Decision 9/2021 (III. 17.) AB

on establishing that the text "by 31 August of the year in which the child reaches the age of four" in section 8 (2) of the Act CXC of 2011 on National Public Education is in conflict with the Fundamental Law and annulling it, on establishing a violation of the Fundamental Law caused by omission, based on Article XVI (1) of the Fundamental Law and establishing a constitutional requirement arising from Article XVI (1) and (2) of the Fundamental Law

In the posterior examination of a statutory regulation's compatibility with the Fundamental Law, the plenary session of the Constitutional Court – with dissenting opinions by Justices *dr. Egon Dienes-Oehm, dr. Tünde Handó, dr. Attila Horváth, dr. Imre Juhász, dr. Béla Pokol, dr. László Salamon* and *dr. Mária Szívós* – adopted the following

decision:

1. The Constitutional Court establishes that the text "until 31 August of the year in which the child reaches the age of four" in section 8 (2) of the Act CXC of 2011 on National Public Education is contrary to the Fundamental Law, and therefore annuls it with effect from 30 June 2021.

Section 8 (2) of the Act CXC of 2011 on National Public Education shall remain in force with the following text:

"In the year in which the child reaches the age of three by 31 August, he/she shall attend kindergarten for at least four hours a day from the beginning of the education year. On the basis of a request submitted by the parent by 25 May of the year in question, the body designated by the Government's decree (hereinafter referred to as the body granting the exemption) may, in the child's legitimate interests, exempt the child from attending kindergarten if the child's family circumstances or special situation so justify. If an expert is to be heard in the proceedings, only the head of the kindergarten or the district nurse may be appointed."

2. The Constitutional Court, acting *ex officio*, establishes that there is a conflict with the Fundamental Law caused by the State's the failure to fulfil its obligation to protect institutions in the form of the law-maker not creating guarantees for making possible that, on the basis of the kindergarten's proposal, or in any other suitable manner, starting the child's schooling could be postponed by one education year on the basis of a school aptitude test of a child who is obviously not ready for school, even if the

parent fails to submit the appropriate application under section 45 (2) of the Act CXC of 2011 on National Public Education, or submits the application inappropriately.

The Constitutional Court calls on the Parliament to comply with its legislative duty by 30 June 2021.

3. The Constitutional Court, acting of its own motion, finds that there is an infringement of the Fundamental Law by reason of the failure of the legislature to provide procedural guarantees, in the procedures under section 8 (2a) and section 45 (6b) of the Act CXC of 2011 on National Public Education, that the final decision closing the procedure and deciding on the merits of the application is taken in each case before the beginning of the education year or the school year, even if the parent brings administrative action against the decision of the body granting the exemption.

The Constitutional Court calls on the Parliament to comply with its legislative duty by 30 June 2021.

4. The Constitutional Court finds that it is a constitutional requirement originating from Article XVI (1) and (2) of the Fundamental Law that in the course of considering the application under section 8 (2) and section 45 (2) of the Act CXC of 2011 on National Public Education, submitted in accordance with the law, the statement of the parent and the documentation submitted by the parent as an annex to the application may not be disregarded; the body granting the exemption may reject the application if it can be established that the rejection of the application is in the best interests of the child.

5. The Constitutional Court rejects the petition for a declaration that section 3 (9a), section 8 (2a), section 21 (9), section 27 (5), section 44/B to 44/C, section 45 (2), section 45 (6) to (6f) and section 84 (9b) of the Act CXC of 2011 on National Public Education are contrary to the Fundamental Law and for their annulment.

6. The Constitutional Court rejects the petition for a declaration that the whole Act and sections 32 and 33 of the Act LXX of 2019 on the Amendment of Certain Acts related to Public Education and Repealing Act CCXXXII of 2013 on the Provision of National Public Education Textbooks as well as section 4 (6a), section 8 (2b) to (2c), section 9 (a), section 23 (9), section 25 (6), section 35/B (3), section 45 (8) and (9), section 67 (1) and (8), section 68 (1), section 70 (2) (j), section 80 (3), section 83 (3), section 90 (1), section 93/A to 93/F, section 94 (4g) and (4h), section 99/J and 99/K of the Act CXC of 2011 are in conflict with the Fundamental Law and for their annulment.

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

Reasoning

I

[1] 1 Fifty-six Members of Parliament (postal address: 1055 Budapest, Kossuth tér 1-3.) initiated, pursuant to Article 24 (2) (e) of the Fundamental Law and section 24 (1) of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC), the declaration that the Act LXX of 2019 on repealing the Act CCXXXII of 2013 on amending certain acts related to public education and on the supply of textbooks for national public education (hereinafter: "Amending Act") is contrary to the Fundamental Law and to annul it retroactively to the date of its entry into force. The petitioners also sought a declaration of the existence of a violation of the Fundamental Law due to omission by reason of the Parliament's failure to comply with the Constitutional Court's call made in in the Decision 9/2019 (III.22.) AB. Thirdly, the petitioners requested that, if the Constitutional Court does not grant the application for annulment of the entire Amending Act, it should annul or prohibit the entry into force of certain individual sections of the Act. According to the petition, the whole Amending Act and certain provisions of it infringe Article B (1), Article C (2), Article VI (3), Article IX (1), Article XI (1), Article XV (2), Article XVI (1), (2) and (3), and the right to a fair procedure under Article XXIV and Article XXVIII (1) of the Fundamental Law and Article XXVIII (7), as follows.

[2] 1.1 In the petitioners' view, it can be stated that the provisions of the entire Amending Act do not comply with the requirement of the rule of law, because they violate the requirement of sufficient preparation time, the requirement of clarity of the norms and the requirement of legal certainty arising from Article B (1) of the Fundamental Law.

[3] The petitioners consider that the requirement of sufficient preparation time is infringed for several reasons. On the one hand, although the Amending Act contains provisions on the entry into force in several stages: the general date of entry into force is the eighth day (26 July 2019) after the publication of the Act (18 July 2019), many of its provisions entered into force on 1 September 2019, at the beginning of the school year barely one month after the entry into force of the Amending Act. Further complicating the understanding and application of the provisions of the Act, according to the petition, is the fact that the substantive provisions will only appear in an implementing regulation at a later date.

[4] The petitioners see this as particularly problematic because the Amending Act fundamentally changes the obligation to attend kindergarten, the rules for determining school readiness, the rules for setting up schools and school maintenance, which also

affect the rights and obligations of the maintainers, the rights and obligations of parents and the tasks related to the development of the personality of the child or pupil. According to the petitioners, the requirement of clarity of norms is violated by the fact that the Amending Act contains a number of provisions the wording of which does not correspond to the ordinary use of concepts in everyday life and, consequently, its interpretation leaves room for broad discretion of the parties applying the law. In the opinion of the petitioners, the wording is in several places so vague as to constitute an infringement of the Fundamental Law. The applicants consider that the requirement of legal certainty has been infringed because the areas of law concerned have become unclear and inapplicable. In their view, the shift from statutory level to a lower level of regulation has the effect of making the application and interpretation of the law more difficult because of the "two-tier" legislation.

[5] 1.2 The petitioners believe that the new provisions introduced by the amendment to the Act CXC of 2011 on National Public Education (hereinafter: ANPE) aim to give the State a primary role in matters of paramount importance for the upbringing of the child, which violates the rights of parents and the right of the child to proper development. According to the petition, it is not disputed that the State has obligations to ensure the proper development of the child, but that the primary responsibility lies with the parent. This is also clear from Article 26 (3) of the Universal Declaration of Human Rights and Articles 3 (1), 5 and 9 (1) and (2) of the Convention on the Rights of the Child, adopted in New York on 20 November 1989 (hereinafter: "Convention on the Rights of the Child"). The division of responsibilities between parents and the State is clarified in Article 18 of the Convention on the Rights of the Child. In the view of the petitioners, it is conceivable that for some disadvantaged or severely disadvantaged families, institutional development may provide a wider opportunity for the development of the child's behaviour and socialisation than the parental home, but it is by no means justified to conclude the same for children from non-disadvantaged families. The regulation therefore represents a reverse logic, since the parent should not have to prove that he or she is capable of bringing up his or her child properly, but the restriction of parental rights would be justified and justifiable in cases where it is actually proven that the parent, acting contrary to the rights and interests of the child, cannot ensure the child's proper upbringing and social integration. In the light of all these considerations, the petitioners also allege a violation of Article XVI of the Fundamental Law by the whole of the Amending Act.

[6] 1.3 The petitioners claim that individual sections are contrary to the Fundamental Law on the basis of the following grounds.

[7] 1.3.1. According to the petition, section 84 (9b) of the ANPE (established by section 1 of the Amending Act) and section 2 (2a) of the Act LXVI of 1994 on the Wage Guarantee Fund (hereinafter: AWGF), which the petition does not seek to have

annulled, are contrary to the Fundamental Law because they infringe the requirements of the rule of law set out in Article B (1) and the prohibition of discrimination set out in Article XV (2). A conflict of interest arises between the public education institution and the maintainer in matters of employment, which creates legal uncertainty. The petitioners also claim that the provision infringes the requirement of sufficient preparation time, but the petition does not contain any arguments in this respect. Furthermore, the provision makes an unjustified distinction between the maintainers and as a result between those who are employed by institutions excluded from the scope of the regulation, since it cannot be ruled out that a municipal, state or national minority public education institution may be closed down in a way that the has employer has debts not covered by the Wage Guarantee Fund.

The discrimination resulting from the contested provision also affects Article XII (1), since the guarantee of access to remuneration for work is differentiated according to the maintainer.

[8] 1.3.2. According to the petition, section 3 (9a) of the ANPE related the liability of heads of institutions (established by section 5 of the Amending Act) violates the requirement of the rule of law under Article B (1) of the Constitution, due to the lack of sufficient preparation time for its introduction, the violation of the requirement of clarity of the norms and the retroactive effect of the regulation. As mentioned in the petition, the contested provision also infringes the freedom of expression under Article IX (1) and the right to a fair procedure. The petitioners consider it problematic that the provision is not accompanied by a transitional provision, thus that it can be applied even if the provisions laid down by the Amending Act have been breached by the head of the institution before the date of its entry into force. Furthermore, the wording of the Act is (in their view) so general that it is open to arbitrary interpretation. They consider that the right to fair procedure has been infringed because the provision does not make it possible to determine the conditions and the course of the procedure to be followed. The petition also holds that the contested provision is contrary to the freedom of expression, since the restriction on information activities means that the head of the institution must impose on all employees what they may say to children. This applies not only to lessons but also to breaks and free time, making the educational activity of the institution impossible.

[9] 1.3.3. In the context of section 4 (6a) of the ANPE [established by section 6 (1) of the Amending Act], the petitioners complain of a breach of the requirements of sufficient preparation time and clarity of the norms under Article B (1). Developmental education is a new concept, and sufficient time should be provided for learning it and for the development of educational programmes accordingly. The petitioners also consider that it is a breach of the requirement of clarity of norms that the statutory text only

interprets this concept in terms of compulsory activities, whereas such activities can also be provided in schools on a non-compulsory basis. In their view, the activity should be judged by its content and not by the nature of its organisation.

[10] 1.3.4. The petitioners claim as the main element of the petition that section 8 (2) of the ANPE on the reduction of the possibility of exemption from compulsory kindergarten education from the age of five to four years and section 8 (2a) to (2c) are contrary to the Fundamental Law [section 7 (1) and (2) of the Amending Act]. In their view, the legislative provisions referred to are contrary to the requirement of the rule of law under Article B (1), because they do not comply with the requirement of sufficient time for preparation and the requirement of clarity of the rules, and they infringe the right of parents to choose their upbringing enshrined in Article XVI (2) and the right to a fair procedure. In their view, the new procedure is ill-considered and raises many practical problems.

[11] The contested provision infringes the requirement of the clarity of norms, since the assessment of any application must take into account the legitimate interests of the child, which allows for a broad interpretation. Similarly, the specific situation of the child is open to a wide range of interpretations. The procedure itself is also considered to be in breach of the right to a fair procedure, since in religious and private institutions it is the maintainer who decides on the parent's application, even though the child has not yet been admitted to the institution. In their view, there is no right of appeal against the first instance decision of the maintainer. However, the most controversial issue, according to the petition, is the extent to which the State can limit the parents' right to upbringing, i.e. where the boundaries of parental responsibility lie and where the State's responsibility begins. To determine the above, in addition to Article XVI, the petitioners drew the attention of the Constitutional Court to the relevant provisions of the Convention on the Rights of the Child and the Charter of Fundamental Rights as a guide, and also referred to the case-law of the Constitutional Court. They consider it an essential change that the examination of the parents' applications relating to kindergarten attendance is transferred to a body subsequently designated by the Government to grant exemption, located, from the kindergarten and the place of residence, at a distance which cannot be established under the provisions of the law.

[12] It is also unclear what procedure the body designated by Government Decree will follow in making its decision and how it will verify the grounds for the application in the absence of an opinion from the head of the kindergarten and the district nurse. The new regulation also restricts the possibility of submitting an application, ignoring the case where circumstances arise after the start of kindergarten attendance that would justify an exemption from kindergarten attendance. In the petitioners' view, the contested provisions also limit the evidentiary procedure of the body granting the exemption, since they provide that only the head of the kindergarten or the district

nurse can be appointed as an expert. This regulation does not take into account the situation when an expert opinion must be given on a child who is not yet attending kindergarten, so that the head of the kindergarten cannot have knowledge of that child. Nor can a staff member of the family protection centre or child protection worker be appointed. According to the petition, the provision in the second sentence of paragraph (2a), which prohibits the court from reversing the decision of the body that granted the exemption, thereby unduly delaying the proceedings, constitutes a violation of the right to a fair (judicial) procedure. Finally, in the petitioners' view, section 8 (2) of the ANPE has changed the conditions on which the Constitutional Court based its proportionality requirement in relation to the restriction of parental rights in its Decision 3046/2013 (II.28.) AB (hereinafter: "CCDec"). The purpose has not changed, but parental rights have been further restricted and the possibility of exemption has been narrowed. The legislation does not give the parent the primacy of decision-making.

[13] 1.3.5. In connection with section 9 (9a) of the ANPE on the rules of the alternative framework curriculum and section 99/K of the ANPE [sections 8 and 30 (2) of the Amending Act], the petitioners alleged a violation of the requirement of the preparation period under Article B (1), the prohibition of retroactive legislation and the requirement of the clarity of norms, as well as the prohibition of discrimination under Article XV. The contested provisions radically change the situation of alternative schools, which are empowered to determine, in the school curricula they draw up, the curriculum taught in the school and the requirements as well as the preparation for the state examinations. The new provisions may require a complete overhaul of the framework curriculum used so far. Section 99/K of the ANPE provides for a one-year period for this task, with severe legal consequences for failure to meet the deadline. The statutory provisions referred to make it impossible for alternative schools to teach using their specific pedagogical methods, thus eliminating their alternative school character. In their application, the petitioners point out that the requirement of the clarity of norms is infringed by the fact that the requirement of a division of subjects into two semesters is not in accordance with the provisions under section 5 (5) of the ANPE, according to which the framework curricula contain the topics and the contents of each subject and the requirements for one or two years. The general rules do not require the curriculum to be split into two semesters, therefore the rules for alternative schools are discriminatory compared to the general rules. The requirement to break down the content of the curriculum into two semesters or to deviate from the subject structure of the curriculum by not more than 30% is not in line with the annexes to the EMMI Decree No 51/2012 (XII.21.) on the procedure for the publication and approval of framework curricula. In addition, pursuant to section 99/K (2) of the ANPE, the provisions of section 9 (9a) of the ANPE shall also be applied in the operating authorisation procedure pending at the time of the entry into force of the Act, which

the petitioners consider to be a violation of partly the prohibition of retroactivity and partly the requirement of sufficient preparation time, since the maintainer could not have been aware of the new system of requirements at the time of the submission of the application.

[14] 1.3.6. In the context of section 21(9) of the ANPE on the placement of pupils attending educational institutions ceasing to exist (section 9 (2) of the Amending Act) the petition seeks a declaration of infringement of the right to education enshrined in Article XI (1) and (2), the prohibition of retroactive legislation under Article B (1) and the requirement of sufficient preparation time. The petition considers it problematic that the amendment only obliges the public education authority to designate an educational institution if the deletion from the register is the result of the authority's measure due to a serious breach of professional rules, or a breach established in the course of a national pedagogical-professional audit. This solution could, according to the petitioners, have the effect of leaving children who have fulfilled the compulsory attendance requirements for kindergarten education and children who are of compulsory school age, without access to care. Indeed, non-state, non-municipal institutions may also be involved in the implementation of the tasks provided for in the Act on public education. According to the petitioners, the provision also infringes the prohibition on retroactive legislation, since it must also be applied in pending proceedings, and the requirement of sufficient time to prepare, since neither the authority, the institutions, nor the children and parents concerned could have prepared for the change.

[15] 1.3.7. In the petitioners' view, section 23 (9) of the ANPE (section 10 of the Amending Act) violates the requirement of the clarity of norms under Article B (1) and the prohibition of discrimination under Article XV (2) because the challenged provision differentiates between the maintainers of the institutions on the basis of the national minority character of the education and the number of inhabitants, and the criterion of "the number of pupils that can be planned in advance" allows for arbitrary interpretation.

[16] 1.3.8. According to the petition, section 25 (6) of the ANPE [section 11 (1) of the Amending Act] also violates the requirement of the clarity of norms under Article B (1). It is not possible to determine from the ANPE what is meant by social services and what kind of job a school social worker is. This provision also causes problems and difficulties of interpretation, since it is not possible to establish the relationship of the provision in question to the rules on institutional liability for damages laid down in section 59 (3) of the ANPE

[17] 1.3.9. According to the petitioners, section 27 (5) of the ANPE (Section 12 of the Amending Act) violates the requirement of sufficient preparation time under Article B

(1). The contested provision redefines activities organised for for pupils with integration, learning and behavioural difficulties, introducing the concept of developmental pedagogical care and assigning the use of a developmental teacher to these activities. However, there is not enough time to implement this provision, as already in the school year starting in 2019, these activities had to be organised according to the new provisions, and with the involvement of a developmental teacher. In their opinion, with this measure, the law-maker has not fully complied with the provisions of the Decision 9/2019 (III.22.) AB.

[18] 1.3.10. Section 35/B (3) of the ANPE (section 13 of the Amending Act) concerns the rules on the employment of persons involved in the optional education of religion and educators of faith and ethics in the case of ecclesiastic legal entities and established churches. With regard to the quoted provision, the petitioners also complain of the lack of sufficient time for preparation under Article B (1), since, in their view, there is insufficient time to obtain the necessary certificates before the start of the school year.

[19] 1.3.11. The petitioners are of the opinion that the provisions of Chapter 26/A of the ANPE (sections 44/B and 44/C) (section 16 of the Amending Act) violate the right to informational self-determination under Article VI (3), as they authorise data processing that does not comply with the provisions on the right to informational self-determination. It is not possible to determine from the provisions referred to how and for what purposes the Hungarian Association for Student Sports and the Tempus Public Foundation process the – partly sensitive – data referred to in the Act. According to the petition, the statutory legislation does not contain any element of guarantee and does not specify the real purpose and meaning of the processing of the data.

[20] 1.3.12. In connection with section 45 (2) of the ANPE on the commencement of compulsory school attendance [section 17(1) of the Amending Act], the petitioners considered that the requirement of the rule of law under Article B (1) was infringed due to the lack of sufficient preparation time. In their view, the provision also infringed the right of the child to adequate development under Article XVI (1), the right of parents to upbringing the child under Article XVI (2) and the right to a fair procedure, as follows.

[21] Under provision referred to, as from 1 January 2020, it is no longer the head of the kindergarten or, in certain cases, the expert committee which decides on the compulsory school attendance, but the compulsory school attendance will commence on a statutorily fixed date, with the exception that the body which authorises the exemption, the Education Authority, may agree to "postpone" the commencement of that obligation. In this context, the obligation of the notary of the municipality and the authority responsible for public education to keep records, and thus the obligation to notify the kindergarten or primary school responsible for compulsory education, is abolished.

[22] As of 1 January 2020, the body managing the register of personal data and addresses will send the data related to kindergarten education and compulsory schooling to the Education Office. The change will affect children and parents of children of the relevant age, kindergarten heads, the Education Office, the bodies managing the register of personal data and address and primary schools. The time available is needed for the reorganisation of the entire registration and notification system, but the period allowed for this does not allow sufficient time to get acquainted with the new provisions and to transfer the responsibilities.

[23] The change fundamentally affects the parents, since under previous practice they had the opportunity, after consultation with the head of the kindergarten, to have their child become subject to compulsory school attendance at the age of seven. Exceptionally, however, it was also possible to postpone the starting date of compulsory schooling to the eighth year of age on the basis of a recommendation of the expert committee.

The latter possibility has been abolished altogether, while the decision to postpone the age of compulsory schooling to the seventh year has been left to the discretion of the body granting the exemption. As a consequence, the assessment of the child's adequate development is no longer a matter for the educational profession, but a simple matter for the public authorities. In addition, the time limit for submitting a parent's request is rigid and cannot be exceeded even if the extension of the period of kindergarten education is necessary for a reason that has arisen subsequently. It is also unclear, according to the petition, what information will be used by the body granting the exemption to decide on the application and how it will verify its authenticity. The petitioners also consider that the right to a fair procedure is infringed by the fact that the contested provision restricts the possibilities of the body granting the exemption to provide evidence by limiting the cases in which an expert may be appointed. Neither the head of the kindergarten nor the paediatrician may be heard to determine whether or not the child is fit for school. The petitioners expressed concern that the absence of transitional provisions would result in some children who will turn six in 2020 being forced by the law from the kindergarten's second year group straight into the school system. These children will therefore not even be able to complete their kindergarten education plan, in a way skipping the last year for school preparation. They argue that, contrary to the reasoning of the Act, it is not in the child's best interests to start school as early as possible, but to start school when ready to do so.

[24] 1.3.13. Section 45 (6) to (6f) and section 99/J of the ANPE [section 17 (3) and (4) and section 30 (1) of the Amending Act] terminate the legal status of private pupil and replace it with individual schedule-based learning. The date of entry into force of the provisions is 1 September 2019, however the Amending Act fails to specify the body

entitled to take the decision or the course and consequences of its procedure. Section 45 (5) to (6) of the ANPE formerly in force empowered the school principal with the right of discretion to decide whether to allow performing studies as a private pupil. Section 45 (5) of the ANPE breaks with this solution and takes the authorisation of individual schedule arrangements, which replace the private pupil status, outside the system of public education.

[25] The petitioners also see as problematic the fact that the body granting the exemption has only the possibility and no obligation of taking evidence. Furthermore, the fact that the decision of the body granting the exemption cannot be reversed by the court leads to a protracted procedure. In the petitioners' view, the parent's priority in the upbringing of the child is enforced when the right to decide is vested in him or her, with the assistance of persons having appropriate expertise. It is necessary to ensure the possibility of State intervention to correct any decision that is contrary to the best interests of the child, but this should not precede the decision of the parent. For the above reasons, the provisions of the legislation in question do not, in the petitioners' view, comply with the requirements of sufficient time for preparation under Article B (1) and of the clarity of norms, and also infringe the child's right to adequate development under Article XVI (1), the parents' right to upbringing under Article XVI (2) and the right to a fair procedure.

[26] 1.3.14. According to the petition, section 45 (8) and (9) of the ANPE [section 17 (5) of the Amending Act] do not comply with the requirement of sufficient preparation time under Article B (1) and the requirement on the clarity of the norms, and they also violate the right to informational self-determination under Article VI (3). The contested provisions fundamentally change the way in which data stored in the public education system are collected, processed and transmitted from 1 January 2020. The municipal notary or the authority responsible for public education in the place of residence of the child will be replaced, according to the text of the Act, by the office or the body granting the exemption. The provisions are, in the petitioners' view, difficult to interpret and the procedure is not well elaborated.

[27] 1.3.15. According to the petitioners, section 67 (1) and (8) of the ANPE amending the practice of appointing senior managers, taking effect on 1 September 2019, section 68 (1), section 70 (1) (j) of the ANPE, section 83 (4) of the ANPE [section 22, section 33 (1) (d) to (g)] infringe the requirement of sufficient time for preparation and the requirement of clarity of the norms under Article B (1), prohibition of retroactive legislation, and the prohibition of discrimination under Article XV (2), the right to informational self-determination under Article VI (3) as well as the freedom of expression under Article IX (1). The petitioners see the reasons for this as follows. Until the publication of a government decree containing detailed rules, it is not possible to determine what conditions are necessary for the appointment of a head of an

institution. However, mandates of heads of institutions may be submitted at any time during the year, the statutory provisions will therefore disappear from behind the applications that have already been submitted and not been awarded. They are also concerned that it will no longer be possible to have access to the professional opinion on the application procedure, and that the obligation to carry out an evaluation procedure before appointing the heads of the institutions run by the regional education authorities has been removed from the regulation previously in force.

[28] The Constitutional Court notes that the petitioners incorrectly referred to section 70 (1) (j) of the ANPE and section 83 (4) of the ANPE, as these provisions of the law were not changed by the Amending Act. The points (f) and (g) of section 33(1) of the Amending Act referred to by the petitioners concerned section 70 (2) (j) of the ANPE and section 83 (3) (e) of the ANPE, and the Constitutional Court therefore considered the petition in this element in terms of its content and included in its scope of examination the sections of the ANPE related to the provisions of the Amending Act referred to by the petitioners.

[29] 1.3.16. According to the petition, section 80 (3) of the ANPE (Article 23 of the Amending Act) infringes the requirement of the clarity of norms under Article B (1) by not making it clear what register is meant by "Onytv.", as this abbreviation is not included in the ANPE.

[30] 1.3.17. In connection with section 90 (1) of the ANPE on the operation of foreign educational institutions in Hungary (section 26 of the Amending Act), the petitioners also claim a violation of the requirement of the clarity of the norms under Article B (1), as in their view it is not clear from the provisions of the Amending Act which body is entitled to determine, in the framework of what procedure, a conflict with the provisions of the Fundamental Law.

[31] 1.3.18. With regard to section 94 (4g) and (4h) of the ANPE [section 28 (3) and (6) of the Amending Act], the petitioners consider that they are not in line with the guidelines of the Constitutional Court laid down in its Decision 38/2012 (XI.14.) AB and confirmed in the Decision 10/2019 (III.23.) AB, and therefore violate the requirement of the rule of law under Article B (1).

[32] 1.3.19. With regard to Chapter 51/A of the ANPE on the provision of textbooks (sections 93/A to 93/F of the ANPE, section 27 of the Amending Law), the violation of the prohibition of discrimination under Article XV (2) and the requirement of the rule of law under Article B (1) are alleged to have occurred, the latter due to the violation of the requirements of sufficient preparation time and the requirements of the clarity of the norms, as follows. Section 93/A of the ANPE fails to provide for a number of issues that were regulated in the previous legislation. Section 93/B of the ANPE has fundamentally changed the scope of the persons entitled to participate in the

procedure for acknowledging a textbook. The restriction on the right of participation of legal persons engaged in publishing is a violation of the prohibition of discrimination, because, unlike under the previous legislation, legal persons already engaged in publishing may participate in the procedure only if they are given the opportunity to do so o the basis of a public notice of the Minister responsible for education. Section 93/C of the ANPE provides for the keeping and the composition of a register of textbooks, but fails to order that a register of textbooks should be set up. At the same time, the contested provision also infringes the prohibition of discrimination, since it provides that no entry in the register of textbooks is required where an established church or its internal ecclesiastical legal entity prepares a textbook in response to a public notice published by the Minister responsible for education.

[33] According to the petition, section 93/D (3) of the ANPE infringes the requirement of the clarity of norms, as it assigns a task to a designated body, the establishment of which is not provided for in the new provisions on the provision of textbooks. Section 93/E (3) (a), like points (b) and (c), infringes the requirement of the clarity of norms. In the petitioners' view, the contested provision sets out an unclear and unquantifiable requirement, since it is not possible to measure the most economical way of providing textbooks. The requirement of clarity is also infringed by section 93/F of the ANPE, because the provision becomes redundant if no payment is needed for the textbook.

[34] 1.3.20. In relation to sections 32 and 33 of the Amending Act, the petitioners allege a breach of the requirement of clarity of the rules under Article B (1). In their view, these legislative provisions contain substantive rules which should have been included in the main text of the Amending Act in order to allow for a substantive discussion at the stage of the parliamentary debate.

[35] In summary, the petitioners are convinced that the restructuring of the education system in this way is not in the interests of the country. In their view, the principle of the division of tasks that had previously prevailed in the public education system appears to be being overturned, and the provisions are also fundamentally contrary to the principles enshrined in Article C of the Fundamental Law.

[36] 2 In the course of its proceedings, the Constitutional Court requested the Minister of Human Capacities to express his professional opinion. The Constitutional Court's request was answered not by the Minister, but by the Secretary of State for Education.

[37] The competent Secretary of State made the following general statement in relation to the petition: the petition serves primarily political purposes, in fact calling on the Constitutional Court to legislate by requesting the setting of the limits of state intervention. In several cases, the petitioners rely on considerations relating to public education policy rather than on constitutional arguments, and their petition contains a

number of technical and legal errors. According to the position, the prohibition of extending beyond the request does not allow for the possibility of annulling the entire Amending Act, since the MEPs have failed to provide justification for several provisions of the Act.

[38] With regard to the lack of a preparation period, the Secretary of State states that the law-maker considered the extent of the necessary preparation period for each provision individually and, in view of this, set the date of entry into force differently between 26 July 2019 and 1 September 2021. The provisions with the shortest preparation period entered into force on 26 July 2019, the majority of which are already applicable in the following school year. The law-maker allowed sufficient time, one and a half months, for getting acquainted with the provisions that entered into force, and their application did not require any preparations that could not have been completed within that period. In the opinion of the Secretary of State, the implementing rules also fully comply with the provisions of the Act CXXX of 2010 on Legislation (hereinafter: "Legislation Act").

[39] With regard to the petitioners' objections concerning the clarity of the norms, the Secretary of State indicated that the law maker's intended break with the previous over-regulation was part of the deregulation efforts. In relation to the petitioners' objections related to the requirement of legal certainty, the position states that there is no general prohibition on regulating a matter previously regulated at a statutory level by a lower level of legislation. The objections concerning the level of regulation in the context of the regulation by the Amending Act are unfounded, as fundamental rights and their limitations are still defined at the statutory level, while the decree-level authorisation relates to the elaboration of the details.

[40] The position states in connection with parents' rights that the two rights can be interpreted in relation to each other, since the parents' rights should ultimately serve the best interests of the child. Parents' rights cannot be interpreted in a way that ignores parental responsibilities. The State Secretary's reply stresses that the obligation of attending kindergarten and school does not entail the removal of children from their family environment and their separation from their parents. It points out that, in relation to both kindergarten education and compulsory schooling at a later age, the legislation also lays down, as a guarantee, the competences of decision-making, the rules of procedure and the possibility of legal remedy. Parental rights are not unlimited as they are limited by the right of children to healthy development. Since the *Ratio Educationis*, compulsory schooling has undoubtedly been an accepted measure of state action in the best interests of the child. Therefore, the right of parents to choose their child's education does not mean allowing the child not to receive any institutional education at all. The Secretary of State reaffirms that the constitutional obligation of parents to educate their child – to ensure the child's physical, mental and spiritual

development – serves to protect the child's fundamental constitutional rights as enshrined in section XVI (1) of the Fundamental Law.

[41] The Secretary of State also emphasises that the obligation to let the child attend education is an inherent limitation under the Fundamental Law of the right to upbringing: parents may choose the type of education they wish to provide for their minor children of compulsory school age, but they may not choose not to provide education at all, as this would be contrary to the provisions of the Fundamental Law. Ensuring that a child of compulsory school age attends lessons and other compulsory activities organised by the school is both a duty and a responsibility of the parent.

If, through no fault of their own, parents are unwilling or unable to ensure that their children perform their duty of compulsory schooling, there is also a need for state intervention to protect the child.

[42] The position of the Secretary of State in relation to each of the provisions of the legislation challenged in the context of the petition is presented by the Constitutional Court in the examination of the constitutionality of each of those provisions.

II

[43] 1 The provisions of the Fundamental Law affected by the petition:

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

“Article C (2) No activity of any person may be directed at the forcible acquisition or exercise of public power, nor at the exclusive possession of such power. Everyone shall have the right and obligation to resist such activities in such ways as permitted by law.”

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

"Article IX (1) Everyone shall have the right to freedom of expression."

“Article XI (1) Every Hungarian citizen shall have the right to education.

(2) Hungary shall ensure this right by extending and generalising community culture, by providing free and compulsory primary education, free and generally accessible secondary education, and higher education accessible to everyone according to his or her abilities, and by providing financial support as provided for by an Act to those receiving education.”

“Article XV (1) Everyone shall be equal before the law. Every human being shall have legal capacity.

(2) Hungary shall guarantee fundamental rights to everyone without discrimination and in particular without discrimination on the grounds of race, colour, sex, disability, language, religion, political or other opinion, national or social origin, property, birth or any other status.”

“Article XVI (1) Every child shall have the right to the protection and care necessary for his or her proper physical, intellectual and moral development. Hungary shall protect the right of children to a self-identity corresponding to their sex at birth, and shall ensure an upbringing for them that is in accordance with the values based on the constitutional identity and Christian culture of our country.

(2) Parents shall have the right to choose the upbringing to be given to their children.

(3) Parents shall be obliged to take care of their minor children. This obligation shall include the provision of schooling for their children.”

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

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

“Article XXVIII (7) Everyone shall have the right to seek legal remedy against any court, authority or other administrative decision which violates his or her rights or legitimate interests.”

[44] 2 The provisions of the Amending Act affected by the petition are as follows:

“Section 1 The following paragraph (2a) shall be added to section 2 of the Act LXVI of 1994 on the Wage Guarantee Fund:

(2a) Employees with their habitual place of work in Hungary who are employed by an entity under liquidation as specified in paragraph (1) shall also include employees of a dissolved private educational institution in the context of the obligations concerning the employees' outstanding wages, transferred to the maintainer of the educational institution pursuant to a statutory provision.”

“Section 32 (1) In the ANPE, the following parts shall be replaced:

1. In section 4, (21), the words »ten hours« shall be replaced by »fourteen hours«,

2. In section 5 (4), the words »National Core Curriculum (hereinafter: NCC)« shall be replaced by »NCC«,

3. In section 8

(a) in paragraph (1), the words »an establishment providing education until the beginning of compulsory schooling« shall be replaced by »an establishment providing education until the beginning of compulsory schooling, which prepares the child progressively, and in particular in their final year, for school education«,

(b) in paragraph (3), the words »children's developmental and« shall be replaced by »children's developmental educational care and«,

4. In section 20 (9) the words »with the exception of the tasks of the national and county expert committees« shall be replaced by »with the exception of the tasks of the expert committees«,

5. In section 21

(a) in paragraph (2), the word »establishment« shall be replaced by »registration«, the words »shall be notified for registration« shall be replaced by »shall be applied for", and the words "notification" shall be replaced by »application«,

(b) in paragraph 3 (e), the words »its core tasks« shall be replaced by »its core tasks per place of completing tasks«,

(c) in paragraph 3 (f), the words »the number of children or pupils« shall be replaced by »the number of children or pupils by basic function and by work schedule breakdown«,

(d) in paragraph (4a), the word »notification« shall be replaced by »application«,

6. In section 27 (13), the words »-- on the basis of an agreement with the school – the student sports association operating in the school« shall be replaced by »-- on the basis of an agreement with the school for the provision of sports activities in the school sports club, the organisation of sports activities – a sports organisation under the Act on Sports«, and the words »at least forty-five minutes may be provided at least twice a week« shall be replaced by »at least forty-five minutes shall be provided at least twice a week«,

7. Section 29 (1) states that »in the musical branch of primary art education, classes for one to three pupils may be held, except for preparatory classes, in three hours per week, within the time available for the organisation of classroom lessons, if the pupil is provided – in a statutorily defined duration of time – with an average of at least four lessons per week during the education year, or one and a half hours per week if the average is less than four lessons per week,« is replaced by »in the music branch of

primary art education, classes for one to three pupils may be provided for the purpose of talent development«,

8. In section 41

(a) in paragraph 7 (d), the words »place and date of birth« shall be replaced by »place and date of birth, social security number« and the words »identification of vulnerability« shall be replaced by »prevention and identification of vulnerability«,

(b) in paragraph 8 (a), the words »between themselves,« shall be replaced by »between themselves and between the specialised pedagogical service and the specialised health care provider,«,

9. In section 47 (8), the words »to developmental lesson« shall be replaced by »developmental pedagogical care«, the words »developmental lesson« shall be replaced by »developmental pedagogical care«,

10. In section 55 (1), the words »and their particular situation so justifies.« shall be replaced by »and their particular situation so justifies. If the request is for exemption from all classroom teaching, the procedure under section 45 (6) shall be followed.«,

11. In section 56/A, the words »developmental lesson« shall be replaced by »developmental pedagogical care«,

12. In section 57 (7), the words »on school leaving certificates and« shall be replaced by »on school leaving certificates as defined in Subtitle V of Annex 1 to the Act LXXXIX of 2018 on Educational Registration (hereinafter: AER), and«,

13. In section 61 (4d), the words »section 82 (9) to (12) shall apply« shall be replaced by »section 82 (9) shall apply«,

14. In section 62

(a) in paragraph (2), the words »compulsory before the first qualification« shall be replaced by »compulsory before the first qualification for the award of the Teacher II qualification«,

(b) in paragraph 3, the words »Teacher IV (hereinafter: Research Teacher)« shall be replaced by »Research Teacher«,

(c) in paragraph (6), the words »up to two hours each per week« shall be replaced by »two hours each per week« and the words »up to one hour per week« shall be replaced by »one hour per week«,

15. In section 63

(a) in paragraph (3), the words »in the job of leisure-time organiser« shall be replaced by »in the jobs of leisure-time organiser and educational assistant«,

(b) in paragraph (3a) (e), the words »required for the delivery of the certificate« shall be replaced by »the cooperating institution within the meaning of paragraph (3b)« and the words »the type of address or the delivery address« shall be replaced by »their address«,

(c) in paragraph (3b), the words »to the beneficiary« shall be replaced by »to the beneficiary at the cooperating institution«,

16. In section 64 (2), the words »anniversary bonus« shall be replaced by »anniversary bonus, as well as target task, target benefit«,

17. Section 65

(a) in paragraph (9) (b), the words »teacher's degree, qualification« shall be replaced by »teacher's qualification, kindergarten teacher qualification«,

(b) in paragraph (10), the words »child and youth protection supervisor« shall be replaced by »child and youth protection supervisor, pedagogical supervisor«,

18. In section 70 (4), the words »in section 4 (18)« shall be replaced by »in section 4 (20)«,

19. In section 74 (4)

(a) the words »public education institution and vocational training centre« shall be replaced by »public education institution, vocational training centre and public higher education institution maintaining a public education institution taken over from a vocational training centre«,

(b) the words »the school district centre and the vocational training centre« shall be replaced by »the school district centre, the vocational training centre and the public higher education institution maintaining a public education institution taken over from a vocational training centre«,

(c) the words »the school district centre or a vocational training centre» shall be replaced by »the school district centre, the vocational training centre or the public higher education institution maintaining a public education institution taken over from a vocational training centre«,

(d) the words »the school district centre and a vocational training centre» shall be replaced by »the school district centre, the vocational training centre and the public higher education institution maintaining a public education institution taken over from a vocational training centre«,

20. In section 76, the words »and the maintainer of the vocational training centre« shall be replaced by »the maintainer of the vocational training centre and the public higher education institution maintaining the public education institution«,

21. In section 78 (8), the words »every three years« shall be replaced by »every two years«,

22. In section 87 (3), the words »institution« shall be replaced by the words »institution, except for law enforcement and military vocational training institutions«,

23. In section 89 (3), the words »in the Act on the the provision of textbooks for national public education« shall be replaced by »in subtitle 51/A«,

24. In section 90 (9), the words »for asylum seekers and for children residing in a transit zone as defined in section 5 and section 15/A of the Act LXXXIX of 2007 on State Borders« shall be replaced by »for children of asylum seekers and for children residing in a transit zone as defined in section 5 and section 15/A of the Act LXXXIX of 2007 on State Borders«,

25. In section 94 (2) (b), the words »(j) and (l)« shall be replaced by »(j), (l) and (u)«,

26. In section 96 (3e), the words »in the Government Decree« shall be replaced by »in the Act on Government Administration«,

27. In section 98 (16), the words »school year 2019/2020« shall be replaced by »school year 2024/2025«,

28. In the title of Annex 6, the words »timeframe« shall be replaced by »timeframe ceiling«.

(2) In the ANPE, the following parts shall be replaced:

(a) in section 20 (8), the words »in section 67 (6) to (7)« shall be replaced by »in section 67 (7)«,

(b) in section 27 (7), the words »as a private pupil« shall be replaced by »in the framework of an individual work schedule«,

(c) In section 41

(ca) in the paragraph (4) (e) (ea), the words »with private pupil status« shall be replaced by »with an individual work schedule«,

(cb) in the paragraph 7 (a), the words »private pupil status« shall be replaced by »individual work schedule«,

(d) in section 50 (1), the words »private pupil« shall be replaced by »pupil with an individual work schedule«,

(e) in section 55 (2), the words »The private pupil« shall be replaced by »The pupil with an individual work schedule« and the words »private pupil« shall be replaced by »pupil with an individual work schedule«,

(f) in section 62 (4), the words »the Minister responsible for education« shall be replaced by »the office«,

(g) In section 91

(ga) in paragraph (1), the words »as a private pupil« shall be replaced by »on the basis of an individual work schedule«,

(gb) in paragraph (3), the words »as a private pupil« shall be replaced by »as a pupil with an individual work schedule«,

(h) section 94 (4) (m), the words »the establishment of a teachers' grant« shall be replaced by »the conditions for using the teachers' grant«,

(i) in Annex 8, the words »class teacher/group leader in student hostel« shall be replaced by »class teacher, group leader in student hostel, head of section in primary art school«.

(3) In section 96 (6) of the ANPE, the words »for education in special skills development vocational school and developmental school education« shall be replaced by »for the education of pupils with special educational needs«, and the words »digital media« shall be replaced by »devices and digital media«.

(4) In section 80 (1) of the ANPE, the words »literacy and mathematical skills« shall be replaced by »literacy, mathematical and scientific skills«.

Section 33 (1) The following parts of the ANPE shall be repealed:

(a) in section 38 (7), the words », and section 39 (4)«,

(b) in section 57 (7), the words »- as specified in the examination regulations -«,

(c) section 60 (9) (d) and paragraph (10),

(d) in section 67 (8), the words », the opinion formed on the management programme by the persons entitled to deliver an opinion under this Act and the result of the vote on the formation of the opinion«,

(e) in section 68 (1), the words »- after consultation with the organisations, communities, persons and the maintainer referred to in this Act -«,

(f) Section 70 (2) (j),

(g) Section 83 (3) (e),

(h) in section 90(9), the words »with the consent of the Minister responsible for alien policing and asylum«,

(i) Section 90 (11) (a) (ac),

(j) in section 94 (1) (h), the words »the professional rules of the authority responsible for public education in connection with the procedure for authorising the operation of establishments not maintained by the school district centre and the control of their legality,«,

(k) in section 94 (1) (l), the words »and the detailed procedure for the issue of the licence pursuant to section 82 (1) (b), and for inclusion in the national register of experts and the national register of school-leaving examination presidents«.

(2) The following parts of the ANPE shall be repealed:

(a) in section 31 (2) (d), the words »and in section 83 (3) (e)«,

(b) in section 36 (4) (e), the words »and in section 83 (3)(e)«,

(c) Section 67

(ca) paragraph (1a)

(cb) paragraphs (4) to (6),

(d) section 98 (18).

(3) Section 45 (4) and (10) of the ANPE shall be repealed.

(4) Section 93/F (1) (b) and paragraphs (3) to (5) of the ANPE shall be repealed."

[45] 3 The provisions of the ANPE in force at the time of examining the petition:

"Section 3 (9a) If, with the exception of kindergartens, an educational or informational activity is carried out in an educational institution maintained by a public entity or an institution of higher education which may result in a violation of the rights of the child, pupil under the Fundamental Law through a serious violation of the legislation on public education, if another legal instrument under this Act

(a) has not led to a result, or

(b) is not available,

the Minister responsible for education may, in his or her discretion, withdraw the mandate of the head of the institution or the consent provided to it, within one year of becoming aware of the activity."

"Section 4 (6a) developmental pedagogical care: compulsory activity aimed at catching-up with the subject and skills development of children, pupils with difficulties in integration, learning and behaviour,"

"Section 8 (2) In the year in which the child reaches the age of three by 31 August, he or she shall attend kindergarten for at least four hours a day from the beginning of the

education year. On the basis of a request submitted by the parent by 25 May of the year in question, the body designated by the Government's decree (hereinafter referred to as the body granting the exemption) may, by 31 August in the year in which the child reaches the age of four, in the child's legitimate interests, exempt the child from attending kindergarten if the child's family circumstances or special situation so justify. If an expert is to be heard in the proceedings, only the head of the kindergarten or the district nurse may be appointed.

(2a) Administrative action may be brought against the decision referred to in paragraph (2) within fifteen days of the notification of the decision. The decision of the body which granted the exemption may not be reversed by the court.

(2b) The court shall, not later than eight days after the date on which the statement of claim is received by the court, arrange for a hearing to be fixed for a date within thirty days of the date on which the statement of claim is received by the court, unless no party has requested a hearing and the court does not consider it necessary.

(2c) A single judge shall adjudicate the case in the first instance in action brought under paragraph (2a). Where the particular complexity of the case so justifies, the single judge may, before the commencement of the trial, order the case to be heard by a panel of three professional judges. The case referred to the panel may not subsequently be heard by a single judge.

(2d) The court shall consider the statement of claim within forty-five days of the date on which it was lodged with the court, and shall give its decision in writing within the same period and serve it on the parties.

(2e) The provisions on recess pursuant to section 148 of the Act CXXX of 2016 on the Civil Procedure shall not apply to the action."

"Section 9 (9a) In the application of paragraph (9), an alternative framework curriculum may be approved only if it meets the following criteria:

(a) the content of the curricula specified in the NCC shall be reflected in the framework curricula broken down into two semesters per school year, in accordance with the assessment of pupils in each semester,

(b) when adapting the areas of learning included in the NCC, the subject structure of the alternative curriculum may deviate by not more than 30 per cent from the subject structure of the curriculum issued by the Minister responsible for education, in order to ensure interoperability between schools and further education."

"Section 21 (9) If a public education institution is removed from the register by the authority responsible for public education pursuant to paragraph (8) (g), it shall designate in its decision on removal from the register an education institution which

may not refuse the admission of children, pupils of compulsory school age who are in a legal relationship with the removed institution. In the case of a pupil who is not of compulsory school age, an establishment offering compulsory admission shall be designated only at the request of the person concerned. The institution shall be designated in such a way that the child, pupil does not have to bear a disproportionate burden in order to receive education-training in the designated institution. The final decision on the removal of a public education institution from the register shall be forwarded by the authority responsible for public education to the regionally competent school district centre, or in the case of vocational training schools, to the state vocational training and adult education body, the municipal government, in order to enable them to perform their duties as defined by the Act. The stock of files of the institution which ceases to exist with a successor shall be transferred to the successor institution. In the case of an institution that ceases to exist without successor, the stock of files shall be transferred to the maintaining authority, or in the case of the dissolution of the maintaining authority without successor, to the authority responsible for public education at the place where the registered office of the institution is located."

"Section 23 (9) The authorisation required for the operation of an educational institution may be granted if the educational institution has its own registered office, and was established for the operation of at least one kindergarten group or student hostel group capable of accommodating the maximum number of pupils, or a single school class for each grade according to the type of school, and the necessary personnel and material conditions – as specified by law – are available, or, in the case of a newly established form of education, it is gradually being established in a progressive system. If, in the case of national minority education and in municipalities with a population of less than five thousand, the foreseeable number of children, pupils using the education is less than the average number of children, pupils in classes or groups, it is sufficient for the institution to have a room suitable for the average number of children, pupils instead of a classroom or group room suitable for the maximum number of children, pupils."

"Section 25 (6) The social worker in kindergartens and schools acting in the course of the social services provided in the educational institution shall deal directly with the child, pupil and shall take care of the supervision of the child, pupil during the period of the provision of individual social services."

"Section 27 (5) Primary and secondary schools shall organise, on account of the pupil's weekly compulsory number of lessons and the allowed weekly timeframe difference for each class, lessons providing differentiated development for one to three pupils, for talent development, the catching-up of disadvantaged pupils, for pupils with difficulties in integration, learning and behaviour, and for the successful preparation of pupils in the first to fourth grades. In the context of providing developmental education

for pupils with integration, learning and behavioural difficulties, the pupils' subject-related training is provided by a teacher with the appropriate professional qualification in line with the stage of the educational work or the subject, and their skills are developed by a developmental teacher. At least one additional hour per week for each class is allocated to talent management and catching-up, over and above the timeframe allocated to each class as set out in Annex 6."

"Section 35/B (3) The persons employed by a ecclesiastical legal person to provide optional religious education or by a registered church and its internal ecclesiastical legal persons to provide religious and ethics education shall meet the conditions set out in section 32 (1) (h). A teacher of religion and ethics employed by a registered church and its internal ecclesiastical legal persons in the context of a civil law relationship shall meet the conditions laid down in section 66 (1) (b), which shall be certified by the person concerned by means of an official certificate at the time of the establishment of the civil law relationship."

"26/A. Data processed in relation to the measurement of pupils' fitness and study trips abroad

Section 44/B (1) The National Unified Student Fitness Test (hereinafter: NETFIT), an IT-based diagnostic assessment system containing data on the physical condition and fitness of students, shall be operated by the Hungarian Association for Student Sports for the purpose of monitoring the health of students.

(2) NETFIT contains the following personal data of the student, using a measurement identifier:

(a) measurement identifier,

(b) year and month of birth,

(c) sex,

(d) decimal age,

(e) data on special educational needs,

(f) grade,

(g) the place where the school functions,

(h) physical fitness test results.

(3) The data in the register may be kept for ten years from the date of the first entry.

(4) The results of the physical fitness measurement shall be recorded and uploaded to NETFIT by the teacher who performed the measurement, by each pupil measured, using a measurement identifier. The results of the physical fitness measurement

affecting the pupil can be accessed by the pupil and the parent using the pupil's measurement identifier.

Section 44/C (1) For the purpose of ensuring the financing of study trips abroad organised from the central budget or from European Union funds and for the purpose of monitoring the use of such funds, the Tempus Public Foundation shall keep an IT-based register (hereinafter referred to as the “study trip register”).

(2) The study trip register shall contain the following data:

(a) the name of the student,

(b) the pupil's education identification number,

(c) the pupil's mother's name at birth,

(d) the place and date of birth of the pupil,

(e) the nationality of the pupil,

(f) the sex of the pupil,

(g) the name and the educational identification number of the educational establishment of the pupil,

(h) the basic educational task on which the pupil’s status is based,

(i) the place of the pupil's education-training,

(j) the pupil's grade,

(k) the grade in which the pupil has been on a study trip abroad and the country of destination,

(l) in the case of a minor, a declaration of parental consent to the foreign study trip,

(m) a school recommendation attesting to the language skills level of the pupil,

(n) the name of the selected host institution or business entity abroad,

(o) the policy number of the travel insurance,

(p) the number of the grant agreement,

(q) in the case of an individual application, the pupil's payment account number.

(r) details of the pupil's special educational needs.

(3) The data specified in paragraph (2) (a) to (f) shall be forwarded by Tempus Public Foundation to KIR for the purpose of securing the financing of study trips abroad

organised from central budget expenditure or from European Union funds and for the purpose of monitoring the use of funds.

(4) In the case of an individual application for a study trip abroad, the data referred to in points (a) to (b) and (g) to (r) of paragraph (2) shall be provided to the Tempus Public Foundation by the pupil, in the case of a minor pupil by the parent, and in the case of a group application, the data referred to in points (a) to (b) and (g) to (p) and (r) of paragraph (2) shall be provided by the education institution.

(5) The data in the register may be processed from the time of recording until the termination of the pupil's legal status."

"Section 45 (2) A child shall become subject to compulsory school attendance in the year in which he or she reaches the age of six by 31 August. Compulsory school attendance shall begin on the first school day of the school year. At the request of the parent, the child may, on the basis of a decision of the body granting the exemption, attend kindergarten for an additional education year. The parent may submit his/her request to the body granting the exemption by 15 January of the year in which the school education starts. If the procedure requires an expert to be heard, only a committee of experts may be appointed. If the committee of experts recommends that the child should continue to attend kindergarten for another year before the deadline for the submission of the parent's application, the parent's application does not need to be submitted. If the child reaches the level of development necessary for entry to school earlier, the body granting the exemption may, at the request of the parent, allow the child to start the performance of his/her compulsory school attendance before the age of six. The provisions under paragraphs (6b) to (6f) shall apply to the court's procedure."

"Section 45 (6) The body granting the exemption shall decide that the pupil may fulfil his/her compulsory school attendance within the framework of an individual work schedule. In the course of the procedure, the body granting the exemption may contact the guardianship authority, the child welfare service, the school principal or, in the case of a pupil in child protection, the child protection guardian. In the procedure, the decision with suspensive effect does not have to provide for the exercise of the right applied for.

(6a) If, for reasons attributable to the pupil, the pupil with an individual work schedule fails to appear for the grading examination on two occasions or fails to meet the academic requirements on two occasions, the school principal shall notify the body which granted the exemption and the pupil shall be obliged fulfil his/her compulsory school attendance only by attending school from the following semester.

(6b) Administrative action may be brought against the decision referred to in paragraphs (2) and (6) within fifteen days of the notification of the decision. The decision of the body which granted the exemption may not be reversed by the court.

(6c) The court shall, not later than eight days after the date of receipt of the statement of claim by the court, arrange for a hearing to be scheduled for a date within thirty days of the date of receipt of the statement of claim by the court, unless no party has requested holding a hearing and the court does not consider it necessary.

(6d) The proceedings shall be heard at first instance by a single judge. Where the particular complexity of the case so justifies, the single judge may, before the commencement of the trial, order the case to be heard by a panel of three professional judges. The case referred to the panel may not subsequently be heard by a single judge.

(6e) The court shall adjudicate the statement of claim within forty-five days of the date on which the statement of claim was lodged with the court, and shall give its decision in writing within the same period and serve it on the parties.

(6f) The provisions on recess pursuant to section 148 of the Act CXXX of 2016 on the Civil Procedure shall not apply to the action."

"Section 45 (8) The office shall ensure the registration of children obliged to participate in kindergarten education and of the ones subject to compulsory school attendance, and shall provide data from the register to the maintainers of the competent kindergartens and schools providing compulsory admission. The body granting the exemption shall, ex officio and on the basis of an indication from the office, order and supervise the performance of the obligation to attend kindergarten and the obligation of compulsory school attendance."

"Section 80 (3) For the national assessment and evaluation, a centrally prepared document with a measurement identification may be used, which may not contain any data allowing the identification of the pupil who filled out the document. For the purpose of measuring and evaluating the performance of pupils, the data generated during the national measurement and evaluation process relating to the assessment of pupils' performance may be processed and, for this purpose, the documents bearing the measurement identifier may be transferred to the office. The office shall process the data transmitted in accordance with the Onytv., in the IT system specified in Annex 1, Subtitle VI, of the Onytv."

"Section 90 (1) A foreign educational institution may operate in the territory of Hungary and issue a foreign certificate if the institution is legally recognised as an educational institution in the State from which it originates and the certificate issued by it is recognised as a certificate corresponding to such educational institution, and the recognition has been credibly proven, provided that the operation of the institution is

not contrary to the provisions of the Fundamental Law. These provisions shall also apply to international schools, with the derogation that recognition shall be granted by the international organisation accrediting the institution. The Minister responsible for education shall register and authorise the operation of a foreign educational institution on the basis of an application by the institution's maintainer. If the international organisation accrediting the institution grants recognition only to an institution already in operation, the international kindergarten or school may be granted a temporary operating permit, subject to the issue of a certificate of the initiation of the accreditation procedure by the international organisation accrediting the institution."

"Section 51/A Provision of textbooks

Section 93/A (1) The provisions of this subtitle shall apply to

(a) schools operating on the territory of Hungary, with the exception of schools providing education on the basis of the educational programme of a foreign state or international organisation, on the basis of a permit granted by the Minister responsible for education,

(b) to natural and legal persons assisting in the performance of the tasks specified in paragraphs (2) and (3).

(2) The provision of textbooks is a duty of the State. The Minister responsible for education shall be responsible for the operation of the system for the provision of textbooks.

(3) The Minister responsible for education shall perform his/her duties, in the context of textbooks used in schools,

(a) by way of the office, with regard to acknowledging textbooks and entering them in the register of textbooks,

(b) through the operation of the body responsible for the State's development and publication of textbooks, with regard to the functions relating to the development and publication of textbooks,

(c) with the assistance of a non-profit company wholly owned by the State and designated by the Government's decree (hereinafter: "library supplier") with regard to the production of textbooks and the ordering of textbooks for schools.

látja el.

Section 93/B (1) Books, dictionaries, textbooks, atlases, encyclopaedias, working textbooks, workbooks, exercise books, digital teaching materials and information carriers and task carriers forming part of educational programmes may be

acknowledged as textbooks in accordance with the procedure specified in this Act and the Government Decree issued on the basis of the authorisation granted by this Act.

(2) The office shall decide on the acknowledgement of textbooks and on the termination of the acknowledgement of textbooks, and the Minister responsible for vocational qualifications shall decide in the case of textbooks for vocational training. The Minister responsible for vocational qualifications may delegate this power to a public administration body under his or her control or to the office on the basis of an agreement with the Minister.

(3) An application for the acknowledgement of a textbook may be submitted by

(a) in respect of a general knowledge textbook

(aa) the body responsible for the state development and publication of textbooks,

(ab) in the case of a book selected by the Minister responsible for education on the basis of a public call pursuant to section 93/D (2), the legal person publishing the book,

(ac) a registered church or its internal ecclesiastical legal person,

(b) in respect of a textbook for vocational training

(ba) a legal person engaged in publishing books,

(bb) an established church or its internal ecclesiastical legal person.

nyújthat be.

(4) The time limit for the procedure for the acknowledgement of a textbook is three months.

(5) In the procedure for the acknowledgement of a textbook, a decision with suspensive effect pursuant to the Act on the General Administrative Procedure need not provide for the exercise of the right applied for.

Section 93/C (1) The office shall keep the register of textbooks. The office shall

(a) upon the request of those specified in section 93/B (3), or

(b) upon a decision of the Minister responsible for vocational qualifications

enter the textbook in the register of textbooks. If the procedure requires an expert opinion to be obtained, such opinion may be obtained from a body designated by the Government decree.

(2) Digital curricula may not be included in the register of textbooks as permanent textbooks.

(3) The textbook register may contain not more than two textbooks

(a) in respect of any subject in any grade by approved framework curriculum subject under the NCC,

(b) in the case of a vocational education textbook, by vocational education framework subject, module, subject area.

(4) The provisions of paragraph (3) shall not apply to dictionaries, text collections, exercise books, atlases, encyclopaedias, workbooks, digital teaching materials and information and task carriers forming part of the educational programme, and foreign language textbooks, and to textbooks produced by a registered church or its internal ecclesiastical legal person in response to a public call published by the Minister responsible for education.

Section 93/D (1) The body responsible for the state development and publication of textbooks shall assist in the implementation of the textbook development plan prepared by the Minister responsible for education regarding textbooks for general knowledge and by the Minister responsible for education as the Minister responsible for vocational qualifications regarding vocational education textbooks, and in this context it shall

(a) prepare the approved edited electronic publication of the newly developed textbooks, and

(b) perform publishing tasks.

(2) A public call may be published by

(a) the Minister responsible for education, after consulting the body designated by the Government in a decree, for the development of a textbook for general knowledge, and with the consent of the National Council of the Nationalities in the case of a textbook for general knowledge in the field on nationality education,

(b) the Minister responsible for vocational qualifications for the development of vocational training textbooks.

(3) The office shall conduct the procedure for acknowledging textbooks – on request, provided that the substantial and formal requirements for the textbook acknowledgement procedure specified in the Government Decree issued on the basis of the authorisation granted by this Act are complied with – for textbooks prepared as a result of a public call for proposals published by the Minister responsible for education and selected after consultation with the body designated by the Government.

Section 93/E (1) Within the framework of ordering textbooks at school, the schools may choose only from the textbooks listed in the register of textbooks for a subject in the

the NCC framework curriculum, a subject, module taught, thematic area in the vocational education framework curriculum.

(2) The State shall arrange through the library supplier for the national ordering, procurement and delivery of textbooks to schools, and the collection of the purchase price of textbooks. The library supplier shall carry out the authorised reproduction of textbooks published by the body responsible for the development and publication of textbooks by the State, as well as the tasks related to the stocking and marketing of these textbooks.

(3) The library supplier shall

(a) act in the supply of textbooks in such a way as to ensure the most economical supply of textbooks at national level,

(b) ensure that pupils have access to textbooks at a price not higher than the highest price indicated in the register of textbooks (hereinafter: “school distribution price”), with the proviso that the school distribution price shall include the amount of value added tax,

(c) ensure that textbooks used in the school are available for purchase by pupils throughout the entire school year.

(4) The library supplier may not have as a senior officer, supervisory board member or auditor any person who

(a) is a natural person engaged in the publication or distribution of textbooks, or a manager, employee or a relative within the meaning of the Act on the Civil Code of another legal person engaged in the publication or distribution of textbooks,

(b) holds property rights conferring membership rights in the organisation referred to in point (a) or participates in its management or supervisory board.

(5) The school shall order textbooks, in electronic form as specified by law, through the library supplier’s platform. The school shall provide the library supplier with the following personal data relating to the ordering of textbooks:

(a) the name of the pupil,

(b) the pupil's education identification number,

(c) the name of the pupil's legal representative,

(d) the address of the legal representative or the address of the pupil of full age,

(e) the name of the pupil's school, OM identification number,

(f) the pupil's grade, class,

(g) the title of the textbooks ordered, purchased for the pupil within the framework of school textbook supply,

(h) the nationality of the pupil, if he/she participates in nationality education by means of a declaration provided for in the legislation on the issue of the education guidelines for nationality kindergarten education and the education guidelines for nationality school education.

(6) The school shall provide the library supplier with a list of the titles of the textbooks broken down by pupil, grade and subject.

(7) The personal data provided pursuant to paragraphs (5) and (6) shall be processed by the library supplier solely for the purpose of determining the entitlement to purchase textbooks at the price specified in the register of textbooks.

Section 93/F (1) The Act on the Central Budget shall specify, with respect to

(a) free textbooks, and

(b) the textbooks specified in paragraph (4)

the funding for state support (hereinafter: "textbook subsidy") provided for the schools' procurement of textbooks (hereinafter: "free supply of textbooks for schools").

(2) The textbook subsidy may be used

(a) to take over and reduce the cost of the purchase of textbooks by pupils and to fulfil school textbook orders, and

(b) if the school does not use textbooks for all or part of the education-training work, for the acquisition of books, workbooks, exercise books, digital media for the implementation of the pedagogical programme for the development of skills and for the development of education, with the agreement of the professional working group and the parents' organisation of the school.

Constitutional Court file No.: II/1437/2019.

(3) The amount of the textbook subsidy shall be transferred, as specified in the Act on the Central Budget, to the school through the school's maintainer.

(4) In school grades not covered by the free supply of textbooks for schools, and in respect of paragraph (1) (b), the ordering of textbooks by the school shall ensure the availability of textbooks free of charge – by means of the loan of textbooks from the school, the use of textbooks placed in day care centres and study rooms, the provision of used textbooks and the provision of financial assistance for the purchase of textbooks – all pupils in full-time education who

(a) is permanently ill,

(b) according to the expert opinion of a committee of experts, has a physical, sensory, intellectual or speech disability, or, in the case of multiple disabilities, is challenged with multiple disabilities, has autism spectrum disorder or other mental disability (severe learning disability, attention deficit or behavioural disorder),

(c) lives in a family with three or more minors or dependent children,

(d) is of full age and entitled to schooling allowance in his or her own right,

(e) is in receipt of regular child protection benefits; or

(f) is being looked after in the framework of child protection or is in receipt of after-care assistance

(hereinafter: "normative discount"). A pupil placed temporarily in a foster home, children's home or other residential institution is not eligible for the normative discount.

(5) For the purposes of entitlement to the normative discount, the person concerned shall be considered as permanently ill, severely disabled, living in a family with three or more children, being of full age and entitled to schooling allowance in his or her own right – unless the entitlement to schooling allowance has ceased due to the attainment of the maximum age – in accordance with Chapter II of the Act LXXXIV of 1998 on Support for Families."

"Section 94 (4) The Government shall be authorised to [...] regulate in a decree

(g) the detailed conditions of appointment of the head of the institution relating to education, professional qualifications and other detailed conditions, the system of promotion of teachers, the requirements for classification in the various grades, the qualifying examination and the operation of the committee conducting the qualification procedure, the detailed provisions concerning professional criteria, the conditions of the qualifications that may be awarded in the course of the qualifying examination and the qualification procedures, the salary for the grades associated with the qualifications, including the salary for each pay grade, and the competence and performance-based appraisal system on which the salary compensation is based, as well as the detailed rules for determining, within the limits specified in Annex 8 and in view of the specific features of sectors and professions, the salary supplement, the additional supplement for heads of institutions, the supplement higher than those specified in this Act, in view of the specific circumstances of work, the salary addition and the bonus, the cost of the repeated qualification examination and qualification procedures, as well as the amount of the qualification and renewal fees and the rules for their payment, the duration of a lesson or activities to be taken as a basis for the calculation of the working time allocated to education in each type of institution, certain tasks which the student hostel teacher may carry out during his/her working

hours for the purpose of education and which are part of the continuous pedagogical supervision of pupils not attending activities in the school or student hostel, the conditions for ordering extraordinary work, on-call time and standby duty in education institutions, the rules and rates for determining the flat-rate remuneration, including remuneration for on-call time and working ordered during on-call, the scope of other tasks related to the preparation and connected with education and teaching, substitution in the form of ad hoc replacement, the detailed rules for the use of sabbatical leave, the rules for the scheduling of teachers' working time, the requirements for the grading of staff providing direct support for education and teaching, as well as financial, administrative, technical, auxiliary and other non-teaching staff, issues relating to the voluntary declaration of school qualifications of parents of children, pupils with multiple disadvantages, and the powers of the board of directors as an employer, [...]"

"Section 94 (4h) The Government shall be authorised to specify in a decree the body acting in relation to the individual work schedule which authorises the exemption."

"Section 99/J Regarding the following provisions as determined by the Act LXX of 2019 on the Amendment of Certain Acts related to Public Education and Repealing Act CCXXXII of 2013 on the Provision of National Public Education Textbooks,

(a) the change of the private pupil status to an individual work schedule of a pupil who had private pupil status on the day before the entry into force of section 45 (5) of this Act shall be reviewed by the authority designated by the Government within one year of the entry into force,

(b) section 62 (4) of this Act shall apply to applications submitted after its entry into force."

"Section 99/K (1) Within 1 year after the entry into force of the Act LXX of 2019 on the Amendment of Certain Acts related to Public Education and Repealing Act CCXXXII of 2013 on the Provision of National Public Education Textbooks, the network, organisation, or maintainer under section 9 (10) shall review the framework curriculum in order to ensure that it complies with the provisions of section 9 (9a) as amended by the Act LXX of 2019 on the Amendment of Certain Acts related to Public Education and Repealing Act CCXXXII of 2013 on the Provision of National Public Education Textbooks, and shall apply for the approval of the amendment of the framework curriculum. Failure to do so shall result in the withdrawal of the operating licence.

(2) The provisions of section 9 (9a) as amended by the Act LXX of 2019 on the Amendment of Certain Acts related to Public Education and Repealing Act CCXXXII of 2013 on the Provision of National Public Education Textbooks shall apply to the approval procedures pending at the time of the entry into force of the Act LXX of 2019

on the Amendment of Certain Acts related to Public Education and Repealing Act CCXXXII of 2013 on the Provision of National Public Education Textbooks. If, on the basis of this paragraph, the framework curriculum or the application for an operating licence needs to be amended, the time limit for the administration of the case shall be extended by 45 days."

III

[46] 1 According to Article 24 (2) (e) of the Fundamental Law, the Constitutional Court shall, "at the initiative of the Government, one quarter of the Members of the National Assembly, the President of the Curia, the Prosecutor General or the Commissioner for Fundamental Rights, review the conformity with the Fundamental Law of any law". The Constitutional Court therefore held, first of all, that the petition submitted by the fifty-six Members of Parliament had been submitted by those entitled to initiate the procedure, in accordance with the cited provision of the Fundamental Law.

[47] The competence of the Constitutional Court to rule on the petition is based on Article 24 (2) (e) of the Fundamental Law and section 24 (1) of the ACC.

[48] 2 The Constitutional Court shall accept a petition that meets the requirements of section 24 (1) of the ACC if it contains a definite request, provided that other conditions are met.

[49] 2.1. The application indicates the provision of the Fundamental Law that establishes the competence of the Constitutional Court to rule on the petition, and which establishes the eligibility of the petitioners to initiate proceedings [Article 24 (2) (e) of the Fundamental Law]. The petition also contains the grounds for initiating the proceedings, indicate the legislation to be examined by the Constitutional Court, the provisions of the legislation and the provisions of the Fundamental Law that have been violated.

[50] 2.2 However, the motion only partially satisfies the requirement for a definitive request. In accordance with section 52 (1b) (e) of the ACC, a request is definite if it contains constitutionally assessable reasons as to why the challenged law or provision of the law is contrary to the indicated provision of the Fundamental Law.

[51] The Constitutional Court finds that the element of the petition for annulment of the entire Amending Act does not meet the requirement of a definite request, since it alleges only in general terms, without any constitutionally assessable grounds, that the preparation time, the clarity of the rules, legal certainty and parental rights have been infringed.

[52] The petition also does not contain any constitutionally assessable reasoning in relation to section 4 (6a), section 8 (2b) to (2c), section 23 (9), section 25 (6), section 35/B (3), section 45 (8) to (9), section 67 (1) and (8), section 68 (1), section 70 (2) (j), section 80 (3), section 83 (3), section 90 (1), sections 93/A to 93/F, section 94 (4g) and (4h), section 99/J of the ANPE and sections 32 and 33 of the Amending Act. Therefore, the Constitutional Court refused the examination of these elements of the petition on the basis of section 64 (d) of the ACC.

[53] 2.3 The Constitutional Court further notes that in connection with section 67 (1) of the ANPE, the petitioners alleged, among others, that the Fundamental Law was infringed because "until the relevant government decree is published", it is not possible to determine the conditions necessary for the appointment of the head of the institution. Contrary to the petitioners' claim, however, section 13 of the Government Decree 196/2019 (VIII.1.) amending certain government decrees on public education provided for the conditions for the appointment of the head of an institution with effect from 1 September 2019, which was already in force at the time the petition was filed.

[54] 3 The petitioners complained of three things in connection with section 9 (9a) and section 99/K of the ANPE. Firstly, the lack of sufficient preparation time, as, in their opinion, the one-year time limit provided for in the legislation was not sufficient for alternative schools to prepare a framework curriculum. Secondly, they find it discriminatory that the law-maker requires the curriculum to be divided into two semesters only in the case of alternative schools and, thirdly, they consider that the provision that section 9 (9a) of the ANPE also applies to pending proceedings infringes the prohibition of retroactivity. In practice, according to the petition, this may have the consequence that some schools will not be able to start operating on 1 September 2019. However, no such institution was identified in their submission of 18 September 2019.

[55] Following the submission of the petition, the Parliament amended, among others, several provisions of the ANPE by the Act CXII of 2019 on Amending and Repealing Provisions related to the Entry into Force of the Act LXXX of 2019 on Vocational Training. As a result of the amendment, section 9 (9a) and section 99/K of the ANPE have also been significantly changed with effect from 1 January 2020, and the one-year deadline as well as the obligation to divide the curriculum into two semesters have been removed from the new provision.

[56] Pursuant to section 64 (e) of the ACC, the Constitutional Court shall refuse the petition if, in the course of its examination of the merits, it finds that the legislation under review is not in force, with the exception of the procedures provided for in sections 25 to 27. The content of section 9 (9a) and section 99/K of the ANPE, which the petitioners challenge, is a statutory provision which, as stated above, is no longer

in force, and therefore its examination by the Constitutional Court is no longer possible in the context of an abstract posterior review of the norm, and the Constitutional Court has therefore refused this element of the petition {similarly: Ruling 3326/2020. (VII.5.) AB, Reasoning [24]}.

[57] At the same time, the Constitutional Court holds it necessary to note that pursuant to section 41 (3) of the ACC, the Constitutional Court's competence may also exceptionally extend to the examination of the constitutionality of a statutory provision that has been repealed, if it is still applicable in a specific case. Thus, questions of constitutionality and violations of fundamental rights arising in connection with the application of a statutory provision that can no longer be examined in the abstract posterior review procedure may be initiated in the procedures under sections 26 and 27 of the ACC, subject to the demonstration of being individually affected. Similarly, in the case of application in an individual case, the possibility of judicial initiative under section 25 of the ACC is also available if the application of the repealed provisions of the law gives rise to a specific infringement of a right guaranteed by the Fundamental Law.

[58] 4 The Constitutional Court also found that the petitioners were not entitled to bring an application for a declaration of the existence of an infringement of the Fundamental Law caused by a legislative omission. As regulated by section 46 (1) and (2) of the ACC, the finding of legislative omission is one of the possible *ex officio* legal consequences that the Constitutional Court may apply in the exercise of its powers, and thus the petitioners are not entitled to submit a petition for the finding of legislative omission {on the procedure of the posterior review of norms: Ruling 3330/2017 (XII.8.) AB, Reasoning [20]}.

The Constitutional Court, however, [having regard in part to the provisions challenged in the petition, the holdings of the Decision 9/2019 (III.22.) AB, the reasoning of the Amending Act and the reply of the Secretary of State] has not seen any reason to apply this legal consequence *ex officio* in the present case for the reason stated by the petitioners.

IV

[59] The petition is, in part, well-founded.

[60] Before examining the substance of the petition, the Constitutional Court first reviewed its previous case-law in relation to Article B (1) of the Fundamental Law, which is relevant to the assessment of the present petition.

[61] According to the consistent case-law of the Constitutional Court, ensuring sufficient time for preparation is a principle deriving from the rule of law and the

requirement of legal certainty that is part of the rule of law, according to which the date of entry into force of a law shall be determined in such a way as to allow the addressees sufficient time to prepare for the application of the law. This requirement is repeated in section 2(3) of the Legislation Act.

[62] It is an essential element of sufficient time to prepare, following from Article B (1) of the Fundamental Law, that all the recipients of the legislative provisions for whom the law imposes new or additional obligations – let them be the bodies responsible for implementing the law (law-applying bodies) or other persons and bodies concerned with voluntary compliance with the law – are potentially able to fulfil their obligations and do not commit a breach of duty or unlawful conduct against their will. Both the application of the law and the observance of the law require knowledge of the law, therefore from this point of view, preparation for the application of the rule and knowledge of the law are in a goal-means relationship with each other {Decision 6/2013. (III.1.) AB, Reasoning [233] to [236]; Decision 24/2019. (VII.23.) AB, Reasoning [43]}. The determination and provision of sufficient time to prepare for the application of the law is a matter for the discretion and decision of the law-maker, in which context an infringement of the Fundamental Law can only be established in the event of a blatant failure to provide or the absence of a period of time to prepare for the application of the law which seriously jeopardises or infringes legal certainty {Decision 3209/2015. (XI.10.) AB, Reasoning [51]}. Accordingly, the Constitutional Court's competence in the context of the requirement of preparation time cannot extend to the examination of the exact time required for the preparation for the application of a specific piece of legislation, as this is not a question of constitutional law; the Constitutional Court may assess, in the context of the requirement of preparation time stemming from Article B (1) of the Fundamental Law, only if the preparation time is missing or is so blatantly short that it is clear that the addressees of the legislation would not be able to fulfil their obligations, despite their good faith, best intentions and efforts, or would be able to do so only at the cost of extraordinary efforts {Decision 24/2019. (VII.23.) AB, Reasoning [43]}.

[63] The prohibition of retroactive legislation may also be derived from Article B (1) of the Fundamental Law. The Constitutional Court summarised its case-law on retroactive legislation in the Decision 10/2018 (VII.18.) AB as follows: "According to the interpretation of the Constitutional Court, legal certainty requires that the legal system as a whole, its subdivisions and individual rules be clear, unambiguous, predictable in their effects and foreseeable for the addressees of the norm, and that they carry a normative content that is recognisable in the course of the application of the law. {Decision 9/1992. (I.30.) AB, ABH 1992, 65 to 66; Decision 38/2012. (XI.14.) AB, Reasoning [84]}. Legal certainty creates the possibility for subjects of the law to

effectively align their behaviour with the law {Decision 3208/2013. (XI.18.) AB, Reasoning [58]}.

The requirement of foreseeability and predictable operation of legal norms includes the limited and exceptional possibility of retroactive legislation. In other words, a law may not lay down legal consequences for a period prior to its promulgation: it may not impose an obligation or declare a specific conduct unlawful.

According to the Constitutional Court, a legislative act may be held to be contrary to that prohibition not only if it enters into force retroactively, but also if its provisions are also applicable, by virtue of an express provision to that effect, to legal relationships which arose before its entry into force {Decision 57/1994. (XI.17.) AB, ABH 1994, 324 to 325; Decision 16/2014. (V.22.) AB, Reasoning [32]}. In the latter case, the rule attaches a new legal consequence to an event or fact occurring before its entry into force, which is different from the one previously in force, and may therefore give rise to a retroactive effect. Furthermore, one may also speak of retroactive effect when the new rule determines the legal consequence of the facts existing before its entry into force, differently from the old one." (Reasoning [49] to [51]).

V

[64] 1 The Fundamental Law places great emphasis on the protection of the family. Even the National Avowal affirms the value of the family ("We hold that the family and the nation constitute the principal framework of our coexistence, and that our fundamental cohesive values are loyalty, faith and love"), while Article L lays down the protection of families and support for having children. According to the Act CCXI of 2011 on the Protection of Families, family is Hungary's most important national resource, an autonomous community based on moral foundations. The family, and growing up in a family, is safer than any other option, and without harmoniously functioning families there is no well-functioning society. Article XVI of the Fundamental Law is the constitutional basis for the protection of children. Article XVI paragraph (1) declares the right of the child to the protection and care necessary for his or her proper physical, mental and moral development, paragraph (2) gives parents the right to choose the education to be given to their child, and paragraph (3) imposes on parents the duty to care for their minor child, which includes the duty to educate the child.

[65] According to the reasoning of the proposed text of the Fundamental Law, "the child has a right to the protection and care necessary for his or her proper physical, mental and moral development from all persons. Accordingly, the rights of the child shall be respected by the child's parents and family, the State and all members of the society, and they shall provide the conditions necessary for the child's appropriate

development, as a guarantee for the sustainability of the society. In the private sphere, the right and duty of care and protection is primarily the right and responsibility of the parents (or other legal guardians of the child). In this context, the Proposal establishes as a right of parents the choosing of education to be given to their child and at the same time makes it their duty to care for their minor child, including the education of their school-age child."

[66] Article XVI (1), (2) and (3) of the Fundamental Law form a coherent unit, with the best interests of the child at its centre, in accordance with Article XVI (1). Every child has the right to such protection and care as is necessary for his or her proper physical, mental and moral development, which is the primary responsibility of parents under Article XVI (2). The parents' right to upbringing is limited in two ways: on the one hand, parents do not enjoy unlimited freedom in selecting the education to be given to their children, and the Fundamental Law protects and supports only those decisions in the context of education which are in the best interests of the child, i.e. the content of the parental rights under Article XVI (2) is limited by the best interests of the child under Article XVI (1). On the other hand, the parents' right to upbringing is limited by the duty of care under Article XVI (3), which includes the obligation to have the child educated. The content of the right of parents to upbringing was defined by the Constitutional Court in its Decision 995/B/1990 AB as the "parents themselves decide how they choose the institution, method and means of education of their children in accordance with their traditions, family customs, social situation, religious and moral convictions and financial means. No outside authority, no person outside the family, may interfere in this." (CCDec 1993, 515, 527)

[67] Thus, while the Fundamental Law itself establishes the parents' right to upbringing, it also recognises that there is not only one right way of educating a child, but that the parent must choose, with due regard to the child, between several equally right methods of education. The general and absolute limit to this freedom of choice is, however, the obligation to have the child educated, in which respect the Fundamental Law does not provide parents with a choice in the case of children of compulsory school age, i.e. children who have reached the statutory age limit and are fit for school. However, as regards the way in which compulsory education is fulfilled, parents' right to upbringing is also respected: in particular, they may (within the limits of the law) choose the educational institution that best suits their child, choose between the teaching of ethics or religious and moral education, or even request an individual work schedule for their child.

[68] Under Article XV (5) of the Fundamental Law, Hungary also provides for special measures to protect children who (like women, the elderly and the disabled) require special care and protection. However, the obligation of the State to protect institutions, based partly on Article XV (5) and partly on Article XVI (1), is only secondary to the

primary obligation of the parent. On the one hand, it is the responsibility of the State to establish and operate an appropriate institutional system (including nurseries, kindergartens, schools and an appropriate health care system), on the other hand, to provide the professional support necessary for parents to make educational decisions in the best interests of the child (for example, through expert examinations by pedagogical services and similar institutions), and thirdly, to ensure that when, in individual cases, parents fail to exercise their right to upbringing or manifestly fail to exercise this right in accordance within limits under Article XVI (1) and (3) of the Fundamental Law, the State shall take, instead of the parent, necessary and indispensable measures in individual cases to ensure that the best interests of the child are properly safeguarded.

[69] In accordance with the above, the Constitutional Court also points out that the reasoning of the proposed text of the Fundamental Law itself expressly recognises the primacy of the rights of the parent in the upbringing of the child. The Decision 995/B/1990 AB laid down the above in the form of stating that "if the child has no parents or parents who do not fulfil their parental duties, the State must take over their responsibilities. This gives the legislative State the opportunity to intervene in accordance with the law and obliges the State to take direct responsibility." (CCDec 1993, 515, 528) This means, therefore, that the role of the State in making decisions on the upbringing of children is only secondary: on the one hand, the State is obliged under Article XV (5) to assist parents in the upbringing of the child, on the other hand, it is obliged to operate the appropriate institutional and care system necessary for the upbringing of the child (of which the Fundamental Law itself mentions compulsory primary education), and thirdly, the State's action in specific, individual cases can only be limited to correcting decisions of parents which are clearly contrary to the interests of the child, or to making up for decisions which are essential for the upbringing of the child and which the parents have not taken.

[70] 2 Under the principle of subsidiarity, the State may not deprive the individual of the possibility to decide on matters that fall within the scope of his or her personal autonomy. The task and responsibility of bringing up children therefore lies primarily with the parents, and the State's task, in accordance with the principle of subsidiarity, is partly to support and assist parents and partly to correct their upbringing activities in individual cases where they lead to results contrary to the best interests of the child. While the principle of subsidiarity (and certain provisions of the Fundamental Law cited above) not only empower but also explicitly oblige the State to assist parents in the upbringing of their children, this State involvement cannot, either generally or in individual cases, take over the right and responsibility of upbringing from parents, if the parents otherwise exercise it in the best interests of the child and in accordance with the Fundamental Law.

[71] 3 The Constitutional Court has previously emphasised in several decisions that "[the] parent's right to choose the upbringing [according to Article XVI (2) of the Fundamental Law, parents have the right to choose the upbringing of their children] – in the context of Article VII (1) of the Fundamental Law (freedom of thought, conscience and religion) – means that parents may care for their children in accordance with their own world-view and conscience, so that "exclusively parents (guardians) have the right to decide on matters relating to the physical and mental development of their children. Parents can choose their children's health care providers, educational institutions, and the kind of ideological education they wish to provide. Parents also decide on the choice of medical services and between the alternatives available." [Decision 39/2007 (VI.20.) AB, ABH 2007, 464, 481]" (CCDec, Reasoning [59]) However, "the right of a parent to choose upbringing, as provided for in paragraph (2), cannot be interpreted in isolation from the obligation incumbent on him or her, nor from the rights of the child." (CCDec, Reasoning [43])

[72] The State has a duty to protect institutions for the purpose of protecting the rights of the child: "The role of the State in the protection and care of children is to define the guarantees for the exercise of the fundamental rights of the child, to establish and operate a system of institutions for the protection of children." [Decision 114/2010 (VI.30.) AB, ABH 2010, 579, 582] However, this institutional protection role is only of complementary nature with regard to the rights of the child: "state (and social) protection – which is derived from the objective obligation to protect institutions – supplements family protection as an internal legal relationship (and, where appropriate, substitutes it)." (CCDec, Reasoning [56])

[73] The Constitutional Court summarised all this in its Decision 14/2014 (13.V.) AB to the effect that the fundamental right to protection and care of children guaranteed by Article XVI (1) of the Fundamental Law has a special structure and is multipolar: the child is the beneficiary, while the primary duty-bearer is the family (the parents), and the secondary duty-bearer is the State, in a complementary and in certain cases a substitute role. In this role, the State shall enforce the children's right to protection and care through an active and supportive (not merely passive) attitude (Reasoning [33]).

[74] 4 The Constitutional Court also refers to the guiding case-law of the German courts and the German Constitutional Court in relation to the best interests of the child and the parents' right to upbringing as well as the extent of the State's involvement. The parents' right to upbringing (Erziehungsrecht) is accompanied with the State's educational task (Erziehungsauftrag), which covers in particular the tasks and powers relating to the supervision of the exercise of the right to upbringing (BVerwG 6 B 65.07). The German Federal Constitutional Court, the Bundesverfassungsgericht, has previously recognised (in line with the case-law of the Hungarian Constitutional Court) that the institution of compulsory schooling constitutes a limitation on the parents'

right to upbringing (1 BvR 1358/09). According to the relevant case-law of the German Constitutional Court, Article 6 (2) of the Grundgesetz provides that the care and upbringing of a child is a natural right of the parents, i.e. those who have given life to the child are naturally prepared and obliged to assume responsibility for the care and upbringing of the child (BVerfGE 24, 150). These parental rights are, however, so-called "servant human rights" which, although they entitle the parent, must be exercised by the parents in the best interests of the child (BVerfGE 61, 372). Accordingly, it follows from the case-law of the German Constitutional Court that parental rights do not primarily serve the free development of the parent's personality, but are a guarantee for the development of the child. The Federal Constitutional Court of Bavaria, on the basis of Article 129 (1) of the Bavarian Constitution, held that although German parents are guaranteed a place in a kindergarten for their children as a subjective right, the primacy of the parents' right to upbringing precludes the State from imposing obligatory attendance of kindergarten (BayVerfGHE 29, 191, 210). Kindergartens are not an obligation, but an institutional system which supports the parents' upbringing obligations (1 BvR 178/97).

[75] According to the relevant case-law of the German Constitutional Court, when the constitutionality of State intervention in the upbringing of a child is to be decided, the best interests of the child and the principle of proportionality must always be taken into account, and the law-maker may only interfere in the parent's right to upbringing by means of general prohibitions if individual measures prove to be insufficient (BVerfGE 7, 320). This means that, prior to primary school education, the State should only intervene if the exercise of the parent's right to upbringing leads, in specific, individual cases, to a result contrary to the best interests of the child. Accordingly, the principle of subsidiarity in the context of the parental right to upbringing is also upheld by the German Federal Constitutional Court (1 BvR 205/58).

[76] 5 Finally, the Constitutional Court also notes that the aforementioned interpretation of Article XVI of the Fundamental Law is fully in line with the provisions of the Convention on the Rights of the Child, which was promulgated by the Act LXIV of 1991 and is binding on Hungary. According to Article 18 (1) of the Convention on the Rights of the Child, "Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern." Article 18 (2) explicitly emphasises the secondary nature of the State's role when it states that "States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children". Article 18 of the Convention [together with Article 5 on the duties and rights of parents and Article 3 (2) and Article 27 on the obligations of the State] clearly provides that parents have the primary responsibility for ensuring

the best interests of the child and that the State must take appropriate steps to assist parents in fulfilling their duties. However, the State can only take over the role of the parent in ensuring the rights and needs of the child if the parent is unable to fulfil this responsibility.

VI

[77] The Constitutional Court first examined the element of the petition relating to Article 8 (2) and Article 8 (2a) to (2c) of the ANPE.

[78] 1 The provision of the Act LXXIX of 1993 on Public Education and, in accordance with it, the provision of the ANPE in force until 31 August 2015, allowed for kindergarten attendance from the age of three, by providing for compulsory attendance of four hours per day from the beginning of the education year in the year in which the child reaches the age of five.

[79] The ANPE lowered the age limit for compulsory kindergarten attendance as of 1 September 2015, providing for four hours of compulsory kindergarten attendance per day for children over the age of three, with the proviso that the municipality notary, at the request of parents and with the agreement of the kindergarten director and the district nurse, had the option to grant an exemption from compulsory kindergarten attendance until 31 August of the year in which the child reaches the age of five, if the child's family circumstances, the development of his/her abilities or his/her special situation so justified.

[80] With the adoption of the Amending Act, the law-maker amended in two stages the rules, in force as from 1 September 2015, on lowering the compulsory kindergarten age and on exempting children from compulsory kindergarten education.

[81] The provision of the ANPE in force as from 26 July 2019 [Section 7 (1) of the Amending Act] changed the previous regulation since it lowered the age limit for the granting of exemption by one year and made it possible until 31 August of the year in which the child reaches the age of four.

[82] Section 8 (2) of the ANPE [Section 7 (2) of the Amending Act] (by leaving the age limit for granting exemption unchanged), effective from 1 January 2020, changed the procedure for granting exemption, so that the parent may only apply for exemption up to the 25th of May of the current year and the decision to grant an exemption is taken by the notary or by the body designated by Government decree in place of the maintainer, and only the head of the kindergarten or the district nurse may be appointed as an expert in the procedure. The rules on administrative proceedings concerning the granting of an exemption, effective from 1 January 2020, were also laid down in section 7 (2) of the Amending Act [section 8 (2a) to (2f) of the ANPE]. The Constitutional Court finds that the petitioners have submitted a constitutionally

assessable statement of reasons only in connection with section 7 (2) of the Amending Act, and accordingly the Constitutional Court could only examine the constitutionality of these provisions [i.e. the provisions of the ANPE in force as of 1 January 2020] in the present proceedings.

[83] The petition alleges that the provisions of the ANPE are contrary to the Fundamental Law on three grounds. First, the petitioners considered that the period between the adoption of the Act and the entry into force of its relevant provision (1 January 2020) was insufficient for the establishment of the procedures of the body authorising the exemption, thereby violating the requirement of sufficient preparation time under Article B (1) of the Fundamental Law. On the other hand, according to the petitioners, the lowering of the age limit for the possibility of exemption from kindergarten education violates the parents' right to upbringing under Article XVI of the Fundamental Law. In this context, they questioned where the boundary between parental and state responsibility lies. Thirdly, the provisions on the assessment of the application for exemption were, according to the petition, contrary to Article XVI of the Fundamental Law and the right to a fair procedure under Article XXVIII (1).

[84] 2 The Constitutional Court first examined the petitioners' arguments concerning the violation of Article XVI of the Fundamental Law.

[85] On the basis of the petition, the Constitutional Court had to rule on the question whether the legislation providing for the lowering of the age limit for compulsory attendance at kindergarten without exemption in order to protect the right of children to protection and care could be regarded as a necessary and proportionate restriction on the right of parents to upbringing in accordance with Article I (3) of the Fundamental Law.

[86] The Constitutional Court observes that Article XVI (3) of the Fundamental Law mentions among the obligations of parents to take care of the schooling of the child, but does not contain any provision relating to kindergarten education. Accordingly, the rules on compulsory kindergarten education and the system of exemptions and exceptions to it are entirely based on statutory grounds. This in itself confirms {in accordance with the findings made in Part V of this decision (Reasoning [64] et seq.), in particular the principle of subsidiarity} that, prior to the start of compulsory schooling, the State may at most be entitled to restrict the right of a parent to upbringing exceptionally and solely in order to safeguard the best interests of the child, where the parent's choice and the best interests of the child are in conflict.

[87] 2.1. As the CCDec pointed out, kindergarten education is “generally justified primarily to facilitate socialisation, adaptation to future school requirements and integration into society.” (Reasoning [43]). The reasoning of the Amending Act also states that "the social interest and aim is that as many children as possible should start

attending kindergarten education and school education by the age of 3 and 6 respectively. This is particularly important in kindergarten, which prepares children gradually, but especially in their final year, for school education." Given that the institution of kindergarten education is primarily intended to prepare children for school and to integrate them into the community, a measure designed to promote the participation of all children in kindergarten education before they start school is therefore a necessary means, in constitutional terms, of restricting the right of parents to choose the education they wish to give their children.

[88] 2.2 When examining the proportionality of the restriction (in line with the findings made i the CCDec), the fact that the Fundamental Law and the legal system as a whole give the family a very prominent role must be taken into account. If the parent considers the upbringing of the child as his or her primary life calling and wishes the child to be brought up entirely within the family during the first period of his or her development, the parent's right to do so can only be restricted on strong constitutional grounds.

[89] The legal basis for State intervention is the enforcement of the child's constitutional right to protection and care, and this can only take place under his or her specific personal circumstances, in matters affecting him or her individually and personally (and not in a general way). The general provisions of the law must therefore always provide for the possibility of individual consideration, i.e. of individual decisions being taken in the best interests of the child, with the exception of manifestly exceptional cases such as the last year of kindergarten education, which prepares the child for school education. When assessing the proportionality of state intervention, taking into account the person and individual circumstances of the child is essential to enforce fundamental rights and the values of the Fundamental Law.

[90] In full accordance with the above, the importance of a possible exemption is also stressed in the Secretary of State's reply. It states that "for all children, whether or not they are disadvantaged, the legislation must ensure uniform compliance with the obligation to attend kindergarten in the best interests of the child, and allow for possible exemption".

[91] As regards the constitutional framework of kindergarten education, the CCDec has established a clear legal position, which also serves as a standard for the assessment of the necessity and proportionality of the present amendment. It stressed that, according to the UN interpretation of the obligation contained in Article 18(1) of the Convention on the Rights of the Child, "the responsibility for ensuring the upbringing and development of the child lies primarily, but not exclusively, with the parents, and therefore the State and society share responsibility." (CCDec, Reasoning [44])

[92] The fundamental right to protection and care of children guaranteed by Article XVI (1) of the Fundamental Law has a special structure and is multipolar: the child is the beneficiary, while the primary duty-bearer is the family (the parents), and the secondary duty-bearer is the State, in a complementary and in certain cases a substitute role. In line with Article L (2) and Article XV (5) of the Fundamental Law, the State should enforce the children's right to protection and care through an active and supportive (not merely passive) attitude {Decision 14/2014. (V.13.) AB, Reasoning [33]}.

[93] In its examination of the necessity of kindergarten education (i.e. the proportionality of the restriction of the parent's right to upbringing), the Constitutional Court, following the principles laid down in this respect in the CCDec, confirms that "in order to enforce the rights of the child under Article XVI (1) of the Fundamental Law, by ensuring his or her physical and mental development, it serves primarily to prepare the child for school studies and to integrate him or her into the community. Although this may restrict the right of certain parents to choose the education of their children, such as parents who reject the whole principle of community education, who consider the start of kindergarten education premature or who would prefer to see their children socialised in other settings than the educational institutions concerned, the objectives outlined and detailed in the National Basic Programme for Kindergarten Education make kindergarten education necessary." (CCDec, Reasoning [40]) The Constitutional Court notes here that, according to the basic programme, the cornerstones which define the basic principles of kindergarten education, such as loving care and special protection, and the promotion of the full development of the child's personality, are tasks which can be best provided in a family environment, and that in this context the kindergarten can only play a complementary role to that of the parents.

[94] Thus, for the last year of kindergarten education, the State (in accordance with the findings made in the CCDec) is entitled (but even then not obliged) to enact legislation that does not allow an exception (exemption) from compulsory kindergarten education, which makes it compulsory for all children to attend kindergarten education; the Constitutional Court recognised the provision of preparation for school studies as an exceptional reason which, even in the case of a complete exclusion of the possibility of exemption, constituted a proportionate restriction of the parents' right to upbringing.

[95] In its examination of the proportionality of the previously applicable provision of the ANPE, the CCDec concluded that "the previously applicable provision of the ANPE, although making the three-year age limit the main rule, allows an exception to its application: it provides for a wide possibility of exemption until the age of five, at the request of the parent. [...] Four hours of education per day is generally justified primarily to facilitate socialisation, adaptation to future school requirements and integration into society. Education carried out in the community does not hinder or infringe the parent's

activities with the child or his or her educational principles; on the contrary, it complements that. Where the special interests of the child and the family circumstances justify it, an exemption may be granted." (CCDec, Reasoning [42] to [43])

[96] The CCDec thus considered the proportionality of the previous regulation as ensured for two reasons. On the one hand, it attached particular importance to the school preparatory year, which should be spent in a kindergarten environment in order to ensure the proper socialisation of children. This approach is explicitly confirmed in the reasoning of the Amending Act and in section 8 (1) of the ANPE itself, which states that kindergarten education "prepares children for school education, particularly in its final year". On the other hand, the reasoning explains that before the school preparatory year, a wide-scale possibility of exemption is offered for children whose best interests for whatever reason are served by education in the family.

[97] In the present case, however, the legislation extended the institution of compulsory kindergarten education for a further year, excluding the possibility of exemption even in cases where the child's family circumstances, the development of his or her abilities or his or her particular situation would justify it for whatever reason. This amendment to section 8 (2) of the ANPE made the second to last year of kindergarten education equal to the last year for the purposes of the regulation (in terms of the granting of exemption), whereas the reasoning of the Amending Act itself and section 8 (1) of the ANPE explicitly state that the last year is considered to be particularly important for the preparation for primary school studies. Accordingly, the reasoning of the Amending Act failed to contain any argumentation as to the professional consideration on the basis of which the law-maker decided that it was necessary to lower the age limit for exemption from kindergarten education. In this context, the Constitutional Court also points out that the exclusion of the possibility of exemption from the last year of kindergarten education has already been an unprecedented exception in the Hungarian education system: section 45 (5) of the ANPE allows for the authorisation of individual work schedules throughout the entire period of primary school education, thus granting exemption from regular attendance at institutions, in view of the pupil's individual circumstances and special situation.

[98] The Constitutional Court points out that a decision under section 8 (2) of the ANPE to exempt a child from school attendance is always a decision taken in the child's legitimate interests, in consultation with the head of the kindergarten or the district nurse, and is based solely on professional criteria (the child's individual interests, abilities and circumstances), and the authorities must base their decision on the presumption that the exemption requested by the parent is in the best interests of the child, in accordance with Article XVI (1) of the Fundamental Law. Accordingly, the lowering of the age limit for the granting of an exemption excluded from the possibility of exemption concerning kindergarten education precisely those children and their

parents in the case of whom exemption was justified by the child's circumstances and abilities.

[99] The Minister of State for Public Education of the Ministry of Human Capacities explained in response to the Constitutional Court's request: "parental rights are not unlimited, they are restricted by the right of children to healthy development [...]. The right of parents to choose their child's upbringing is therefore not equal to a right not to allow the child to participate in institutional education at all." The Secretary of State himself also refers to the CCDec, according to which Article XVI of the Fundamental Law "requires the State, in the context of all branches of law, to take into account the interests of the child in the regulation of certain legal institutions, to promote through its activities their proper development and to ensure the necessary basic conditions for this." (Reasoning [27]). The Secretary of State also referred to the Government Decree 363/2012 (XII.17.) on the National Basic Programme of Kindergarten Education (hereinafter: Government Decree), which states as a basic principle that the education of children is primarily the right and duty of the family, and kindergartens play a complementary, sometimes disadvantage-reducing role in this.

[100] The proportionality of the new legislation in relation to the contested provision can no longer be justified on the above grounds, since the exemption can be requested only between the ages of three and four. The contested provision therefore does not support a family model in which the child's upbringing is considered to be the primary concern and one parent chooses to take care of the child, even as a life-calling. Whilst it is undoubtedly true that, for a significant proportion of the children concerned, it is of paramount importance from a social point of view to start early with kindergarten education, firstly in order to identify any problems early and secondly to help disadvantaged children to catch up, the legislature must also provide for the possibility, in exceptional cases where the best interests of the child and the family, duly assessed, so require, of the child being educated in a family until the last year of kindergarten education. In such cases, this minimum period of time spent in the community, after an appropriate family education, should also adequately prepare the child for school life. However, by excluding the possibility of exemption in connection with the kindergarten education of children over the age of four in a discretionary manner, the law-maker has, on the one hand, disregarded the individual circumstances and characteristics of each child, and, on the other hand, formulated a general provision that is not only not derivable from the Fundamental Law, but is also explicitly contrary to Article XVI (2) of the Fundamental Law, namely that for all children (irrespective of their individual abilities and personal and family circumstances) only kindergarten education can serve the best interests of the child as early as from the age of four.

[101] The Constitutional Court emphasises that the previously applicable section 8 (2) of the ANPE did not grant parents the right to exempt their children from compulsory

kindergarten education in all cases until the age of five, but only granted the right to initiate the exemption of a child from compulsory kindergarten education, and that the exemption was granted only in cases where the head of the kindergarten or the district nurse, in agreement with the parent, considered it professionally justified in view of the child's particular circumstances and abilities. This also means that the lowering of the age limit for the possibility of exemption has in fact adversely affected those children and their parents who, in the opinion of professionals who are familiar with the child and the child's specific circumstances, would benefit from exemption from kindergarten education, since in the past other children had the same obligation of attending the kindergarten.

[102] The law-maker, however, has not justified in any way that if upbringing the child is primarily the right and duty of the family, and kindergartens only play a supplementary, sometimes disadvantage-reducing role (see the National Basic Programme of Kindergarten Education, which the Secretary of State also explicitly referred to), in certain cases, it may be of particular benefit to the child to be exempted from compulsory kindergarten education, why does the law-maker exclude children and their parents, who are primarily responsible for their upbringing, from initiating the possibility of exempting the child from compulsory kindergarten education, which in a particular case may be of benefit to the child on professional grounds. This is particularly true since the CCDec itself expressly considered the previous legislation to be proportionate in view of the "wide possibility of exemption". (Reasoning [45]). Moreover, section 8 (2) of the ANPE not only restricted the possibility of exemption for the children concerned, but completely excluded it.

[103] The previously applicable provisions of the ANPE were also based on the main rule of kindergarten education and allowed for the possibility of exemption from kindergarten education as an exception to this rule. The abolition of this exception rule in respect of children who have reached the age of four but have not yet reached the age of five establishes the irrebuttable presumption that for all children, irrespective of their family circumstances, their particular situation and their individual abilities, only kindergarten education provides an appropriate education, an approach which is expressly contrary to the general values of the Fundamental Law and in particular to the provisions of Article XVI of the Fundamental Law, according to which the family (parents) has the primary duty to ensure the right of children to protection and care, with the state playing only a secondary, complementary role, with the exception of clearly defined objectives such as preparing children for school in the final year of kindergarten education. Restriction by the State on parents' right to upbringing in the context of kindergarten education can only be accepted if it is in accordance with the best interests of the child under Article XVI (1) of the Fundamental Law, on the one hand, and, on the other hand, is limited only to cases where it serves either an

overriding and materially important objective which must be pursued (such as the last year of attending kindergarten in preparation for primary school) or to correct a parent's decision concerning the child's education which is clearly not in the best interests of the child.

[104] In view of the above, the Constitutional Court concluded that the restriction of the right of parents to upbringing, which reduces the age of exemption from compulsory kindergarten education by one year, cannot be justified under Article I (3) of the Fundamental Law without, on the one hand, specifying the fundamental right or constitutional value whose protection is served by the provision and, on the other hand, ensuring the possibility of making a decision, in accordance with Article XVI (1) of the Fundamental Law, on the question of compulsory kindergarten attendance for children who have reached the age of four but have not yet reached the age of five, on the basis of the best interests of the child.. The restriction of a right guaranteed by the Fundamental Law in the absence of a fundamental right or constitutional value does not satisfy the requirements of Article I (3) of the Fundamental Law and is therefore contrary to it.

[105] 2.3 In the light of the above, the Constitutional Court finds that the phrase "until 31 August of the year in which the child reaches the age of four" in section 8 (2) of the ANPE is contrary to the Fundamental Law, and therefore annulled it with effect from 30 June 2021, as stated in the holdings of the decision. The Constitutional Court emphasises that no legislative obligation can be directly derived from the Fundamental Law on the basis of which participation in kindergarten education should be made compulsory in the last year of kindergarten education (for children over the age of five) without the possibility of granting an exemption, and accordingly, section 8 (2) of the ANPE is in conformity with the Fundamental Law after the annulment of the phrase "until 31 August of the year in which the child reaches the age of four". At the same time, however, the Constitutional Court also held in the CCDec that the previously applicable section 8 (2) of the ANPE was not contrary to the Fundamental Law either, because the law-maker had made participation in the last year of kindergarten education compulsory for all children in such a way that at the same time it had provided for the possibility of a broad exemption for the preceding period of kindergarten education.

[106] The Constitutional Court also emphasises that the annulment of the wording "until 31 August of the year in which the child reaches the age of four" in section 8 (2) of the ANPE means that the main rule of the obligation to attend kindergarten continues to apply, and thus the annulment under the holdings of the decision only affects the scope of exceptions to the main rule and does not change the general obligation to attend kindergarten. With regard to the *pro futuro* annulment, the Constitutional Court gives the law-maker sufficient time to consider whether, in

addition to the main rule of compulsory kindergarten education, it wishes to exclude the possibility of exemption from compulsory kindergarten education in the last year of kindergarten education, essentially in accordance with the previously applicable legislation, or whether it wishes to allow for individual exemptions throughout the entire period of kindergarten education in exceptional cases where the family circumstances and the particular situation of the child justify it, in line with the provisions of section 8 (2) of the ANPE remaining in force. It is for the law-maker (and not for the Constitutional Court) to choose between these two solutions, which are both in accordance with the Fundamental Law, but granting an exemption from kindergarten education will remain (based on the Fundamental Law and in accordance with the provisions of the ANPE remaining in force) a possibility applicable only with regard to the child's state of health, family circumstances, abilities, special situation, i.e. the best interests of the child, such as the existence of a health or developmental problem, or, in the case of a child moving home from abroad, the lack of adequate knowledge of the Hungarian language. In cases where the parent does not request exemption from kindergarten education, the general rule of compulsory kindergarten education is fully applied in accordance with the legislation in force.

[107] 3 The Constitutional Court then examined the petitioners' argument that the requirement of sufficient preparation time had been infringed. In Part IV of the present decision (Reasoning [59] et seq.), the Constitutional Court, on the basis of the principles set out in Article B (1) of the Fundamental Law, finds that the Amending Act was promulgated on 18 July 2019 and the provisions at issue entered into force on 1 January 2020. Taking into account that the framework of the amended procedure was laid down in the Amending Act more than 5 months before its application and that the detailed rules for its application were also adopted before 1 January 2020, neither the lack of preparation time nor its blatant brevity can be established. All this means that the provisions at issue are not, for the reasons set out in the petition, manifestly contrary to the requirement of a period of preparation under Article B (1) of the Fundamental Law.

[108] 4 The Constitutional Court then examined the relevant part of the petition concerning the element relating to the authorisation of the exemption procedure, which concerns the administrative procedure. According to the petitioners, the legislation infringes both Article XVI and Article XXVIII (1), as follows. The new legislation restricts the possibility of submitting an application (ignoring the case where circumstances arise after the start of kindergarten attendance which would justify an exemption) and also restricts the procedure for taking evidence by stipulating that only the head of the kindergarten or the district nurse may be appointed as an expert. The petition underlines that the expert opinion needs to be given on a child who is not yet attending kindergarten, thus the head of the kindergarten cannot have any knowledge

of the child, while neither family protection nor child protection staff, nor, for example, the general practitioner, can be appointed as experts.

[109] The reply of the Secretary of State only responds to a single element of the petitioners' argument: if with regard to a child who has entered into a legal relationship with the kindergarten a reason has arisen that prevents or makes it impossible for him/her to attend the kindergarten, then proof of absence from the kindergarten may be provided in accordance with the provisions of the Decree No. 20/2012 (VIII.31.) of the Ministry of Human Capacities on the operation of education institutions and using the names of public education institutions (hereinafter: "MHC Decree").

[110] 4.1 Pursuant to section 5 (1) (a) of the MHC Decree, the rules on the justification of absence, missing or tardiness of children, pupils shall be regulated in the house rules of the education institution. Accordingly, the Constitutional Court finds that, although the provision of the ANPE limits the possibility of submitting a parental request in time, the MHC Decree does, however, in fact provide for the possibility of temporarily excluding a child from kindergarten education, in accordance with the reply of the Secretary of State, if circumstances arise subsequently which might otherwise justify the child's exemption from kindergarten education. However, in accordance with the principle of the binding nature of the petition, the Constitutional Court, in the context of the present proceedings, has only examined the provisions of the ANPE (and not other legislation such as the MHC Decree). Accordingly, the Constitutional Court finds that, in view of the institution of the ex post justification applicable in the case of non-attendance at kindergarten, the element in section 8 (2) of the ANPE, according to which the parent may submit his/her request for exemption until 25 May of the year in question, is not in itself contrary to the Fundamental Law.

[111] 4.2 The Constitutional Court also had to examine whether the rules on the scope of experts and the prohibition on judicial review of the decision of the body granting the exemption restrict the right to a fair procedure before a public authority under Article XXIV (1) of the Fundamental Law, the right to effective judicial protection under Article XXVIII (1) of the Fundamental Law and whether they also infringe the rights of parents and children under Article XVI of the Fundamental Law.

[112] 4.2.1. The element of the petition concerning the scope of experts relates to the issue of the fixed system of evidence. According to the established case-law of the Constitutional Court, "the law-maker has a wide margin of appreciation in the design of the system of proof, which must ultimately, in its entirety, comply with the requirement of the Fundamental Law concerning fair procedure. Not only the legislation on evidence but also its actual application must be consistent with the right to a fair trial. Since the Fundamental Law does not contain any provision which, in cases of uncertainty, would oblige the authorities and courts to carry out acts in accordance

with the procedural principle of free evidence, the rules governing the procedure in question always determine the evidentiary acts that may be carried out and the evidence that may be admitted." {Decision 3174/2014. (VI. 18.) AB, Reasoning [14]} The Constitutional Court has also previously established that the law-maker enjoys a large degree of freedom in the design of the system of evidence, the specific rules of taking evidence {Ruling 3104/2014. (IV.11.) AB, Reasoning [17]}. The system of evidence established by the law-maker becomes contrary to Article XXVIII (1) of the Fundamental Law if it infringes the principle of effective judicial protection as a partial element of the fundamental right to a fair judicial procedure {Decision 5/2020. (I. 29.) AB, Reasoning [51]}

[113] Pursuant to section 62 (1) of the Act CL of 2016 on General Administrative Procedure (hereinafter: AGAP), if the available data are insufficient for adopting a decision by the body granting the exemption, the authority shall conduct a procedure of taking evidence. This also means that the body granting the exemption must make its decision by assessing the annex and the statement submitted by the parent together with the application, and may take evidence (appoint an expert) if the information submitted by the parent is not sufficient to make a well-founded decision (to assess the application). Therefore, if the body granting the exemption considers that the request for exemption cannot be assessed in the summary procedure pursuant to section 41 (1) of the AGAP, the authority is obliged to appoint the head of the kindergarten or the district nurse as an expert in the context of its duty to clarify the facts, as the granting of an exemption from kindergarten education is a specialised matter requiring specific knowledge in each case.

[114] The Constitutional Court also notes that, contrary to the petitioners' assertion, the exemption procedure may also be used to exempt a child who has already attended kindergarten education, and that in such cases the head of the kindergarten may therefore be able to assess whether the exemption from kindergarten education may be justified on the basis of the child's individual circumstances. In the case of a child who has not previously attended kindergarten education, the appointment of the head of the kindergarten as an expert is not required by section 8 (2) of the ANPE either, in such cases the body granting the exemption must appoint the district nurse, also referred to in section 8 (2) of the ANPE, as an expert. Accordingly, as a conclusion, either the head of the kindergarten or the district nurse (or both, as the case may be) can take a position on the question of whether an exemption should be granted on the basis of their personal knowledge of the child. In view of all these considerations, it is not contrary to the Fundamental Law to limit the method of taking evidence in the phrase used in section 8 (2) of the ANPE by stating that "if an expert is to be heard in the proceedings, only the head of the kindergarten or the district nurse may be appointed".

[115] 4.2.2. The Constitutional Court then examined the element of section 8 (2) of the ANPE, according to which, upon the request of a parent, the body designated by Government decree and granting the exemption may exempt a child from attending kindergarten if the family circumstances or the particular situation of the child justify this. The Constitutional Court reiterates that, under Article XVI of the Fundamental Law, the right of the child to protection and care is a special fundamental right, the primary duty of which lies with the family (the parent) and the secondary duty (complementary and, in certain cases, substitute) lies with the State {Decision 14/2014. (V.13.) AB, Reasoning [33]}. The National Basic Programme for Kindergarten Education also states that the education of children is primarily the right and duty of the family, and that kindergartens only play a complementary, sometimes disadvantage-mitigating role. This also means that, with the exception of the last year of kindergarten education (which, as the reasoning of the Amending Act also states, "prepares the child for school education"), the State may only impose compulsory attendance at kindergarten against the will of the parents if it can be demonstrated that it is in the child's best interests, having regard to the child's family circumstances and particular situation, to attend kindergarten, because only in this way can the child's adequate preparation for school education be ensured.

[116] Section 46 (3) of the ACC authorises the Constitutional Court to specify in a decision, in the procedure carried out in the course of exercising its competences, the constitutional requirements – that result from the Fundamental Law and enforce the provisions of the Fundamental Law – the application of the reviewed law has to comply with. In the event that the legal provision under review has (one or more) interpretations that are in line with the Fundamental Law, the Constitutional Court, based on the principle of saving the law in force, should not annul the challenged provision of the law, however, it should ensure, in accordance with section 46 (3) of the ACC, that the application of the norm leads in all cases to a result which is in conformity with the Fundamental Law.

[117] The grammatical interpretation of section 8 (2) does not in itself require that the decision as to the participation of the child in kindergarten education (except for the last year of kindergarten education) is primarily the possibility and responsibility of the parents, which the State may limit only in that case, if the parents' decision is contrary to the best interests of the child, but could also be interpreted, in a particular case, as meaning that the body granting the exemption, once the parents have submitted their request, enjoys complete freedom to decide whether to grant the exemption, the role of the parents being limited to the right to initiate proceedings. The Constitutional Court, however, refers back to its findings in Part V of the present decision (Reasoning [64] et seq.), according to which the primacy of the parents' right to upbringing and the parents' decision to exercise that right cannot be called into question under Article

XVI(2) of the Fundamental Law, as long as it is in accordance with the best interests of the child, which are constitutionally protected under Article XVI (1) of the Fundamental Law. Accordingly, the State's role in granting an exemption is not to take over the parent's right to decide, but to correct the parent's decision, if necessary, in the best interests of the child in cases where the parent's decision regarding the child's upbringing would lead to an outcome contrary to the best interests of the child.

[118] This also means that if the parent primarily responsible for the child's upbringing submits an application for exemption from kindergarten education in accordance with the law, and, if applicable, submits additional documentation in addition to his or her own statement, concerning the child's abilities, family circumstances and special situation, the body granting the exemption cannot disregard either the parent's statement or any annexes, but must primarily assess the application on the basis of these. Accordingly, an expert may be appointed if the parent's statement and any supporting documentation are for some reason insufficient to enable a well-founded decision to be taken (to assess the application) and the request for an exemption, duly submitted, may be rejected by the authority granting the exemption, acting on behalf of the State with ultimate responsibility for the child's upbringing, if it can be clearly established that, contrary to the wishes of the parent with primary responsibility for the child's upbringing, it is in fact in the best interests of the child to refuse the application, the assessment of which issue is a matter of expertise, rather than a question of law. The State's task in granting an exemption from attending kindergarten education cannot be to replace the parent and decide exclusively in the best interests of the child in matters of education in which the Fundamental Law itself grants the parent freedom of choice. In accordance with Article XVI (1) and (2) of the Fundamental Law, it follows from the State's duty to protect institutions that the State must ensure that the will of the parent in relation to the child's participation in kindergarten education cannot lead to a result contrary to the child's best interests.

[119] The Constitutional Court therefore finds that it is a constitutional requirement stemming from Article XVI (1) and (2) of the Fundamental Law that, when considering an application submitted in accordance with the law pursuant to section 8 (2) of the ANPE, the parent's statement and, where applicable, the documentation submitted by the parent as an annex to the application may not be disregarded; the body granting the exemption may reject the application if it can be established that, contrary to the wishes of the parent primarily responsible for the child's upbringing, it is in fact in the child's best interests to reject the application and to ensure the child's compulsory participation in kindergarten education. By imposing this constitutional requirement, it can be ensured that the contested provision does not, for the reasons set out in the petition, in any event lead to a result in conflict with the rights of the child under Article XVI (1) and the rights of the parent under Article XVI (2) of the Fundamental Law, since

the body granting the exemption must state in a reasoned decision, based on a consideration of the best interests of the child as a matter of expertise, why, in a particular case, it refuses the request for exemption, taking into account the best interests of the child and despite the express request of the parents who are primarily responsible for the child's upbringing.

[120] In the light of all these considerations, in particular the constitutional requirement and the principle of the saving the law in force, the Constitutional Court found this element of the petition to be unfounded.

VII

[121] The petitioners sought the annulment of section 45 (2) of the ANPE on the commencement of compulsory schooling on the grounds of the infringement of the requirement of due preparation time, the right of the child to adequate development, the right of parents to upbringing and the right to a fair procedure.

[122] 1 In examining this element of the petition, the Constitutional Court first examined the relevant legislative context.

[123] Under the legislation in force prior to 1 January 2020, a child became subject to compulsory schooling in the year in which he or she reaches the age of six by 31 August 2020, and at the latest in the following year. A child who was recommended by the expert committee was educated in kindergarten for an additional year and only became compulsory thereafter. According to the former section 45 (4) of the ANPE, the decision on compulsory school attendance was taken (a) by the head of the kindergarten, (b) by the expert committee on the basis of a school readiness assessment if the child did not attend kindergarten, or (c) by the expert committee on the basis of a school readiness assessment, on the initiative of the kindergarten, the head of the school or the parent. This meant that, under the previous system, if there was a difference of opinion between the parent and the head of the kindergarten as to whether the child was ready for school, an expert committee was always called in, i.e. the expert committee was in fact responsible for deciding whether the parent had correctly judged that the child was not yet ready for school. In addition, since the school readiness procedure was not a formalised administrative procedure, the head of the kindergarten could, in full respect of the best interests of the child, indicate directly to the parent if he or she considered that the child was not yet ready for school. This also meant that the parent always received the professional support of the kindergarten institution with which the child was familiar to exercise his or her right under Article XVI (2) of the Fundamental Law, taking into account the best interests of the child.

[124] The provision of the ANPE effective from 1 January 2020 has changed the above regulation in several elements. On the one hand, in the year in which the child reaches the age of six by 31 August, he or she automatically becomes fit for schooling, unless the parent applies to the body granting the exemption (the Education Office) between 1 January and 15 January to allow the child attend kindergarten for an additional year of education. On the other hand, the question of the authorisation of the exemption has become an administrative authority procedure to be carried out upon request under the AGAP, in which the kindergarten is no longer directly involved. It is also worth mentioning that, under the provisions previously in force, the parent could initiate the school readiness examination separately, so that, if the parents wished, they could rely on the opinion of state experts, with the involvement of the educational consultant, to determine school readiness before the actual enrolment date. However, these legal possibilities were removed by the law-maker without justification at the same time as the new legislation was introduced.

[125] According to the statement of the Ministry, the legislative objective justifying the change in the state body responsible for the registration of children of kindergarten age and school age was to ensure that all children and all pupils of school age received the development they needed in good time.

[126] According to the reply of the Secretary of State, the law-maker also aimed to ensure that children start their education in a school-ready state. It provides that the amendment to the MHC Decree states, as a guarantee, that the start of compulsory schooling is conditional on the child's intellectual, psychological, social and physical development reaching the level required for entry to school (section 21).

[127] 2 The Constitutional Court first examined the element of the petition relating to the violation of Article XVI (1) of the Fundamental Law in connection with section 45 (2) of the ANPE. In this context, the Constitutional Court first of all refers to its summary findings in Part V of this decision (Reasoning [64] et seq.) concerning the Fundamental Law and the case-law of the Constitutional Court, which it also considers to be relevant for the examination of section 45 (2) of the ANPE.

[128] According to Article XVI (3) of the Fundamental Law, "parents shall be obliged to take care of their minor children.

This obligation shall include the provision of schooling for their children." Section 45 (2) of the ANPE determines the age from which parents are obliged to provide schooling to their children, on the basis of Article XVI (3) of the Fundamental Law. The first turn of section 45 (2) of the ANPE defines the beginning of the legal institution of compulsory school attendance, as also referred to in the Fundamental Law, when it states that "a child shall become subject to compulsory school attendance in the year

in which he or she reaches the age of six by 31 August. Compulsory school attendance shall begin on the first school day of the school year."

[129] Given that the education year traditionally starts uniformly at the beginning of September throughout the country, the definition of compulsory school attendance on the basis of age necessarily implies that there may be a significant difference of up to 364 days between children who become of compulsory school age on the basis of their date of birth, which is reflected in their development ("school readiness"), and that the actual developmental difference may be even more significant for premature children. For this reason, the ANPE itself allows for the possibility of an additional year of kindergarten education as an exemption from the main rule of compulsory schooling.

[130] The purpose of the exemption from the start of compulsory schooling is therefore precisely to ensure that the child starts primary school in the education year in which he or she reaches the age and maturity required for that purpose. Therefore, the granting of the possibility of exemption for one education year is not in itself a preferential rule, but a compensatory provision to remedy the inequalities arising from the nationally uniform starting date of the education year and the different birth dates of children, and its legitimacy is therefore unquestionable.

[131] Under Article XVI (2) of the Fundamental Law, parents have the primary right and duty to determine whether their child is fit to start primary school and therefore can start his or her primary school studies. However, parents may only exercise this right in accordance with Article XVI (1) of the Fundamental Law and in the best interests of the child. The underlying responsibility of the State means that, in cases where a parent does not, for whatever reason, considers his or her child to be ready for school, the institutional system set up by the State must be able to correct the parent's decision in justified cases, including but not limited to those cases, where a parent considers that his or her child is not ready for school despite his or her age, but also in cases where the parent is convinced of his or her child's readiness for school but wrongly assesses the best interests of the child (or even fails to make a declaration on the issue of school readiness for any reason).

[132] 3 In the above context, the Constitutional Court reiterates that the fundamental right to protection and care of children has a special structure and is multipolar: the child is the beneficiary, while the primary duty-bearer is the family (the parents), and the secondary duty-bearer is the State, in a complementary and in certain cases a substitute role. {Decision 14/2014. (V.13.) AB, Reasoning [33]}. Article XVI of the Fundamental Law therefore imposes obligations on the State to ensure the proper development of the child, but the primary responsibility lies with the parent. This provision of the Fundamental Law is also in line with Article 26 (3) of the Universal Declaration of Human Rights, which states that parents have a right of priority in the

choice of education to be given to their children. The division of responsibilities between parents and the State is also made clear by Article 5 of the Convention on the Rights of the Child, which states that States Parties to the Convention shall respect the responsibility, right and duty of parents to provide direction and guidance in the exercise by the child of the rights recognized in the Convention, in a manner consistent with the evolving capacities of the child. It is therefore essentially the responsibility (right and duty) of the parents to prevent circumstances that put the child at risk, and the State must play an active role, "casting a safety net" where individual families are unable or unwilling to provide certain care.

[133] The obligations of parents and the State in relation to children thus have in common that their absolute limit is the unconditional enforcement of the child's right to protection and care, which in the case of the State applies equally to the taking of individual decisions concerning each child and to the creation of a legislative environment for the upbringing and education of children.

[134] The Constitutional Court has already examined the constitutionality of the rules on the determination of compulsory schooling in the CCDec, following a petition by the Ombudsman, and has held that the right of the child to begin his or her schooling when he or she has reached school age is a right directly deriving from Article XVI (1). It stated that "the condition for becoming subject to compulsory schooling is that the child must have reached the level of development necessary for entry to school, that is to say, that he or she must be able to meet the requirements of school. This means not only biological, but also psychological maturity, the most important component of which is social maturity: the child's sense of task, work maturity, imprinting and memorisation based on voluntary discipline. [...] This is determined by a qualified kindergarten teacher who has regular contact with the child or, in the absence of a qualified kindergarten teacher, by a team of teachers and psychologists who carry out a school readiness assessment." (CCDec, Reasoning [47])

[135] To sum up, in the context of school readiness, the child has the constitutional right under Article XVI (1) of the Fundamental Law to begin his or her schooling after becoming school-ready. According to the CCDec, it is primarily the right of the parent to determine school readiness as a matter of professional competence. However, it is part of the child's right to protection and care that, should the parent be mistaken as to whether the child is ready for school, the parent's declaration of school readiness should be reconsidered by professionals who know the child individually and directly, in the child's best interests, when the child's individual development is being assessed.

[136] 4 The question of school readiness is therefore (as the CCDec has also stated) an individual question, sometimes requiring professional discretion, and not an age-related, automatic ability. The objective criteria for its determination are laid down in

point VI of the Government Decree in accordance with Article XVI of the Fundamental Law. That provision sets out a long list of minimum physical requirements as well as psychological and social skills which, when met, determine a child's school readiness. This date varies from one child to another because of their different pace of development. When assessing a child's readiness for school, the following aspects should be evaluated (but not exhaustively): whether the child is starting to change teeth; whether his/her movements are more coordinated and harmonious; whether he/she can control his/her movements, behaviour and physical needs with intention; whether his/her spatial perception is developed; whether the intentional attention that is the basis of learning is emerging and whether the content and scope of attention is gradually increasing; emergent conceptual thinking; communicates clearly and continuously; pronounces vowels and consonants clearly; has rudimentary knowledge of self and environment; can adapt to rules. These conditions are on the one hand ones that a parent who knows his or her child well is likely to be able to judge and on the other hand they cannot be judged without knowing the child personally. In response to the request from the Constitutional Court, the Secretary of State for Public Education stressed that, in his view, no child is forced to attend school if he or she does not reach the necessary level of development. According to the reply, section 21 of the MHC Decree states, as a guarantee, that the condition for starting compulsory education is that the child's intellectual, psychological, social and physical development reaches the level necessary for school entry.

[137] Section 45 (2) of the ANPE contains sufficient guarantees, enforceable and executable in court proceedings, in cases where the parent submits the application to the body granting the exemption within the time limit, in order to ensure that a decision is made in accordance with Article XVI (1) of the Fundamental Law, in line with the reply of the Secretary of State and the MHC Decree, on the issue of school readiness and thus on the issue of the child's commencement of primary school education, in the best interests of the child. The legislation allows the parent to attach to the application any documentation he/she deems relevant, in particular an opinion from the kindergarten or medical documentation, which must be fully assessed by the authority granting the exemption in accordance with the provisions of the AGAP and the results of which must be reported to the authority in a reasoned decision (including in cases where an element of the documentation is not considered relevant for the assessment of the child's school readiness). The legislation also provides that in justified cases where the documentation provided by the parent is not sufficient to allow the application to be considered under the ad hoc procedure, the authority granting the exemption may appoint a panel of experts. Finally, section 45 (6b) to (6f) of the ANPE also provides that if the body granting the exemption fails to fulfil the above obligations, the parent may challenge the decision in an administrative court. In the light of all these aspects, the amended regulation as a whole adequately ensures the

best interests of the child in accordance with Article XVI (1) of the Fundamental Law in cases where the parent initiates the proceedings of the body granting the exemption in accordance with Article 45 (2) of the ANPE. Therefore, the Constitutional Court concluded that section 45 (2) of the ANPE does not violate Article XVI or Article XXVIII (1) of the Fundamental Law for the reason alleged by the petitioners.

[138] 5 However, the Constitutional Court also observed that the procedure under section 45 (2) of the ANPE and the guarantee system relating to it can only be applied in cases where the parent submits an application to the body granting the exemption by 15 January of the year of the start of school and the application is suitable for taking a decision on the merits. In cases where a parent fails to submit a request in due time for any reason (either because of failure to meet the deadline, because the request is seriously incomplete and cannot be assessed, or because he or she wrongly assesses the child's school readiness), the child shall automatically start primary school, purely on the basis of age. In this context, the Constitutional Court also points out that the mere filling in and submission of the application (the form made available on the website of the Education Office as the body granting the exemption) may pose a fundamental difficulty for parents who do not have access to a computer, internet access and printing or client gate facilities. In this context, the Constitutional Court cannot also ignore the fact that the law-maker also repealed the provisions of the MHC Decree which established the right of parents (and the kindergarten) to apply directly to the expert committee for a school readiness assessment and thus to decide, in the light of the expert committee's opinion, whether to initiate proceedings before the body which authorises the exemption.

[139] The Constitutional Court recalls that the State also has an obligation to protect institutions for the purpose of asserting the best interests of the child in the context of Article XVI (1) of the Fundamental Law, which is only secondary to the primary obligation of the parent (as stated in Part V of this Decision (Reasoning [64] et seq.). However, the need to enforce this secondary obligation is increased precisely in cases where the parent fails to exercise his or her parental obligations or does not exercise them in the best interests of the child.

[140] According to the reasoning of the Amending Act, the relevant provision of the ANPE was amended because “the child's interest is served by allowing him or her, following appropriate preparation in kindergarten, to start his or her schooling as soon as possible and have a better chance of acquiring the knowledge, skills and competences expected by the end of each educational stage. The new legislation provides for the postponement of the start of schooling by up to one year at the request of parents in justified cases and gives the right to decide on this to a public authority.” However, contrary to the reasoning of the Amending Act, the best interests of the child are not served by the earliest possible start of primary schooling, even in

cases where the parent does not, or does not properly, exercise his or her obligations under Article XVI (2) of the Fundamental Law. On the contrary, it is precisely in these cases that it is particularly important for the state institutional system to ensure that the best interests of the child are safeguarded in accordance with Article XVI (1) of the Fundamental Law, and that the child is only allowed to start primary school if he or she is really deemed to be ready for school.

[141] By laying down the general rule that "a child shall become subject to compulsory school attendance in the year in which he or she reaches the age of six by 31 August", section 45 (2) of the ANPE reclassified the question of school maturity from a question of expertise to a question of fact linked to the child's date of birth in all cases where the parent does not duly submit (or fails to submit at all) the request for exemption to the body granting the exemption between 1 January and 15 January. However, under Article XVI (1) of the Fundamental Law, children are not obliged to start primary school education at the age of six, but on the contrary, they have the right to start school when they are deemed ready for school. This assessment is no longer provided for in the amended legislation (as opposed to the previous provisions of the ANPE).

[142] Section 45 (4) of the ANPE in force prior to 1 January 2020 contained sufficient guarantees that the State would, if necessary, correct the parent's decision, taking into account the best interests of the child, even if the parent had not declared his or her intention to postpone the start of compulsory schooling for any reason. According to the provision of the law, the decision on compulsory school attendance was taken (a) by the head of the kindergarten, (b) by the expert committee on the basis of a school readiness assessment if the child did not attend kindergarten, or (c) by the expert committee on the basis of a school readiness assessment, on the initiative of the kindergarten, the head of the school or the parent. This also meant that the provisions of the ANPE in force prior to 1 January 2020 clearly ensured that only children who had reached the age of compulsory schooling and were considered ready for school could start primary school, by allowing the heads of the 2,915 kindergartens listed in the Education Office's register to judge whether a child was ready for school or not on the basis of their personal knowledge and abilities of the child. However, the provisions of the ANPE in force at the time of the examination of the petition only contain such a guarantee, comparable to the role of the kindergarten, in cases where the parent initiates the procedure of the body granting the exemption in accordance with section 45 (2) of the ANPE within the time limit.

[143] However, under Article XVI (1) of the Fundamental Law, the State is also obliged to ensure the correction of inappropriate parental decisions in the case of children where the parent (due to a wrong assessment of the child's school readiness or due to the failure to meet the deadline) does not initiate the proceedings of the body granting the exemption, although the best interests of the child under Article XVI (1) of the

Fundamental Law would be served by postponing the start of primary school attendance in the given case.

[144] As the Constitutional Court has repeatedly pointed out, the State has an underlying responsibility to ensure, by establishing an appropriate procedure, that in all cases it is possible for the State institutions to ensure that, where a parent takes a decision contrary to the best interests of the child (or, where appropriate, fails to take the necessary decision), the best interests of the child are taken into account, which is particularly true in the case of school readiness and the commencement of primary school education. However, by introducing the provisions of section 45 (2) of the ANPE, in force as of 1 January 2020, the assessment of the child's school readiness is only allowed in cases where the parent initiates it, the kindergartens that know the child directly and personally are not involved in the procedure at all, and the parent may only request the opinion of the specialised educational service on the child's school readiness if the subject of the assessment is the child's special educational needs. Therefore, the current legislation is no longer able to fulfil this fundamental obligation of the State to protect institutions when the parent does not initiate the procedure of the body that grants the exemption.

[145] Based on section 46 (1) of the ACC, "if the Constitutional Court, in its proceedings conducted in the exercise of its competences, establishes an omission on the part of the legislator that results in violating the Fundamental Law, it shall call upon the organ that committed the omission to perform its task and set a time-limit for that". Pursuant to section 46 (2) (c) of the ACC, it is considered a failure to fulfil the legislative task if the essential content of the legal regulation derivable from the Fundamental Law is incomplete.

[146] Therefore, while the rules under section 45 (2) of the ANPE governing the initiation of the proceedings of the body authorising the exemption and the proceedings are not contrary to the Fundamental Law in cases where the parent submits his or her application to the body authorising the exemption in due time and in a form and content suitable for consideration, the rules do not provide any institutional guarantee for the best interests of children whose parents do not initiate the proceedings of the body authorising the exemption for whatever reason, irrespective of whether or not those children are otherwise ready to attend school.

For this reason, the Constitutional Court, acting *ex officio*, established that there is a conflict with the Fundamental Law caused by the failure to fulfil the obligation to protect institutions in the form of the law-maker not creating guarantees for making possible that, on the basis of the kindergarten's proposal, or in any other suitable manner, starting the child's schooling could be postponed by one education year on the basis of a school aptitude test of a child who is obviously not ready for school, even

if the parent fails to submit the appropriate application under section 45 (2) of the ANPE, or submits the application inappropriately. Therefore, the Constitutional Court calls on the Parliament to comply with its legislative duty by 30 June 2021.

[148] 6 Finally, the Constitutional Court examined the petitioners' argument that the requirement of sufficient preparation time had been infringed. The Constitutional Court here also refers back to its findings made in Part IV of this decision (Reasoning [59] et seq.) in relation to Article B (1) of the Fundamental Law, in the light of which it concludes that the promulgation of the Amending Act took place on 18 July 2019 and that the provisions at issue entered into force on 1 January 2020 (more than 5 months later), which also means that in the present case neither the lack of a preparation period nor its blatant brevity can be established in relation to the contested provision of the Amending Act. All this means that the provisions at issue are not, for the reasons set out in the petition, contrary to the requirement of a period of preparation under Article B (1) of the Fundamental Law.

VIII

[149] The Constitutional Court, as the next step, examined the constitutionality of section 45 (6) and section 99/J of the ANPE introducing the individual work schedule. The petitioners sought the annulment of the said legislation on the grounds of the need for sufficient preparation time, the requirement of clarity of the norms, the right of the child to proper development, the right of parents to upbringing and the alleged violation of the right to a fair procedure.

[150] 1 The Constitutional Court first examined the legislative context of the contested provision.

[151] Pursuant to the previously applicable section 45 (5) of the ANPE, compulsory education could be performed as a private pupil at the request of the parent if it was not detrimental to the pupil's development, the successful continuation and completion of his/her studies. Section 45 (6) of the ANPE formerly in force provided that the school principal was entitled to decide on this matter after mandatory consultation of the guardianship authority and the child welfare service.

[152] The provisions of the ANPE in force from 1 September 2019 replaced the status of private pupil by the institution of individual work schedule for a fixed period of time for the purpose of performing compulsory schooling, if the pupil's individual ability and special situation justify it and it is beneficial for the pupil's development and the successful continuation and completion of his/her studies. According to section 45 (6) of the ANPE, now, instead of the school principal, the body granting the exemption

shall decide whether the pupil may perform his/her compulsory schooling within the framework of an individual work schedule. In the course of the procedure, the body granting the exemption may contact the guardianship authority, the child welfare service, the school principal or, in the case of a pupil in child protection, the child protection guardian.

[153] Section 10 of the Government Decree 196/2019 (VIII.1.) amending certain government decrees on public education, by amending the Government Decree 121/2013 (IV.26.) on the Education Office, designated the Education Office to perform the tasks related to the authorisation of individual work schedules from 1 September 2019.

[154] The reasoning of the Act states that "the Proposal abolishes the private pupil status and replaces it with an individual work schedule authorised by the authorising body. Accordingly, authorisation may be granted if it is justified by the pupil's individual ability and particular situation and is advantageous for the pupil's development and the successful continuation and completion of his or her studies."

[155] The statement of the Secretary of State stresses that, by comparing the new provisions of section 75 of the MHC Decree with the previous text of the norm, it can be established that the professional content of private pupil status and the individual work schedule is essentially the same (individual preparation, the duties of the parent, the possibility of attending classes, the non-evaluation of behaviour and diligence, etc.). The Secretary of State also states that the Education Office conducts the official procedure under the AGAP, in the context of which it is obliged to clarify the facts, to establish the relevant circumstances of the pupil and to decide which documents it will request as evidence.

It is also at the discretion of the authority to decide whether it considers it necessary to meet the pupil in person or to contact the child protection and guardianship authorities.

[156] 2 The Constitutional Court has already summarised its approach to Article XVI in Part V of the reasoning of the present decision (Reasoning [64] et seq.), which it considers to be also applicable to the present point, and recognizes that an amendment which significantly affects the lives of children and families can be considered to be in conformity with the Fundamental Law if it is in the best interests of the children concerned. Furthermore, it is a constitutional right of children under Article XVI (1) that, in addition to the general rules which are compulsory for all pupils, education should provide the possibility of focusing on the personal circumstances of the pupils in special life-situations or those who are developing at a different pace from the expected development, and, where appropriate, they should be allowed to learn

even outside the classroom for a limited period of time. In this case too, this right is guaranteed the parent, who has the right and the duty under Article XVI (2) to choose the upbringing best suited to his or her child. The individual work timetable, in terms of its professional content, provides adequate opportunities for this.

[157] The Constitutional Court emphasises that the best interests of children can be best served if decisions concerning their individual matters and their personal situation are taken by taking into account, first, the opinion of their parents and, second, the opinion of those who know them best and their individual needs (in this case, above all, the school principal).

[158] The contested provision transfers the decision-making on individual work schedule from the school principal to the Education Authority, converting it into a decision of an administrative authority. This necessarily means that the decision is taken physically away from the child, which also means that the decision-makers have much less insight into the child's needs and the Education Authority, which is empowered to make the decision, has no direct knowledge of the child or the circumstances of the educational institution. The Constitutional Court holds that the mere declaration of a case as a matter for the administrative authority cannot raise the question of an infringement of the Fundamental Law. Indeed, the procedures covered by the AGAP contain a system of additional safeguards to protect both the client and the parties to the procedure. Some of these guarantees derive from the AGAP (principles of legality, professionalism, efficiency, principles relating to the client, etc.), while others derive from the Fundamental Law itself (right to a remedy, principle of impartial, fair and reasonable administration within a reasonable time, etc.).

[159] The Constitutional Court considers, however, that the contested provision, according to its grammatical interpretation, may also be interpreted as not taking the fullest possible account of the fact that the parent, the teachers working with the child in the educational institution, and the school principal know the child best, since they are in direct contact with the child at all times during his or her schooling and are in a position to propose a decision which is appropriate for the child's future, taking into account all the circumstances affecting the child.

[160] In the Constitutional Court's view, the safeguards which underpin the decision of the public authorities can only be effective in the present case, that is to say, they can only provide a real additional guarantee for a pupil if the body granting the exemption itself takes the decision after considering all the circumstances of the case, taking into account the opinion of those who know the child and his or her individual situation (and not merely by formally assessing an application). The Constitutional Court stresses that the main objective in procedures concerning children is to take into account the individual, personal circumstances of the child as fully as possible, and that the

Education Office, as the body granting the exemption, is obliged by the Fundamental Law to take a decision in the best interests of the child. As a consequence of the State's duty to protect the institution {also set out in Part V of the reasoning of this decision (Reasoning [64] et seq.)}, the body granting the exemption is also under that duty if the parent does not exercise due diligence in submitting the application for authorisation of the individual work schedule and its annexes.

[161] As the Secretary of State pointed out in his reply to the request of the Constitutional Court, the authorising authority examines the existence of the conditions laid down in section 45 (5) of the ANPE, namely the pupil's individual characteristics, his or her particular situation and whether the granting of the exemption is advantageous for his or her development and the successful continuation and completion of his or her studies, of which the assessment of the application and its annexes is only one, but not the only, element.

[162] With regard to the assessment of the constitutionality of the legislation, the Constitutional Court refers back to its findings (made in relation to Article XVI of the Fundamental Law and the exemption from kindergarten education) in Parts V and VI of the reasoning of this decision (Reasoning [64] et seq., Reasoning [77] et seq.).

Considering that under Article XVI of the Fundamental Law, the right of the child to protection and care is a special fundamental right, the primary obliged party of which is the family (the parent), and only secondarily the State {Decision 14/2014 (V.13.) AB, Reasoning [33]}, the relevant provision of the ANPE can be interpreted also in this case as meaning that the body granting the exemption enjoys complete freedom in the matter of granting the exemption after the submission of the parent's application, and the parent's role is limited to the right to initiate the proceedings. The Constitutional Court, however, refers back to its findings made in Part V of the reasoning of the present decision (Reasoning [64] et seq.), according to which the primacy of the parents' right to upbringing and the parents' decision to exercise that right cannot be called into question under Article XVI (2) of the Fundamental Law, as long as it is in accordance with the best interests of the child. However, the State's duty to protect institutions requires that, in the context of the procedure, the body granting the exemption must also have regard to cases where the exercise of the parent's right under Article XVI (2) of the Fundamental Law would lead to an outcome contrary to the best interests of the child under Article XVI (1).

[163] This also means that if the parent primarily responsible for the child's upbringing submits an application for exemption in accordance with the law, and, if applicable, submits additional documentation in addition to his or her own statement, concerning the child's abilities, family circumstances and special situation, the body granting the exemption cannot disregard either the parent's statement or any annexes, but must

take its decision on the basis of these. In the event that the body granting the exemption does not have all the information necessary to assess the merits of the application on the basis of the application and its annexes, requests to be made pursuant to section 45 (6) of the ANPE (including, in particular, requesting school principal) may not be dispensed with.

[164] Therefore, the body granting the exemption may reject the parent's application for an individual work schedule if it can be justified that the child's overriding interest in the child's individual ability, special situation, development and the successful continuation and completion of his or her studies is – contrary to the parent's application – to continue his or her studies by attending school rather than by following an individual work schedule. If this cannot be ascertained from the application and its annexes submitted by the parent, the body granting the exemption must obtain the opinion of the bodies or institutions referred to in section 45 (6) of the ANPE before considering the application.

[165] The Constitutional Court therefore finds in this case too that it is a constitutional requirement stemming from Article XVI (1) and (2) of the Fundamental Law that, when considering an application submitted in accordance with the law pursuant to section 45 (5) of the ANPE, the parent's statement and, where applicable, the documentation submitted by the parent as an annex to the application may not be disregarded; the body granting the exemption may reject the application if it can be established that, contrary to the wishes of the parent primarily responsible for the child's upbringing, the child's best interests is in fact served by rejecting the application. By imposing this constitutional requirement, it can be ensured that the contested provision does not, for the reasons set out in the petition, in any event lead to a result in conflict with the rights of the child under Article XVI (1) and the rights of the parent under Article XVI (2) of the Fundamental Law, since the body granting the exemption must state in a reasoned decision, based on a consideration of the best interests of the child as a matter of expertise, why, in a particular case, it refuses the request for exemption, taking into account the best interests of the child and despite the express request of the parents who are primarily responsible for the child's upbringing.

[166] In the light of all these considerations, in particular the constitutional requirement and the principle of the saving the law in force, the Constitutional Court found this element of the petition to be unfounded.

[167] 3 The Constitutional Court then examined the petitioners' argument alleging a violation of the requirement of sufficient preparation time, in connection with which the Constitutional Court refers back to its findings in Part IV of the reasoning of the present decision (Reasoning [59] et seq.) in relation to Article B (1) of the Fundamental Law. The Amending Act was published on 18 July 2019 and the relevant provisions of

the ANPE entered into force on 1 September 2019. Prior to the entry into force, the implementing regulation related to the relevant provisions was also adopted [MHC Decree No. 20/2019 (VIII.30.) of the Minister of Human Capacities amending and repealing certain ministerial decrees on public education]. The relevant provisions of the ANPE are applicable as from 1 September 2019, while pursuant to section 99/J (a) of the ANPE, the amendment of the private pupil status of those pupils who enjoyed private pupil status on the day before 1 September 2019 to an individual work schedule shall be reviewed by the authority designated by the Government within one year of the entry into force. This means that neither the lack of preparation time nor its blatant brevity can be established neither for future applications for individual work arrangements nor for the provisions relating to private pupil status that have already been considered in the past. All this means at the same time that the provisions at issue are not, for the reasons set out in the petition, manifestly contrary to the requirement of a period of preparation under Article B (1) of the Fundamental Law, therefore the Constitutional Court rejected the petition in this element as well.

IX

[168] 1 The petitioners argued, in connection with both section 8 (2a) to (2c) of the ANPE and section 45 (6b) to (6f) of the ANPE, that since the court may not change the decision of the body granting the exemption, the delay in the proceedings leaves little chance of the proceedings being concluded by the start of the education year, and that the provisions at issue are therefore contrary to the Fundamental Law.

[169] 1.1 Pursuant to section 8 (2a) to (2c) of the ANPE, administrative proceedings against the decision of the body granting the exemption may be instituted within fifteen days of the notification of the decision. No hearing shall be held in the action if neither party has requested a hearing and the court does not consider it necessary. As a general rule, the case shall be heard by a single judge or, in cases of particular complexity, by a panel of three professional judges. The decision of the body which granted the exemption may not be reversed by the court. Formally, the petition challenges section 8 (2a) to (2c), but it only contains a reasoning concerning the violation of the Fundamental Law by section 8 (2a), and the Constitutional Court has therefore only examined the constitutionality of that provision.

[170] 1.2. Pursuant to section 45 (6b) to (6f) of the ANPE (in line with section 8 of the ANPE), an administrative action may be brought against the decision of the body granting the exemption within fifteen days of the notification of the decision. The court shall decide on the application within forty-five days of the date of its receipt by the

court, acting as a single judge as a rule (in the case of a particularly complex case, in a panel of three professional judges). In the procedure, a hearing may be dispensed with only if neither party has requested one and the court does not consider it necessary. However, in this case, the court may not reverse the decision of the body which granted the exemption.

[171] 2 Pursuant to both section 8 (2a) and section 45 (6b) of the ANPE, the court may, in the course of its review proceedings, in its competence of cassation, annul the decision of the body granting the exemption. The Constitutional Court has previously held that both cassation and reformation can be in line with the requirement of effective judicial protection as a partial element of the right to a fair trial under Article XXVIII (1) {similarly in the context of the right to judicial remedy: Decision 3297/2019. (XI.18.) AB, Reasoning [27]}. In this context, the Constitutional Court also refers to the fact that pursuant to section 97(4) of the Act I of 2017 on Administrative Court Procedure (hereinafter: AACP), not only the holdings of the court's decision, but also the reasoning of the decision is binding upon the authority in the repeated proceedings if the court annuls the administrative act. This also means that a rule which does not allow the court reviewing an administrative decision in a procedure to alter the decision, but allows a full review of the substance of the decision, is not in itself contrary to Article XXVIII (1) of the Fundamental Law.

[172] However, Article XVI of the Fundamental Law also provides for the protection of the best interests of the child, which must be fully respected in all administrative and judicial proceedings directly affecting children {concerning the relationship between Article XVI and Article XXVIII (1), see the Decision 3375/2018 (XII.5.) AB, in particular Reasoning [58]}. The Constitutional Court points out that a procedure repeated in accordance with the instructions of the court complies with the procedural requirements of Article XXVIII (1), but at the same time, the repetition of the procedure necessarily means that it is prolonged, not only because of the repeated procedure of the body that granted the exemption, but also because there is a place for a subsequent appeal against the decision taken, and the child is still obliged to attend the kindergarten until the final decision on the exemption is taken [in the case of a procedure under section 8 (2) of the ANPE], or to perform his/her compulsory schooling by attending the school [in the case of the procedure under section 45 (5) of the ANPE], and to start his/her compulsory schooling [under section 45 (2) of the ANPE], even though the child's interests would be served by a positive decision on the application in accordance with the parent's request, and the application cannot be finally decided for procedural reasons.

[173] In this context, the Constitutional Court also specifically emphasises that the submission of the application is possible until 25 May in accordance with section 8 (2) of the ANPE, and until 15 June in accordance with section 45 (5) of the ANPE. Unless

otherwise provided by law, the body granting the exemption may take its decision within 60 days in a full procedure under section 50 (2) (c) of the AGAP, and the parent may bring an administrative action against the decision which he/she considers to be prejudicial within 15 days of the notification of the decision. Pursuant to section 8 (2d) and section 45 (6e) of the ANPE, the court shall decide on the application within 45 days of its receipt by the court, except that the provisions on recess shall not apply to the action. This means that even if the time limits laid down by the law-maker for the various procedural stages are fully observed, it is questionable whether a final court decision will be issued before the start of the kindergarten or school education year, and can be stated with absolute certainty, that, in the event of the annulment of the decision on the exemption and the repeated procedure of the body which granted the exemption, the final decision on the exemption will not be taken before the start of the kindergarten education year or the school year, even if the decision in the repeated proceedings is otherwise favourable to the parents and the child.

[174] However, the best interests of the child require, as a minimum, that the final decision on the exemption from attending kindergarten, the commencement of compulsory schooling or the authorisation of following an individual work schedule should be available in all cases before the start of the kindergarten education year or the school year. This is particularly true if the authority granting the exemption is already under an obligation to clarify the facts in full under the provisions of the AGAP, and a summary procedure is only possible if the authority granting the exemption grants the parent's request without the involvement of an expert (in which case the parent will not have recourse to the courts and therefore no retrial would take place).

[175] Pursuant to section 8 (2a) and section 45 (6b) of the ANPE, the decision of the body granting the exemption may not be reversed by the court. In accordance with section 90 (1) (b) of the AACP, the court may only change the infringing administrative act if the nature of the case so permits, the facts are sufficiently clear, the dispute can be finally decided on the basis of the available information and the law allows (with exceptions) for such a change in the case of an administrative act carried out in a single instance administrative procedure. Pursuant to section 90 (2), the court shall also reverse an administrative act if the nature of the case so permits and the administrative body in the repeated procedure has acted contrary to the final judgement of the court on the basis of the same legal or factual situation. This means that even a potential annulment of the text "The decision of the body granting the exemption may not be reversed by the court." in section 8 (2a) and section 45 (6b) of the ANPE would not have the effect of allowing the court to change the decision of the body which granted the exemption, i.e. the annulment would not result in the court's cassation power being transformed into a reformatory power. The annulment would only have the result that, in line with section 90 (2) of the AACP, only in the event of a retrial, and then only if the

conditions laid down therein are fulfilled, would it be possible for the decision of the body which granted the exemption to be overturned by the court.

[176] Based on section 46 (1) of the ACC, "if the Constitutional Court, in its proceedings conducted in the exercise of its competences, establishes an omission on the part of the legislator that results in violating the Fundamental Law, it shall call upon the organ that committed the omission to perform its task and set a time-limit for that". Pursuant to section 46 (2) (c) of the ACC, it is considered a failure to fulfil the legislative task if the essential content of the legal regulation derivable from the Fundamental Law is incomplete. In the context of section 8 (2a) and section 45 (6b) of the ANPE, legislation which grants the court only cassation powers is not unconstitutional if the legislature creates procedural guarantees which ensure that, even in the case of cassation powers, proceedings are always concluded with final effect before the start of the kindergarten education or school year. The infringement of the Fundamental Law is therefore not caused by section 8 (2a) and section 45 (6b) of the ANPE, but specifically by the regulatory deficiency relating to those provisions, and only by remedying that deficiency, that is to say, by legislation, can the regulation at issue be made compliant with the Fundamental Law. {see for example the Decision 7/2020. (V.13.) AB, Reasoning [38]}.

[177] The Constitutional Court therefore rejected the petition on this point, and at the same time, acting *ex officio*, held that there is an infringement of the Fundamental Law by reason of the failure of the law-maker to provide procedural guarantees, in the procedures under section 8 (2a) and section 45 (6b) of the ANPE, that the final decision closing the procedure and deciding on the merits of the application is taken in each case before the beginning of the school year (education year), even if the parent brings administrative action against the decision of the body granting the exemption. Therefore, the Constitutional Court calls on the Parliament to comply with its legislative duty by 30 June 2021.

X

[178] 1 The Constitutional Court then examined whether section 84 (9b) of the ANPE is in line with the Fundamental Law. The petitioners considered the challenged provision to be contrary to the Fundamental Law on the grounds of the alleged violation of legal certainty under Article B (1) of the Fundamental Law and the prohibition of discrimination under Article XV (2). Given that the petition did not contain any constitutionally assessable reasoning in connection with the violation of legal certainty, and that the petitioners had not initiated the annulment of section 2 (2a) of the AWGF,

the Constitutional Court, in accordance with the principle of the binding nature of the petition, only examined the conformity of section 84 (9b) of the ANPE with the Fundamental Law in connection with the prohibition of discrimination.

[179] 2 Pursuant to section 84 (9b) of the ANPE, "the maintainer shall be liable as a guarantor for the obligations of the private institution of public education arising from employment relationships for the performance of which its assets are insufficient. If a private institution of public education is dissolved without successor, the rights and obligations arising from the employment relationship concerning the employees' unpaid wages and other claims against the employer shall be transferred to the maintainer at the time of dissolution."

[180] Pursuant to section 2 (3) (b) of the ANPE, a public education institution may be established and maintained by (a) the State, and (b) within the framework of the ANPE (ba) a nationality self- government, (bb) an ecclesiastical legal person, (bc) a religious association or (bd) another person or organisation, if it has acquired – in accordance with the law – the right to carry on the activity. The definition of what constitutes a private institution of public education is interpreted by section 4 (16) of the ANPE, which provides that a private institution of public education is an institution of public education maintained by a person as defined in section 2 (3) (b) (bc) and (bd), i.e. a religious association and another person or organisation.

[181] The applicants base their application on Article XV (2) of the Fundamental Law, which prohibits any discrimination on the basis of the characteristics referred to therein. However, the differentiation created by the ANPE cannot be linked to any of the characteristics referred to in section XV (2) of the Fundamental Law. Consequently, the constitutionality of the challenged provision of the law should be decided on the basis of the general rule on the equality of rights under Article XV (1) of the Fundamental Law, rather than paragraph (2) {see Decision 6/2018. (VI.27.) AB, Reasoning [37]; Decision 30/2017. (XI.14.) AB, Reasoning [49]; Decision 32/2015. (XI.19.) AB, Reasoning [79]}.

[182] 3 According to Article XV (1) of the Fundamental Law, the breach of the Fundamental Law by making a distinction can be established if the law distinguishes without constitutional justification between legal entities being in a comparable situation – a homogeneous group – with each other from the point of view of the regulation {see: Decision 42/2012. (XII.20.) AB, Reasoning [28]; from recent case-law, for example: Decision 3002/2019. (I.7.) AB, Reasoning [39]}. From the point of view of constitutional law, making a distinction may not be accepted if there is no objectively reasonable justification for the distinction, i.e. it is arbitrary {see for example: Decision 3009/2012. (VI.21.) AB, Reasoning [54]; Decision 43/2012. (XII.20.) AB, Reasoning [41]; Decision 14/2014. (V.13.) AB, Reasoning [32]; Decision 32/2015. (XI.19.) AB, Reasoning

[80]}. It should be stressed in this context that the prohibition of discrimination applies to persons in general, including legal persons {see for example: Decision 3062/2012. (VII.26.) AB, Reasoning [166]}.

[183] According to the petitioners, the challenged provision of the ANPE is unconstitutional because it lays down the obligation of the maintainer to stand as a guarantor for the obligations of private institutions of public education arising from employment, but does not provide for such a provision in relation to public education institutions maintained by the State, a nationality self-government or an ecclesiastical legal person. According to the proposal, it cannot be ruled out that a public education institution maintained by a local government, the State, a nationality self-government, or a church is closed down in a way that it has debts owed to its employees, thereby depriving the employees concerned of access to their remuneration, and public education institutions are in a comparable situation from the point of view of the regulation and form a homogeneous group.

[184] The Constitutional Court points out that, under section 1 (1) of the AWGF, wage guarantee proceedings may be brought in the case of undertakings under liquidation or compulsory winding-up proceedings. The Wage Guarantee Fund guarantees the payment of wages in the case of undertakings for which no State guarantee applies. It follows from the contested provisions of the ANPE that the Wage Guarantee Fund is not liable for the payment of wages of public education institutions run by the State, a nationality self-government or an ecclesiastical legal person as the maintainer.

[185] Public education institutions form a homogeneous group from the point of view of the legislation and are therefore in a comparable situation. However, at the same time, the legislation makes only an illusory distinction between the maintainers of private institutions of public education and the maintainers of institutions that do not qualify as private institutions of public education, the regulation is in fact intended to ensure that the payment of wages for the employees of all public education institutions (irrespective of their legal status) enjoys the same level of guarantees. Pursuant to section 25 (7) of the Act CLXXIX of 2011 on the Rights of National Minorities, if a nationality self-government ceases to exist, the right of maintenance shall be exercised by the Budapest-Capital or county government office according to the place of the registered office, i.e. the maintainer’s right is exercised directly by the State. According to to section 29 (2) of the Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and on the Legal Status of Churches, Religious Associations and Religious Communities, in the event of the dissolution of an ecclesiastical legal person (established church, registered church, recorded church), its assets shall, after the creditors' claims have been satisfied, become the property of the State and shall be used for public benefit. This means that the State is ultimately responsible for the wages of the employees of public education institutions maintained by the State, a nationality

self-government and the ecclesiastical legal person, whereas in the case of private institutions of public education it is precisely section 2 (2a) of the AWGF which ensures that the wages of the employees of all public education institutions are paid in the event of the dissolution of the maintainer, where no specific legislation provides that the State itself is ultimately liable for the payment of wages. The legislation thus, contrary to the allegation made in the petition, does not discriminate between the employees of the various public education institutions, but places them in the same position by creating a system of guarantees of comparable value. Accordingly, the Constitutional Court finds that the contested provision of the ANPE is not contrary to Article XV (1).

XI

[186] 1 The petitioners sought the annulment of section 3 (9a) of the ANPE on the liability of heads of institutions on the grounds of lack of time for preparation under Article B (1), the violation of the requirement of the clarity of norms, the prohibition of retroactive legislation, the freedom of expression under Article IX and the right to a fair procedure.

[187] The petition merely alleges a breach of the right to a fair procedure and of the requirement of preparation time, but does not contain any constitutionally valuable reasoning in relation to those provisions of the Fundamental Law, and therefore the Constitutional Court could not examine it in the present proceedings. In connection with the right to legal remedy under Article XXVIII (7) of the Fundamental Law, the petition merely cites the decision of the Constitutional Court's Decision 24/2015 (VII.7.) AB, but neither claims a violation of the right to legal remedy, nor does it contain any reasoning as to why section 3 (9a) of the ANPE would be contrary to Article XXVIII (7) of the Fundamental Law.

[188] 2 The Constitutional Court first examined whether section 3 (9a) of the ANPE violates the prohibition of retroactive legislation stemming from Article B (1) of the Fundamental Law.

[189] The petitioners argued in this regard that, in the absence of a transitional provision, the provision could be applied to acts that occurred before its entry into force and that the mandate of the head of the institution could be terminated even for events that occurred before the entry into force of the provision.

[190] According to the contested provision of the legislation, "if, with the exception of kindergartens, an educational or informational activity is carried out in an educational institution maintained by a public entity or an institution of higher education which

may result in a violation of the rights of the child, pupil under the Fundamental Law through a serious violation of the legislation on public education, if another legal instrument under this Act (a) has not led to a result, or (b) is not available, the Minister responsible for education may, in his or her discretion, withdraw the mandate of the head of the institution or the consent provided to it, within one year of becoming aware of the activity".

[191] The contested legislative provision did not enter into force retroactively and it can therefore only be examined whether its brings about a change in legal relationships which existed before its entry into force. The Constitutional Court examines the infringement of the prohibition of retroactivity on a case-by-case basis. In the present case, the question to be examined in the context of the prohibition on retroactive legislation in relation to the challenged provision of the ANPE was whether that provision could attach further adverse legal consequences to acts committed before its entry into force, without transitional rules. Under the requirements stemming from Article B (1) of the Fundamental Law, no head of institution can clearly be held liable for acts taken place before the entry into force of the provision.

[192] In its examination, the Constitutional Court took into account the provision on regulatory transition in the Legislation Act. According to section 15 (1) of the Legislation Act, the provisions of the law shall apply to facts and legal relationships arising after its entry into force and to procedural acts commenced, unless otherwise provided by law. The Legislation Act thus clearly states that, where no specific rule has been laid down for the application of a provision, the relevant provisions may not be applied to facts and legal relationships which arose earlier. In the present case, this means that, in the absence of an express statutory provision, the managers of public education institutions may not be held liable for events which occurred before the entry into force of the contested provision.

[193] Applying this approach, the Constitutional Court annulled the provisions on the suspension of service allowance payment for violation of the rule of law in its Decision 23/2013 (IX.25.) AB. The Constitutional Court held: "The law-maker may not therefore introduce a rule which has the effect of restricting the right to receive a benefit established subsequently on the ground that the beneficiary has previously engaged in unlawful conduct. This is only possible – in the case of a non-insurance-based benefit – if, at the time the benefit is granted, the beneficiary is aware of the rules for the disbursement of the benefit he or she has been granted, including the rules on suspension. [...] A regulation that ignores this requirement is contrary to the rule of law." (Reasoning [118])

[194] 3 The Constitutional Court also notes that the rules of the Act XXXIII of 1992 on the Legal Relationship of Civil Servants (hereinafter: ACS) also apply to the revocation

of the mandate of a manager. Pursuant to section 23 (5) of the ACS, the reasons for the revocation of a manager's mandate shall be given by the employer at the request of the public employee, and the reasons must clearly state the grounds for the revocation, and in the event of a dispute, the employer must prove the reality and reasonableness of the grounds for the revocation, which may, where appropriate, be the subject of an employment dispute.

[195] According to Article 28 of the Fundamental Law, in the course of the application of law, courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law. In the course of ascertaining the purpose of a law, consideration shall be given primarily to the preamble of that law and the justification of the proposal for or for amending the law. In the interpretation of the Fundamental Law and of the laws one should assume that they serve a moral and economic purpose, which is in line with common sense and the public good." The petitioners' interpretation of section 3 (9a) of the ANPE, according to which the revocation of a manager's mandate may also be carried out in the case of acts which, at the time of their occurrence, the person concerned was not in a legal relationship with the public education institution or, if he or she was, he or she did not have a manager's mandate or was not liable for the act in question, is clearly not connected to the provision of the Fundamental Law referred to.

[196] 4 The petitioners also claimed that the contested provision was contrary to the Fundamental Law in terms of the infringement of the freedom of expression.

[197] The Secretary of State for Public Education, in his reply to the request of the Constitutional Court, stressed that the provision does not prohibit information activities in general, but provides for sanctions in cases where the information provided seriously infringes a public education rule and where the use of other means has not led to results or was not available. It considers that the legislation is consistent with freedom of expression, which is limited by the right of the child to healthy development.

[198] 4.1 On the basis of the petition, the Constitutional Court first had to examine whether the petitioners' conduct was covered by the protection of Article IX of the Fundamental Law and, if so, whether there was a competing interest justifying the restriction of the fundamental right.

[199] According to Article IX (1) of the Fundamental Law, "everyone shall have the right to freedom of expression". The Fundamental Law protects freedom of expression, i.e. the freedom to express an idea and share it with others, regardless of its form. Consequently, it is not only speech in the ordinary sense that is constitutionally protected, but also any conduct (use of a symbol, gesture, etc.) that has informative content. Information activities in an educational institution can clearly have an

informative content that can be appreciated by pupils and therefore fall within the scope of protection of Article IX of the Fundamental Law.

[200] 4.2 Subsequently, the Constitutional Court examined if there is any ground that could be raised in contrast with the freedom of expression to constitutionally justify a restriction of the fundamental right in this case.

[201] In the contested provision, the ANPE indirectly gives effect to the institution-protection aspect of Article XVI (1), when, in order to protect the constitutional rights of pupils to healthy development, it allows the withdrawal of the mandate of the head of the institution in the case of information which seriously infringes the rules of public education, in the event that no other legal instrument has been effective or is available. The enforcement of children's rights is a legitimate aim for the restriction of a fundamental right. Indeed, it does not follow from the Fundamental Law that freedom of expression cannot be restricted in cases where children's rights under the Fundamental Law are infringed in the event of serious violations of public education rules.

[202] In the Constitutional Court's view, the need to protect the rights of the child and the need to provide children with objective information free from influence adequately justifies the need for such legislation. Nor can the restriction be regarded as disproportionate, since the law can only lead to the dismissal of the head of the institution in the event of a breach of the rights of the child guaranteed by the Fundamental Law due to a serious breach of the rules governing public education, and only as a last resort, where no other legal tool proved to produce a result or has been available.

[203] 5 For the above reasons, the Constitutional Court has rejected this element of the petition as well.

XII

[204] 1 In their constitutional complaint, the petitioners also requested the declaration that section 21 (9) of the ANPE was in breach of the Fundamental Law and its annulment. In their view, the provision on the placement of pupils attending an educational institution which is to be closed down also violates the right to education and the rule of law as well, due to the lack of preparation time and the retroactive legislation.

[205] Given that the petition merely alleges a breach of the requirement of a preparation period, but does not provide any constitutionally assessable reasoning in

relation to the contested legislation, nor does it explain why the legislation infringes the prohibition of retroactivity or the rule of law, the Constitutional Court could only examine the present element of the petition in relation to the alleged breach of the right to upbringing. Under Article XI (1) of the Fundamental Law, every Hungarian citizen has the right to education, while under Article XI (2), as the relevant element for the purposes of the present petition, Hungary ensures this right by providing free and compulsory primary education.

[206] 2 The Constitutional Court then examined the regulatory environment of the affected provision. Prior to September 2012, there was no provision for a designation decision in the event of the dissolution of a public education institution without legal successor, and parents could apply under the law to the institution providing compulsory admission to place their child. However, with the entry into force of the ANPE as of 1 September 2012, in the event of the dissolution of a public education institution for any reason, the Act made it obligatory for the authority responsible for public education to designate an education institution which may not refuse to admit children and pupils who are in a legal relationship with the terminated institution. However, the rule enacted by the Amending Act now only imposes this obligation on the public education authority in case if the deletion from the register is the result of the authority's measure due to a serious breach of professional rules, or a breach established in the course of a national pedagogical-professional audit. This solution could, according to the petitioners, have the effect of leaving children who have fulfilled the compulsory attendance requirements for kindergarten education and children who are of compulsory school age, without access to care.

[207] The Constitutional Court therefore had to examine whether the ANPE adequately ensures the placement of all children of compulsory kindergarten age and pupils of compulsory school age in another institution in the event of the institution they attend ceasing to exist without successor, since only in that case can there be a risk of a breach of Article XI of the Fundamental Law.

[208] The law-maker attached the following reasoning to the amendment of the legislation. "Removal from the register may be appealed against, but the designation of another institution to receive pupils must be made at the same time as the removal, and not at the time of the final declaration of termination. There is no justification for imposing such an obligation on the government authorities in cases where the institution is being closed by the maintainer's own decision, which, under the rights to give opinion, is communicated to the parents in due time. According to the Proposal, the designation of an institution would only take place when the government office decides on the deletion due to serious and repeated breaches of the law, and the designation shall only apply to pupils of compulsory school age, as a designation of an

institution for pupils who are not of compulsory school age would not always take place, but only if requested by a pupil who is no longer of compulsory school age."

[209] As the reply signed by the Secretary of State points out, the ANPE also deals with the admission to kindergarten and the beginning of the pupil's legal status in Chapter 30, in addition to the contested provision of the legislation. Pursuant to section 49 (3) of the ANPE, a kindergarten is obliged to admit or take over a child who is obliged to attend kindergarten if the child's place of residence or, failing that, the child's place of stay is within its district, and section 50 (6) of the ANPE provides that a primary school is obliged to admit or take over a pupil of compulsory school age who is habitually resident in the district of the primary school. On this basis, pupils of dissolved institutions not maintained by the State are also guaranteed the possibility to continue their studies in the district institution. As the statement notes, it is also possible that this may not take place in the institution that offers compulsory admission, irrespective of whether the institution offering compulsory admission is designated under the relevant provisions of the ANPE. Based on the experience of previous years, section 21 (9) of the ANPE, which entered into force on 26 July 2019, is intended to make life easier for families with children of compulsory school age who are unable to prepare adequately for the consequences of the closure of a public education institution, while reducing the administrative burden on the authority. Young people who are not in compulsory education may apply to the public education authority for the designation of a public education institution, as stated in the reasoning.

[210] On the basis of the above, the Constitutional Court concluded that the right to education is not infringed in the context of the challenged provision, since the attendance of children of compulsory school age and of children of compulsory kindergarten age is duly guaranteed under the ANPE, and children of compulsory kindergarten age and of compulsory school age are never deprived of education. Therefore, no violation of the Fundamental Law can be established with regard to section 21 (9) of the ANPE and the Constitutional Court rejected the relevant element of the petition.

XIII

[211] The petitioners sought the annulment of section 27 (5) of the ANPE for violation of the requirement of sufficient preparation time, which entered into force on 26 July 2019. In their view, the new concept of developmental pedagogical care, which is mentioned in the provision in question, makes it inevitable that the pedagogical programmes of educational institutions should be revised, but in their view the institutions do not have sufficient time to do so. The petition also suggests that the recruitment of developmental teachers for skills development could be a problem.

[212] 1 In the Decision 9/2019 (III.22.) AB, the Constitutional Court rejected the petition for a declaration that the wording "with special educational needs" in section 56 (1) of the ANPE and section 97 (1a) thereof were contrary to the Fundamental Law and for their annulment, but, acting *ex officio*, it found that the law-maker had created a conflict with the Fundamental Law in the form of an omission, because the law-maker had failed to lay down – in the ANPE or other legislation – additional rules on preferential treatment for children, pupils with difficulties of integration, learning and conduct, which would allow for the appropriate consideration of individual aspects and which would fully ensure the protection of those children and pupils in the course of public education, in accordance with Article XVI (1) of the Fundamental Law.

[213] Section 27 (5) of the ANPE was subsequently supplemented by the requirement that "in the context of providing developmental education for pupils with integration, learning and behavioural difficulties, the pupils' subject-related training is provided by a teacher with the appropriate professional qualification in line with the stage of the educational work or the subject, and their skills are developed by a developmental teacher".

[214] According to the reasoning of the Amending Act – in connection with the Decision 9/2019 (III.22.) AB – the contested rule in the regulation on the provision of developmental pedagogical care for children, pupils with difficulties in integration, learning and behaviour makes it clear which framework is to be used for the organisation of developmental care and for whom.

[215] The reply of the Secretary of State explains that the call for action contained in the Decision 9/2019 (III 22.) AB is answered by the ANPE and the relevant implementing regulations together. The ANPE introduces and defines the concept of developmental pedagogical care. It states that the two basic content elements are catching-up with the relevant subject and skills development. As a consequence, this kind of care is a joint affair, between the regular teacher who supports catching-up with the relevant subject and the developmental teacher who has special knowledge and is responsible for skills development. However, implementing rules at decree-level provide, for example, for the extension of the preferential rules granted for examinations, the obligation to draw up an individual development plan (MHC Decree), the possibility of extending the oral matriculation examination or language examination equivalence (Government Decree 100/1997 (VI.13.) on the issue of the examination regulations for the matriculation examination). The reply also states that the amendment has added a provision on the professional qualifications of teachers who provide subject-related catching-up and skills development, which does not require a revision of the pedagogical programme.

[216] 2 The Constitutional Court examined the constitutionality of the contested provision in the light of the requirement of the preparation period laid down in the Fundamental Law. In connection with the requirement of sufficient preparation time, the Constitutional Court refers to the summary findings made in Part IV of the reasoning of the present decision (Reasoning [59] et seq.), on the basis of which it reached the following conclusions with regard to the alleged violation of the Fundamental Law by section 27 (5) of the ANPE.

[217] In the present case, the parties applying the law had more than one month between the entry into force (26 July 2019) and the mandatory application date (2 September 2019) of the contested provision to incorporate the new concept of developmental pedagogical care introduced by the Amending Act into their pedagogical programmes and to employ developmental teachers where necessary. That period (even if, in certain cases, it may have caused difficulties in recruiting a sufficient number of qualified teachers with developmental education qualifications) cannot in any event be regarded, in the context of constitutional law, as a period of such a short duration as to constitute a breach of Article B (1), particularly in view of the fact that that element of the legislation at issue was intended, in part, to remedy the infringement of fundamental rights which was found by the Constitutional Court to have been committed by the failure to adopt the measures in question. Moreover, it follows from the Decision 9/2019 (III.22.) AB, cited above, that the application of the contested provision at the beginning of the education year was in the interests of the pupils concerned who had difficulties of integration, learning and conduct, since the entry into force of the provision at a later date would have hindered the development of the same pupils. Since neither the petitioners nor the Secretary of State had established any exceptional difficulties preventing the application of the new provision which would justify postponing the start of the development of the pupils concerned, the Constitutional Court rejected the petition for a declaration that the contested section 27 (5) of the ANPE was in conflict with the Fundamental Law and for its annulment.

XIV

[218] 1 The petitioners sought the annulment of sections 44/B and 44/C of the ANPE under the subtitle “Data processed in connection with the measurement of pupils' fitness and study abroad” of the ANPE, on the grounds of an alleged violation of the right to information self-determination. According to the petitioners, the purpose and meaning of the processing are not defined, and the way in which it is carried out is not clear. Furthermore, to their knowledge, no prior consultation has taken place in the framework of the legislative preparatory procedure.

[219] Given that the petitioners did not explain how the possible lack of prior consultation affected the right to informational self-determination of pupils, the Constitutional Court did not examine this element of the petition in the absence of any fundamental rights context. The Constitutional Court's examination could only cover the question of whether the sections 44/B and 44/C of the ANPE introduced by the Amending Act, were consistent in their meaning and purpose with the Fundamental Law in the light of the right to informational self-determination.

[220] 2 Again, the Constitutional Court first looked at the contested legislative context.

[221] 2.1. Section 44/B of the ANPE stipulates that the Hungarian Association for Student Sports (hereinafter: HASS) operates the National Unified Student Fitness Test (hereinafter: NETFIT), an IT-based diagnostic assessment system containing the data of the physical condition and fitness of students, for the purpose of monitoring the health of students. The system contains the personal data listed in section 44/B (2) of the ANPE in an anonymous manner, using a measurement identifier, and the data may be processed for ten years from the date of the first upload. The results are uploaded to the system by the teacher who has taken the measurement and can be accessed by the pupil and the parent using the measurement identifier.

[222] As of 4 November 2014, section 81 of the MHC Decree defines the system for measuring the physical fitness of pupils and regulates its content. According to that provision, the teacher of physical education in schools shall perform the tasks related to the measurement of physical fitness with the participation of pupils in full-time education using a nationally standardised measurement method and the tools developed for its application. The purpose of measuring pupils' physical fitness is to promote the preservation, improvement and maintenance of pupils' health and to monitor pupils' health by assessing their level of physical fitness. The results of the physical fitness assessment are recorded by the teacher conducting the assessment, per pupil measured, and uploaded into NETFIT, an IT-based diagnostic assessment system. The system automatically evaluates the results. The designated teachers analyse the data and determine the actions needed to further improve the physical fitness level of the student. Using the student's assessment ID, the school will upload the results of the physical fitness assessment to the NETFIT system, where the student and parent will be informed of the results using the student's assessment ID.

[223] As of 1 September 2019, section 81 of the MHC Decree was clarified by the insertion of section 44/B of the ANPE. While the provision in force before 1 September 2019 required the teacher of the school teaching the subject of physical education to record the measurement data for all pupils in full-time education, the new regulation also specifies who is responsible for recording and analysing the data for pupils who

take part in therapeutic physical education, structured physical development and pupils with special educational needs.

[224] In the light of the above, it can be concluded that, under the NETFIT system developed by the HASS, public education institutions have been recording data on pupils' fitness anonymously for more than 5 years. The aim of recording the measurements and data is to promote the preservation, improvement and maintenance of pupils' health and to monitor pupils' health by assessing their level of physical fitness.

[225] 2.2 Section 44/C of the ANPE empowers the Tempus Public Foundation to monitor language learning in a language environment, and at the same time establishes the necessary data processing authorisation for the performance of the activity and the legal basis for the transfer of data from and to the public education institution. The contested provision lays down a list of the data processed; the register of study trips includes the pupil's name, educational identification number, mother's name, date and place of birth, nationality, sex, name of the pupil's educational institution, educational identification number, the basic educational task on which the pupil's status is based, the place and year of the pupil's education, the year in which the pupil was educated abroad and the country in which the pupil was educated, in the case of a minor pupil, a parental declaration of consent to the study trip abroad, a school recommendation attesting to the language level of the pupil, the name of the chosen host institution or organisation abroad, the policy number of the travel insurance, the number of the grant contract, the payment account number of the pupil in the case of an individual application, and information on the pupil's special educational needs.

[226] 3 According to Article VI (3) of the Fundamental Law, "everyone shall have the right to the protection of his or her personal data, as well as to access and disseminate data of public interest". The content of the right to the protection of personal data and the right to access and disseminate data of public interest is detailed in the Act CXII of 2011 on the Right to Informational Self-Determination and Freedom of Information (hereinafter: FOIA). The aim of the FOIA in relation to the protection of personal data is to ensure that the privacy of natural persons is respected by data controllers. Data protection applies to data that can be associated with a living natural person. According to section 3 of the FOIA, personal data is not only the data itself, but also the conclusions that can be drawn from it concerning the data subject. The provisions of the FOIA are in line with the principles laid down by the Constitutional Court. As established in the Decision 11/2014. (IV.4.) AB, "part of the protection of privacy is the right to the protection of personal data, which is contained in Article VI (3) of the Fundamental Law and which the Constitutional Court has understood as a »right of informational self-determination« since the Decision 15/1991 (IV.13.) AB [ABH 1991,

40, 44 to 57.] »Personal data« is in any case information about one's private and family life; thus, the law allows one to have information about one's private and personal life exclusively at one's disposal: it follows that its restriction is permissible under the conditions of the fundamental right restriction. Self-determination is possible if each person decides what information about himself or herself – about the person's private life (which is his or her own life) and family life – he or she shares and with whom." (Reasoning [55])

[227] According to section 4 (1) to (3) of the FOIA, "personal data may be processed only for clearly defined, legitimate purposes, for the exercise of a right and the performance of an obligation. At all stages of the processing, the purpose of the processing must be fulfilled and the collection and processing of the data must be fair and lawful. Only personal data which is necessary for the purpose of the processing and adequate for the purpose shall be processed. Personal data may only be processed to the extent and for the duration necessary to achieve the purpose. Personal data shall retain this quality during the processing for as long as its relationship with the data subject can be re-established. The link with the data subject may be re-established if the controller has the technical conditions necessary for its restoration."

[228] Data protection may therefore cover any knowledge that can be associated with a natural person, with the proviso that there is necessarily a link between the natural person and the data which makes identification possible. The personal data retain this quality during processing for as long as the link between the data and the data subject can be re-established. The link can be re-established only if the controller has the technical means to restore it.

[229] The Minister's statement explains that the FOIA, in accordance with the provisions of the General Data Protection Regulation [Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Regulation (EC) No 95/46/EC (hereinafter: GDPR)], which is the underlying legal instrument, allows for the processing of personal data to be ordered in an Act of Parliament [section 5 (1) (a) of the FOIA]. The text of the ANPE complies with the requirements of the FOIA and the GDPR, designating the controller and the scope of the data to be processed, the purpose of the processing. The data controller is charged with the implementation tasks arising from the GDPR and the FOIA to ensure further data protection, disposal of data, etc. According to section 5 (5) of the FOIA, "if the period of mandatory processing or the periodic review of the necessity of mandatory processing is not specified by an Act of Parliament, local government decree or a binding legal act of the European Union, the controller shall review, at least every three years from the start of processing, whether the processing of personal data processed by the controller or by a processor acting on its behalf or under its

instructions is necessary for the purposes of the processing. The controller shall document the circumstances and the results of this review, keep this documentation for ten years after the review and make it available to the National Authority for Data Protection and Freedom of Information (hereinafter: "Authority") upon request. The reply of the Secretary of State also indicates that a prior data protection impact assessment was carried out during the preparation of the Act and that the National Authority for Data Protection and Freedom of Information (hereinafter: NADP) was consulted on several occasions.

[230] 3.1 In the context of section 44/B, the reasoning of the Amending Act states: "The Proposal regulates the anonymous processing of data generated in connection with the measurement of pupils' physical fitness." The provision of the law challenged in the petition provides that the results are to be recorded for each pupil concerned, using a measurement identifier. Section 44/B (2) contains an exhaustive list of the personal data recorded on pupils, namely: measurement identifier, year and month of birth, sex, decimal age, special educational needs, year of education, place of assignment of the school and the results of the physical fitness measurement. The names of pupils are not included in the data recorded. On the basis of the foregoing, the Constitutional Court concluded that the contested provision complies with the requirements of purposeful processing, processing the data laid down in the ANPE and required for the sole purpose of monitoring the pupils' state of health. The ANPE therefore designates the controller, the scope of the data to be processed, the purpose of the processing, and only the amount of data strictly necessary for this purpose in accordance with the provisions of the FOIA and the GDPR. The Constitutional Court stresses that the data to be processed do not include the names of the pupils, they are recorded in the system with a measurement identifier known only to the teacher who recorded them and the parent, therefore the pupils' data – in particular in view of the high number of individuals and the very similar parameters – cannot be linked to their identity, and the data protection adequacy of the regulation has been confirmed by the NADP.

[231] 3.2 The Constitutional Court has reached a similar conclusion in relation to section 44/C of the ANPE. It can be concluded that the challenged provision meets the requirements of purpose-related data processing and that, pursuant to the relevant provision of the ANPE, the Tempus Public Foundation processes the data that are indispensable for this purpose, as laid down in the ANPE, for the necessary period of time, solely for the purpose of ensuring the financing of the study abroad and controlling he using of funds. The ANPE therefore designates the controller, the scope of the data to be processed, the purpose of the processing, and only the amount of data strictly necessary for this purpose in accordance with the provisions of the FOIA and the GDPR.

[232] 4 Therefore, as the Constitutional Court did not find that the contested provisions violated the right of informational self-determination of students, it rejected the petitions of the petitioners for the annulment of sections 44/B and 44/C of the ANPE.

XV

[233] According to the first sentence of section 44 (1) of the ACC, this decision shall be published in the Hungarian Official Gazette.

Budapest, 23 February 2021.

Dr. Tamás Sulyok,
President of the Constitutional Court

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Egon Dienes-Oehm* unable to sign

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

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Tünde Handó* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Attila Horváth* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Imre Juhász* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Ildikó Hörcherné dr. Marosi* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Miklós Juhász* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Béla Pokol* unable to sign

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

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Balázs Schanda* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Péter Szalay* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice rapporteur *dr. Marcel Szabó* unable to sign

Dr. Tamás Sulyok, President of the Constitutional Court on behalf of Justice *dr. Mária Szívós* unable to sign