon
Judge of the Constitutional Court
impeded in signing

