BACKGROUND DOCUMENT ON THE FOURTH AMENDMENT TO THE FUNDAMENTAL LAW

I. HISTORY

1. The reasons for the Amendment

The Hungarian Parliament **adopted the fourth amendment to the Fundamental Law** (hereinafter referred to as 'the Amendment') on 11 March 2013. The Amendment was promulgated on 25 March 2013 and has entered into force on 1 April. The adoption of the Amendment **was made necessary by the decision of the Constitutional Court of December 2012 –** Decision No. 45/2012. (XII. 29.) –, in which the Constitutional Court **annulled a part of the Transitional Provisions of the Fundamental Law for technical reasons**. The constituent Parliament passed the Transitional Provisions of the Fundamental Law with the express desire that these provisions constitute rules of equivalent nature as those of the Fundamental Law. However, according to the decision of the Constitutional Court, Parliament did not choose the correct solution. In the opinion of the Constitutional Court, the Transitional Provisions contained different types of rules – on the one hand, genuine transitional rules and, on the other hand, substantial non-transitional rules –, and therefore concluded that **the provisions regarded as substantial in significance cannot be considered as legislation of constitutional level without their integration into the core text of the Fundamental Law, in spite of the legislator's original intention.**

Pursuant to the decision of the Constitutional Court, a unified Fundamental Law can only constitute a single constitution, and therefore all rules which by their content serve to supplement or amend the Fundamental Law must be contained in the Fundamental Law itself. In the wording of the reasoning of the decision: "***provisions supplementing or amending the norm text of the Fundamental Law must be integrated into the norm text of the Fundamental Law*** *('command of integration')."* The decision of the Constitutional Court additionally **laid down** that *"after the decision of the Constitutional Court, it is the constitutional legislator's duty and responsibility to clarify the ensuing situation after the partial annulment. Parliament must create a clear legal situation without ambiguity.* ***Parliament must review*** *the regulatory subject-matters of the annulled non-transitional provisions,* ***must decide on those which need to be re-regulated*** *and must determine the level of regulation. As to which provisions from amongst those to be re-regulated should be integrated into the Fundamental Law and which provisions should be re-regulated on a statutory level should also be determined by Parliament. The subject-matters to be re-regulated that fall within the scope of the Fundamental Law may only be created within the procedure under Article S) of the Fundamental Law and must be integrated into the norm text of the Fundamental Law.*" [Decision No. 45/2012. (XII. 29.) of the Constitutional Court]

It follows from the above that **the reason for the annulment was formal in its nature** – "public law invalidity"; in other words, in its Decision No. 45/2012. (XII. 29.), the Constitutional Court **expressed no material criticism** with respect to the rules found in the Transitional Provisions but found it unacceptable merely from a formal point of view that constitutional provisions should be featured in two separate documents.

With regard to the fact that, already upon the adoption of the Transitional Provisions in 2011, it was the original intention of the constituent Parliament to make these provisions constitutional in their

status, it directly followed from the decision of the Constitutional Court that **Parliament is best able to pursue this intention in accordance with the decision of the Constitutional Court if it integrates the Transitional Provisions into the core text of the Fundamental Law in their entirety.**

Therefore, in the wake of the decision of the Constitutional Court, **the main purpose of the Amendment is to integrate the rules annulled for formal, procedural reasons into the text of the Fundamental Law**. In addition, also in accordance with the decision of the Constitutional Court, the constituent Parliament **integrated into the Fundamental Law** not only the annulled provisions but **also the non-annulled, actual transitional provisions in their entirety**. The Amendment assigns the individual annulled provisions of the Transitional Provisions to the relevant Articles of the Fundamental Law and places the non-annulled parts in their entirety at the end of the Closing and Miscellaneous Provisions.

In addition it should also be noted that, following the annulment of the Transitional Provisions for formal reasons, in a later decision, Decision No. 1/2013. (I. 7.), the Constitutional Court has indirectly considered a rule, that was also to be found in the Transitional Provisions, objectionable with respect to its substance when it declared the unconstitutionality of the provisions relating to electoral registration of the Act on electoral procedure, also laid down in the Transitional Provisions. In observance of this decision of the Constitutional Court establishing a case of unconstitutionality on substantial grounds, the **Fidesz-KDNP parliamentary group alliance**, which holds a constitutional majority in Parliament by virtue of a legitimate authorisation gained in democratic elections, **abandoned the plan of introducing electoral registration**, and accordingly, the Amendment does not include the institution of electoral registration in the text of the Fundamental Law.

2. Volume of the Amendment

With regard to the fact that the Amendment basically incorporates the rules previously found in the Transitional Provisions into the text of the Fundamental Law, in spite of its length, the Amendment represents to a significant extent a mere technical amendment to the Fundamental Law. Most of the provisions of the Amendment do not depart from or are directly attached to the former texts of the Transitional Provisions originally intended as constitutional rules based on the constituent legislator's intention. Accordingly, it is unreasonable to over-estimate the significance or novelty of the Amendment. Compared with the earlier constitutional rules, **in fact,** the thirteen-page Amendment (when compared with the combined content of the Fundamental Law and the Transitional Provisions) **only contains 5 per cent of new provisions**, and cannot be regarded as brand-new legislation.

Attention should also be drawn to the fact that the **vast majority of the newly incorporated provisions do not limit the scope of future governments** which may not hold a two-third majority as they only **provide the authorisation for adopting certain legislation** and do not prescribe the adoption of corresponding legislation as an obligation.

II. INDIVIDUAL PROVISIONS OF THE AMENDMENT

3. Concept of family

The Amendment supplements Article L) of the Fundamental Law declaring the protection of marriage and family by expressing that **it regards marriage and the parent-child relationship as the foundations of family relations**. The reason why this has been elevated to constitutional status is that the constituent legislator attributes particular importance to family in the traditional sense as it represents the foundation for the subsistence of the nation. At the same time, it should be stressed that the provision **only defines the basis of family relations and not family itself;** on the other hand, this constitutional rule **does not preclude the statutory protection of family relations in a wider sense**. Other family relations may, and following from other constitutional rules, must be recognised at a statutory level. Pursuant to Article VI of the Fundamental Law in force as of 1 January 2012, which identifies new rights in comparison with the former Constitution, everyone has the right to respect for their private and family life, home, relations and reputation. Additionally, Article II of the Fundamental Law lays down the inviolability of human dignity, similar to the former Constitution, from which the Constitutional Court previously deduced, inter alia, the obligation to protect other forms of relationships outside marriage, in the absence of express constitutional reference to the right to private and family life. Articles II and VI of the Fundamental Law will, also in the future, require the protection of relationships that do not fall within the legal definition of the conventional family. This regulatory method which, on the one hand, makes specific reference to certain groups and, on the other hand, does not leave any unspecified groups without protection, is not unprecedented in the European Convention on Human Rights itself which, for instance, highlights the right of men and women to marry in Article 12, while based on the more general wording of Article 8, it also provides protection for other relationships outside marriage. The above-mentioned constitutional provisions and Article Q) of the Fundamental Law requiring harmony between international law and domestic law sufficiently guarantee that the Amendment will not detrimentally affect individuals who do not come under the legal concept of traditional family relations.

It is, nonetheless, important to remark also with respect to the legal concept that while the basis of the parent-child relationship is most frequently descent by blood, the Fundamental Law does not make this exclusive, and pursuant to Article L) of the Fundamental Law, a relationship conceived by way of legal means, for instance, through adoption, too, may qualify as a parent-child relationship. The Amendment **does not bar anyone from the opportunity of having children, whether by natural, artificial or legal (adoption) means, and from thereby creating a family relationship within the meaning of the Fundamental Law. The Amendment** further does not preclude a **person actually raising a child in a single household, as a step-parent or foster-parent, from qualifying as a party to a family relationship or as a parent within the meaning of the Fundamental Law.**

In order to confirm that the concerns related to the Amendment and its possible consequences are unfounded, mention should be made of **Act V of 2013 on the Civil Code** recently passed by Parliament (on 11 February 2012) which will enter into force on 15 March 2014. Amongst the changes approved by Parliament, it is necessary to highlight the fact that the **body of family law previously regulated in a separate law has been incorporated into the new Civil Code**. This

change permits not only a more accentuated consideration of the private law background and correlations of family law but also the adjustment of rules under family law to fast changing **social conditions** and **international expectations** (primarily the documents of the Council of Europe and the case law of the European Court of Human Rights in Strasbourg concerning family law). Based on the Book of Family Law of the Civil Code, in harmony with the practice of the Strasbourg Court, the principle of the protection of the family extends to both family relations conceived by legal means (e.g. marriage, descent, adoption) and actual family relations (e.g. step-parent – step-child, foster-parent – foster-child).

As regards **domestic partnerships, without distinction between same-sex and different-sex partners, the Civil Code** contains the relevant general private-law rules in the Book of Contract Law, while it stipulates the rules of family law governing domestic partnerships where the partners live together for more than one year and also have a common child in the Book of Family Law, in the part that follows the provisions relating to marriage. In the latter case, the **rights and obligations of the domestic partners are extended compared to the legislation in force** as the law provides maintenance and property usage rights for the partner in need after the cessation of the relationship. By virtue of these provisions, the Code expresses that, in this case, it regards domestic partnerships as a relationship under family law; however, it does not elevate the recognition of and support for these relationships to the ranks of marriage. The Book of Contract Law will continue to define the concept of domestic partners and also elaborates upon the contractual relations of domestic partnership in more detail. As concerns proprietary rights, the Code enhances the proprietary independence of domestic partners but guarantees their rights to a share in any incremental property in proportion to their respective contributions to the acquisition thereof.

Neither the Amendment, nor the new Civil Code affects the legal institution of the registered partnership regulated in a separate law which has existed in Hungary since 2009. Act XXIX of 2009 on registered partnership and the amendment of certain related acts and acts necessary for facilitating the verification of registered partnership permits same-sex individuals of age to enter into a registered partnership before a registrar. The law referred to makes it clear by virtue of a general rule of reference that the legal consequences of the registered partnerships of same-sex individuals are governed by the provisions of legal rules relating to marriage. Accordingly, this legal institution conveys, inter alia, the same proprietary and inheritance consequences under law as marriage. The registered partnership is established through an act of will declared before a registrar, subject to the difference compared with marriage that only persons having completed the age of eighteen years may conclude a registered partnership.

Based on the above, also following from Articles II and VI of the Fundamental Law, **same-sex couples in Hungary are, within the boundaries of the registered partnership, eligible for the same protection as heterosexual couples, which also satisfies international requirements**. According to the interpretation of the European Court of Human Rights, Member States have no obligation to vest same-sex couples with the right to marriage, with the proviso that, in certain situations, the legal consequences similar to those of marriage must be associated with their cohabitation following from the prohibition of discrimination (e.g. judgment of 24 June 2010 in case Schalk and Kopf v. Austria).

In an international context, it is reasonable to highlight that the constitutions of a number of countries regard the conventional family as the basis for the subsistence and growth of the nation

and it is under the protection of the State (for instance, **Bulgaria, Estonia, Greece, Lithuania, Romania**). It is further worth remarking that while in **Germany** the text of the constitution does not contain a definition of the family, it places marriage and the family as institutions and the raising of children in families under special constitutional protection. Also, while not defined in the constitution itself, marriage under German law may only exist between persons of different sexes and registered same-sex relationships are not equivalent to marriage. Based on the generally recognised definition of the constitutional court, the family concept of the German constitution denotes a comprehensive community that is based on the parent-child relationship and that covers, in an ideal scenario, a community of married parents and their children; however, it now also covers the relationship of step-, adopted and foster-children with their parents, the relationships of parents raising their children on their own with their children and long-term relationships outside marriage established for the purpose of raising children. Notwithstanding, however, this updated and extended **new family concept, too, is based on marriage, or at least the relationships of marriageable persons, and the parent-child relationship.**

4. Amendments concerning the Constitutional Court

a) Review of amendments to the Fundamental Law by the Constitutional Court

The Amendment **creates scope for the prior and, subject to a time limit, subsequent review of the Fundamental Law and amendments to the Fundamental Law by the Constitutional Court with regard to compliance with the procedural rules applicable to their adoption**. It should be stressed that this provides **new powers** for the Constitutional Court as, **based on the Fundamental Law, the Constitutional Court previously had no legal means of any kind to review the amendments to the Fundamental Law**. This provision is **in harmony with the practice of the Constitutional Court under the former Constitution**, based on which, or at least in its latest Decision No. 61/2011. (VII. 13.), the Constitutional Court expressly confirmed that it had no competence to review the substance of the amendments to the Constitution (the Constitutional Court came to the same conclusion in at least 15 decisions). Decision No. 45/2012. (XII. 29.) of the Constitutional Court regarding the Transitional Provisions also did not overturn this practice.

In order to better understand the background of the Amendment, it is important to note that the reason why the Constitutional Court may have concluded on the basis of the former Constitution that there was scope for the review of constitutional amendments on formal grounds is that the text of the former Constitution did not make a clear distinction between the Constitution and other legislation. In consequence, constitutional amendments were then made in the form of laws passed with a constitutional majority; at the same time, the concept of legal acts used to include laws representing constitutional amendments and, in theory, also the Constitution itself. It was as a result of this scenario that, prior to 1 January 2012, the Constitutional Court may have included the review of constitutional amendments in its powers relating to review of legal acts. At the same time, the consistent practice of the Constitutional Court denied the existence of its powers to review constitutional amendments in any way for a long time, and the Constitutional Court only conducted a review based on formal criteria (due to invalidity under public law) in its Decision No. 61/2011. (VII. 13.) for the first time (however, they did not establish an actual violation of the Constitution in that instance either), while it never considered a substantial review permissible.

A few **quotes** in support of the above-mentioned practice:

"*The **Constitutional Court may not annul (…) a single provision of the Constitution**. If a provision is integrated into the provisions of the Constitution by virtue of the votes of two thirds of Members of Parliament, it has then become part of the Constitution and cannot be declared unconstitutional as a matter of course.*" (ABH 1994, 862.)

"*In the case of a constitutional amendment, while the norm providing for the entry into force of the law amending the Constitution will not form part of the text of the Constitution, it is a provision essential for the amendment of the norm content of the Constitution without which the constitutional amendment itself cannot occur. (...) Due to the close correlation between the provision prescribing the entry into force of the constitutional amendment with immediate effect and the provisions integrated into the norm text of the Constitution as a result of the constitutional amendment, the Constitutional Court cannot review the constitutionality of the provision of entry into force because this would also mean that the Constitutional Court established for the protection of the Constitution would exceed its constitutional powers and would assume constitutional legislative powers and, as part of its review, would not only construe but would necessarily qualify the provisions of the Constitution.*" (ABH 1998, 816, 818-820.)

"*The **review of the Constitution for constitutionality is precluded as a matter of course;** following from this, the Constitutional Court has no competence to resolve any presumed or actual contradiction within the Constitution.*" (ABH *2008, 1863, 1868.)*

*"One of the most important arguments against the extension of the powers of the Constitutional Court to the review of the Constitution is that **the Constitutional Court cannot create and cannot alter the Constitution which it is designed to protect and which it must apply as a yardstick in the course of the constitutional review of legislation.** This is confirmed by the fact that, throughout its operation, the Constitutional Court has consistently refused to review the Constitution or its provisions. (...) **Within the system of the division of powers, the power of the Constitutional Court, too, is a limited power. Following from this, the Constitutional Court will not draw the review the Constitution and new amendments to the Constitution within its competence without express authorisation in the Constitution.**" (ABH 2011, 290, 322.)*

*"**The Constitutional Court has not yet adopted a decision to date** on the possible review of the constitutional invalidity of amendments to the Constitution; that is, **on the issue of whether a constitutional amendment or a provision integrated into the Constitution may be annulled in the event of a gross procedural breach committed in the course of the legislative procedure.** Based on a review of the practice of the Constitutional Court developed in connection with motions seeking the establishment of the unconstitutionality of certain provisions of the Constitution or constitutional amendments, it may be established that the Constitutional Court not only refused to annul constitutional provisions but also concluded a lack of competence in the case of motions aimed at their constitutional review. In the opinion of the Constitutional Court, **it is not possible to exclude the competence of the Constitutional Court for the review of constitutional provisions from the respect of invalidity under public law as legal rules that came into being in breach of any law or the Constitution that are found to be invalid under public law should be regarded as null and void, that is, as if they had not been created at all.** This is why the Constitutional Court looked into the circumstances of the coming into being of the Amendment [Act CXIX of 2010 on the Amendment of Act XX of 1949 on the Constitution of the Republic of Hungary]." (ABH 2011, 290, 317.)*

Therefore, based on the former Constitution and the practice of the Constitutional Court based on the former Constitution, the Constitutional Court only had powers to review constitutional amendments from a purely formal point of view. By contrast, by virtue of the entry into force of the Fundamental Law on 1 January 2012, the possibility of the review of constitutional amendments by the Constitutional Court ceased. This was an indirect consequence of the fact that the Fundamental Law, in contrast to the former Constitution, made a clear distinction between the concepts and levels of the Fundamental Law and its amendments, on the one hand, and other legislation, on the other. Articles R), S) and T) of the Fundamental Law in force as of 1 January 2012 clearly reflect that the Fundamental Law does not include the Fundamental Law itself and its amendments in the concept of "legal acts" but treats them as the foundations of the legal system and a yardstick for legislation. These provisions of the Fundamental Law in effect as of 1 January 2012 were not designed to reduce the powers of the Constitutional Court; all the more so as, at the time of the passage of the Fundamental Law in April 2011, based on the then practice of the Constitutional Court, the possibility of the review of constitutional amendments by the Constitutional Court had not even emerged. The Constitutional Court conducted its first review based on formal criteria in July 2011 – that is, after the passage of the Fundamental Law but during the effect of the old Constitution –, in its Decision No. 61/2011. (VII. 13.). Therefore, the provisions of the Fundamental Law that entered into force on 1 January 2012 were simple, legal dogmatic clarifications designed to make a clear distinction between the constitutional and other legislative levels which reflected the then prevailing practice of the Constitutional Court, are consistently enforced throughout the entire text of the Fundamental Law and have not been the subject of any criticism, either then, or in the two years that have elapsed since the passage of the Fundamental Law. It is a fact, nonetheless, that the treatment of the Fundamental Law and amendments to the Fundamental Law outside the concept of "legal acts" resulted in the consequence that, as of 1 January 2012, the powers of the Constitutional Court to review legislation no longer included the power to review the Fundamental Law and amendments to the Fundamental Law, even from a formal point of view. Therefore, as of 1 January 2012, the Constitutional Court had no grounds of any kind for reviewing constitutional amendments even for formal reasons, and the Constitutional Court was not required to decide on cases of this nature in the last eighteen months. Decision No. 45/2012. (XII. 29.) on the Transitional Provisions itself did not constitute a decision of the Constitutional Court on legislation of constitutional level. While Parliament intended to adopt the Transitional Provisions as constitutional rules, by contrast, the Constitutional Court established that the annulled provisions of the Transitional Provisions were not constitutional in their level or status. The Constitutional Court concluded that as the Fundamental Law itself granted authorisation for the passage of the Transitional Provisions, the Transitional Provisions necessarily are inferior to the Fundamental Law, in spite of the fact that it was unclear as to the precise status of these rules. The Constitutional Court annulled the objected provisions of the Transitional Provisions for the very reason that they, on the one hand, extended beyond the authorisation granted by the Fundamental Law and, on the other hand, their unsettled legal status caused legal uncertainty.

Consequently, Decision No. 45/2012. (XII. 29.) of the Constitutional Court was not about the review of the Fundamental Law or a constitutional amendment. At the same time, the constitutional debate that emerged in its wake brought to the surface the issue of the possible review by the Constitutional Court of constitutional amendments that fall beyond the concept of legal acts of the Fundamental Law. The Amendment settles this issue in harmony with the former consistent practice of the Constitutional Court. Compared with the situation that prevailed as of 1 January 2012, it is an

express progress that the Amendment extends the competence of the Constitutional Court to the review of the Fundamental Law and amendments to the Fundamental Law in such a way that, in accordance with the former practice, these may only be reviewed by the Constitutional Court on formal grounds. The Amendment determines a time limit of 30 days for the review in the interest of avoiding any long-term uncertainty that may arise in connection with the legal validity of constitutional norms.

In this context, attention should also be drawn to the fact that **very few national constitutions expressly permit the review of constitutional amendments, and substantial reviews are only permitted in exceptional circumstances.** The Constitutional Court itself analysed the relevant international practice in its Decision No. 61/2011. (VII. 13.): "*In the context of the possible review of constitutional laws, the Constitutional Court primarily reviewed whether the powers of the constitutional courts or other organisations acting as constitutional courts (e.g. supreme courts, hereinafter collectively referred to as 'constitutional courts') of other countries, in particular, countries following the so-called European (centralised) model of constitutional adjudication, included the power of reviewing and eventually annulling the Constitution or its amendments, and if so, how extensive these were.* ***Within the competence of prior norm review, there are some examples of constitutional courts having the power to review constitutional amendments based on the express provision of their constitution****. This competence exists in Romania, Algeria, Kyrgyzstan (in ex officio proceedings) or in Cambodia (at the King's initiative).* ***The constitution or its amendments may be subjected to subsequent norm reviews by the constitutional court,*** *based on powers granted in the constitution,* ***in very few countries internationally.*** *Pursuant to Article 148(1) of the Constitution of the Republic of Turkey, the Constitutional Court may review constitutional amendments with regard to formal criteria. Article 125(2)b) of the Constitution of the Russian Federation allows the Constitutional Court of the Russian Federation to determine whether the constitutions of the members of the Federation are in harmony with the Constitution of the Federation. The Constitutional Court of Bosnia and Herzegovina, too, has similar powers [Article 6(3)a) of the Constitution].*

Some of the constitutional courts of European States *that bear more resemblance to the Hungarian constitutional judicial system* ***allow the constitutional review of procedures aimed at constitutional amendments also in the absence of an express constitutional provision. Based on formal grounds****, in the event of the existence of certain conditions, the constitutional bodies of Austria, Cyprus, France, Germany and Spain do not fully rule out constitutional reviews.* ***The constitutional courts of Cyprus, Germany and Austria dealt with the possibility of substantial reviews, and positions in all three countries were divided on the issue.*** *According to the position of the Austrian Constitutional Court, a distinction must be made between the possible review of technical amendments and adjustments to the constitution warranted by circumstances (to which constitutional judges mostly responded in the negative) and the possible review of conceptual revisions (to which most constitutional judges responded in the positive).*

Pursuant to Article 79(3) of the Basic Law of the Federal Republic of Germany, 'Amendments to this Basic Law affecting the division of the Federation into Lander, their participation on principle in legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible'. Article 1 of the Basic Law contains the first provision of the Chapter entitled 'Basic Rights', while Article 20 lays down the principles of democracy, the sovereignty of the people and the division of

power. The German constitutional court reviewed constitutional amendments in 1960 and 1970, however, it did not annul them in either case. In its opinion, in the context of a constitutional amendment, its main duty is to construe the provisions; as part of this, any amendment must be construed based on the entirety and as part of the constitution, with a view to guaranteeing constitutional values.

There have barely been examples for the establishment of constitutional violations in the practice of the European constitutional courts reviewed *(such exceptions are Resolutions No. E.2008/16 and K.2008/116 adopted by the Constitutional Court of the Republic of Turkey in connection with the wearing of headscarves); however, this possibility is not precluded by the constitutional courts of a number of States." (ABH 2011, 290, 311-312.)*

In Austria, the constitution differentiates between simple constitutional amendments (requiring a two-third majority) and comprehensive constitutional amendments (requiring confirmation by a referendum). Regardless of length and extent, the Austrian Constitutional Court also regards as comprehensive any constitutional amendments that are aimed at the abolition or significant restriction of any of the constitutional basic principles of "constitutionality", "democracy", "federal state" and "republic". This practice of the constitutional court may be seen in such a light that it sets a content yardstick for simple constitutional amendments; however, the constitutional court deduced this yardstick in the interest of the protection of the procedural requirements applicable to comprehensive constitutional amendments. If therefore the procedural requirements defined in the Austrian constitution with respect to comprehensive constitutional amendments (referendum) are met, the above "content" yardstick does not apply to those constitutional amendments. It should further be noted that the Austrian Constitutional Court only actually applied the content yardstick regarding simple constitutional amendments in two instances (due to the elevation of the legal rules related to taxi licences and certain public procurements to a constitutional level as the constitutional amendments served to avoid the competence of the constitutional court in a way that violated constitutionality). Additionally, the Austrian constitution is far lengthier than the Hungarian Fundamental Law and, in addition to the core text of the constitution that is frequently modified, a number of simple laws – more than 80 according to estimates – contain rules of detail of constitutional status, established to cement political objectives, which the Constitutional Court cannot review. By contrast, the cardinal acts in Hungary are not removed from the reviews of the Constitutional Court and a single uniform Fundamental Law exists precisely due inter alia to the Amendment, which repeals the Transitional Provisions.

In Germany, the constitution itself determines the provisions which cannot be altered even by way of constitutional amendments (eternity clause), and the constitutional review of constitutional amendments is only possible with a view to this. However, the German legislation is not a wide-spread, general model in Europe, on the one hand and, on the other hand, there was never any such express provision in Hungarian constitutional law and there was no precedent for content reviews in the practice of the Hungarian Constitutional Court either. Therefore, the Amendment can hardly be criticised on the grounds that it does not create such an option, while it cannot under any circumstances be evaluated as a rule that reduces the powers of the Constitutional Court. It should further be noted that, as the Hungarian Constitutional Court itself pointed out, in spite of the express legal grounds set forth in the German constitution, the German constitutional court never actually

annulled any constitutional amendment, and the German body made it clear that construction is its main duty also in the context of constitutional amendments.

It must be also noted that in certain countries, e.g. in the **Netherlands**, in **Finland** and in the **United Kingdom** there is no constitutional court at all.

The Amendment therefore **vests the Constitutional Court with powers that are rare by international standards** when it expressly allows the Constitutional Court to review the Fundamental Law and amendments to the Fundamental Law on formal, procedural grounds, whether as part of prior or subsequent norm reviews. At the same time, there is hardly any example for the possibility of substantial review of constitutional amendments internationally, and neither did this follow from the former practice of the Hungarian Constitutional Court.

b) Extension of those entitled to initiate subsequent norm review

A further **important new feature of the Amendment is that it extends the right to initiate subsequent norm reviews to the President of the Curia and the chief prosecutor**. As a result, the most important players of the judicial system are directly vested with the power to initiate the review by the Constitutional Court of legislation they deem to be contrary to the Fundamental Law. The Amendment likewise vests these two players with the right to initiate a review on formal grounds of the Fundamental Law or amendments to the Fundamental Law before the Constitutional Court.

c) Tying the proceedings of the Constitutional Court at the initiative of judges to a time limit of 30 days

The Amendment **sets a time limit of 30 days for the Constitutional Court for the event of norm reviews initiated by judges for preventing the further protraction of lawsuits** and with regard to the right to a fair trial. With this amendment that serves as a guarantee, it is possible to avoid situations where the enforcement of rights before a court of law is suspended for an uncertain time due to the protraction of the relevant proceedings before the Constitutional Court. The **time limit of 30 days has been present in other proceedings of the Constitutional Court also to date** and it therefore does not represent an excess burden for the body.

It should be highlighted that the constitutions of a number of countries in Europe prescribe similar time limits for the proceeding courts. **In France,** there is a time limit of one month for any constitutional review by the Constitutional Council before promulgation which may, at the Government's request, be reduced to eight days. Similarly, **in Portugal,** the Constitutional Court adopts a decision in prior norm review proceedings within 25 days which the President of the Republic may reduce in urgent cases.

d) Hearing of the parties, public access to the proceedings of the Constitutional Court

With the insertion of the **new Article 24(7)** into the Fundamental Law, the Amendment **serves to make the proceedings of the Constitutional Court more transparent** by prescribing the hearing of the author or initiator of the legislation or their representative or the obtaining of their positions as set forth in a cardinal law. **Equivalent rules are frequent in Europe;** a number of countries

expressly lay down the related basic principles (publicity, hearing of the parties) in their constitutions (e.g. **Cyprus, Ireland**, etc.).

Bill No. T/10593 on the amendment of certain acts related to the Fourth Amendment to the Fundamental Law submitted to Parliament (hereinafter referred to as the „Bill") **defines the above in detail by virtue of the amendment of the Act on the Constitutional Court.** Pursuant to the Bill, the Constitutional Court notifies the author of the legal act and the initiator of the legislation of the institution of proceedings related to norm reviews or constitutional complaints and sends the relevant motion. Following this, if the author of the legal act or the initiator of the legislation wishes to inform the Constitutional Court of his/her position on the case, also with regard to whether the case concerns a wide group of individuals, he/she is given the option to forward his/her opinion to the Constitutional Court within 30 days of the above notification [within 15 days in the case of urgent proceedings, while in the proceedings under Article 6(8) of the Fundamental Law, within 5 days]. The author of the legal act and the initiator of the legislation may also agree on a joint position.

Additionally, based on the Bill, the author of the legal act or the initiator of the legislation may, simultaneously with forwarding his/her opinion, request the Constitutional Court to conduct a public hearing. In this case, the Constitutional Court will hear the author of the legal act or the initiator of the legislation or their representative in a plenary session within 15 days [within 8 days in the case of urgent proceedings, while in the proceedings under Article 6(8) of the Fundamental Law, within 3 days]. The author of the legal act and the initiator of the legislation may, in this case, also proceed jointly and may appoint a joint representative for the hearing. This phase of the proceedings gives the legislator an opportunity to cast light for the body on the goal intended to be attained through the passage of the given legislation and the motivations behind the individual legislative solutions.

The Bill also provides public access to this phase of the proceedings by prescribing the mandatory publication of the position on the website and the conducting of a public hearing. It should be stressed that the above rules **do not affect the right of the Constitutional Court to obtain the opinions of any of the parties concerned or to hear anyone on the given issue**.

e) Elevating the principle of tying the proceedings of the Constitutional Court to the motion to a constitutional level

Prior to the Amendment, the Act on the Constitutional Court contained the rules on being tied to the motion by stipulating that „The Constitutional Court may examine and annul other provisions of the legal act specified in the motion if the contents of these provisions are closely related and if failure to examine or annul the given provisions were to entail infringement of legal certainty".

The Amendment **elevated the above rule of being tied to the motion to a constitutional level; however, it eased the necessary conditions.** Consequently, the Constitutional Court may subject a provision of the legal act not specified in the motion to its review if the contents of this provision are closely related to the rule requested to be reviewed. Therefore, while the **former statutory rule also required an infringement of legal uncertainty** for departure from the motion, in addition to a content-based correlation, the Amendment only prescribes the latter. Consequently, this provision

does not reduce the competence of the body; on the contrary, **it provides wider scope for the body to depart from the motion than the former statutory rule.**

A **similar rule applies to the German Constitutional Court** which may, in the case of an abstract norm review, also annul other provisions of the same law if they are unconstitutional for the same reason, while the **French Constitutional Council only adopts an opinion on the issue covered by the motion in subsequent norm reviews.**

f) Resolutions of the Constitutional Court adopted prior to the entry into force of the Fundamental Law

The Amendment **repeals the resolutions adopted by the Constitutional Court prior to the entry into force of the Fundamental Law, with the proviso that this act does not affect the legal consequences induced by those resolutions. The purpose of this provision is to ensure that the provisions of the Fundamental Law are construed in the context of the Fundamental Law, independently of the system of the former Constitution.**

With this provision, Parliament as the constituent legislative power makes it clear that the Constitutional Court is not tied to its decisions adopted on the basis of the former Constitution. Naturally, this **does not preclude the possibility that the body may, upon the construction of the individual provisions of the Fundamental Law, come to the same conclusions as before.** At the same time, it creates an opportunity for the Constitutional Court to reach findings in the context of the whole of the Fundamental Law that are contrary to its former decisions. This provision therefore does not restrict but, on the contrary, **broadens the freedom of the Constitutional Court** in the construction of the Fundamental Law.

It should further be stressed that **the provision likewise does not bar the Constitutional Court from referring to its earlier decisions** as they form part of the historical constitution and the Fundamental Law itself lays down in Article R) that its provisions must be construed in harmony with the National Avowal and the achievements of the historical constitution. As to which aspect of the historical constitution the Constitutional Court takes into consideration in the course of its construction is left to its sole deliberation.

It should be highlighted that, in this context, the Amendment also took account of the fact that the constituent legislator elevated a number of elements of the former practice of the Constitutional Court to a constitutional level (e.g. concept of marriage; division of power; necessity-proportionality test in the proceedings of the Constitutional Court; state monopoly of the use of force; rules of conduct with general binding force may only be established by the legislator and only in legal acts specified in the Fundamental Law; etc.).

It should also be stressed that **this provision of the Amendment is likewise not unusual in the European constitutional practice**. For instance, Article 239(3) of the new Polish Constitution passed in 1997 provides as follows: „*On the day of the entry into force of the Constitution, the resolutions of the Constitutional Court containing legislative interpretations shall cease to be generally binding; however, the final and absolute judicial decisions and the other final and absolute decisions of public administration agencies that took account of the Constitutional Court's generally binding construction of laws shall remain in force."*

g) Transitional rule relating to the powers of the Constitutional Court after the cessation of the state debt limit

By inserting Article 37(5) into the Fundamental Law, the Amendment does not impose a new restriction on the powers of the Constitutional Court; on the contrary**, it repeats the provision that may be found in the Transitional Provisions with a change conveying a restricted meaning,** the purpose of which is to clearly and unambiguously regulate the transition from the period of the applicability of the special state debt rule to the period when the state debt no longer exceeds one half of GDP. **Based on the new provision, the Constitutional Court may annul fiscal legislation that Parliament has adopted during periods when the state debt exceeded 50 per cent of GDP with *ex nunc* effect after the state debt has fallen below the critical level.** (Based on the rule in the Transitional Provisions, this would not have been possible.) That is, the Constitutional Court may not annul the fiscal legislation in question retroactively in relation to only those periods when the state debt exceeded 50 per cent of GDP.

Consequently, this provision of the Amendment is merely a transitional rule from which no new restriction affecting the powers of the Constitutional Court arises. In the context of this rule, too, attention must be drawn to the circumstances of the former restrictions on the powers of the Constitutional Court that were introduced with respect to certain fiscal legislation, not arising from the Amendment. One of the priority goals of the Fundamental Law reflected in a number of provisions was to guarantee the country's economic stability and to create the conditions for the preservation of that stability. It should be evaluated in the light of this goal that, based on the Fundamental Law, the Constitutional Court may, on a temporary basis, until the country's state debt decreases substantially (to 50% of GDP), review budgetary and fiscal legislation within a more limited scope. This, with the added control of the Fiscal Council relating to the rate of the state debt, increases the scope of any given government majority in its economic policy in difficult economic situations; however, this does not constitute an obstacle to the effective protection of fundamental rights. The Constitutional Court may continue to review the infringement of the individual fundamental rights defined in the Fundamental Law, as we saw in recent decisions of the Constitutional Court (retroactive introduction of 98% tax); the rule restricting the Constitutional Court does not prevent the body, for instance, from reviewing fiscal laws with reference to the infringement of the right to human dignity. Therefore, even as part of its limited subsequent review, the Constitutional Court is able to fulfil its most fundamental function of protecting fundamental rights; at the same time, there is no restriction at all on the powers of the Constitutional Court under the Fundamental Law in respect of prior norm reviews and the investigation of the infringement of international agreements.

h) In conjunction with the Amendment: further provisions concerning the Constitutional Court of the Bill implementing the Amendment

In the interest of broadening the scope for the enforcement of rights, also with regard to Decision No. 42/2012. (XII. 20.) of the Constitutional Court, the Amendment **abolishes mandatory legal representation in constitutional complaint proceedings**. The Constitutional Court pointed out in its cited resolution: „a constitutional complaint, as a tool designed to protect fundamental rights, comes under the same consideration as fundamental rights, and it is therefore unconstitutional to exclude the constitutional complaint from the legal assistance provided for the socially disadvantaged". By initiating a **change that constitutes a guarantee,** the Bill makes this

forum for the enforcement of rights accessible to a wider group of people through the abolition of mandatory legal representation.

5. Provisions related to communist dictatorship

The Amendment reinstates the **provisions related to communist dictatorship** from among the Transitional Provisions annulled for formal reasons**.** After the generally declared findings contained in Article U)(1) of the Fundamental Law, Article U)(2) provides that the **true and faithful exploration of the functioning of the communist dictatorship must be guaranteed and society's sense of justice must be satisfied** in accordance with the specific, normative provisions set forth in paragraphs (3) to (10). Only these latter provisions contain actual norm contents pointing beyond the moral condemnation of the communist regime, and therefore the Amendment does not go beyond that already stated in the Transitional Provisions. The specific provisions extend to the **establishment of the National Memory Committee, the classification of the holders of power during the dictatorship as public figures, the scope for the reduction of the excessive benefits of certain leaders of the dictatorship and the exclusion of limitation in respect of the punishability of certain serious crimes committed during the period of the communist dictatorship on behalf, in the interest or with the agreement of the party state**. The latter proposition **does not break with the principle of „nullum crimen sine lege"** as only those acts committed during the communist dictatorship come under its effect which were punishable under the penal laws in force already at the time of their commission but were not prosecuted out of the political interests of the party state. The Amendment further pays regard to the time that elapsed between 2 May 1990 and the entry into force of the Fundamental Law: the constitutional state is only given as much extra time for the prosecution of the crimes concerned after the entry into force of the Fundamental Law by which it was deprived by the communist dictatorship.

A similar law was also passed in Germany regarding the calculation of the period of limitation under criminal law at the beginning of the 1990's. According to this law, „upon the calculation of the period of limitation relating to the prosecution of acts that were committed during the illegitimate rule of the Socialist Unity Party of Germany but were not prosecuted in accordance with the express or presumed will of the state and party leadership of the Democratic Republic of Germany for political reasons or reasons that are not compatible with the basic principles of free law and order, the period extending from 11 October 1949 to 17 March 1990 shall be discounted. Limitation rested during this period." Similar **rules were adopted in the Czech Republic and Poland as well** regarding the resting of limitation. **The European Court of Human Rights did not find criminal proceedings based on these provisions to be contrary to the convention**, in spite of the fact that it necessarily conducted its investigations in specific cases, and accepted the efforts of these States to detach themselves from the unacceptable practices of totalitarian regimes (see e.g. K.-H. W. v. Germany case No. 37201/97; Sterletz, Kessler and Krenz v. Germany, combined cases Nos. 34044/96, 35532/97 and 44801/98; Ludmila Polednová v. Czech Republic, case No. 2615/10).

Compared with the Transitional Provisions, the Amendment lays down a single new provision in addition to the above; namely that the documents of the state party and of organisations established with the participation or under the influence of the state party must be deposited in public archives.

6. Provisions relating to churches

In the context of the individual and collective practice of religion available to any individual or organisation, the Amendment **creates the opportunity for the State to provide a special church status for organisations engaged in religious activities**. Parliament may recognise churches that satisfy the conditions determined in the relevant cardinal law. Based on the new Article VII(4) of the Fundamental Law, these criteria are **a sustained period of operation, social support and suitability for cooperation in the interest of the attainment of communal goals.**

The Amendment integrates the text of the Transitional Provisions into the Fundamental Law with substantial changes. It defines suitability for cooperation with the State in the interest of the attainment of communal goals as a possible new criterion for recognition as a church with regard to the fact that **the purpose of the special church status is to enable the recognised churches to pursue their activities more effectively in the interest of the attainment of communal goals.** In the context of the individual and collective practice of religion available to any individual or organisation, the Amendment creates the opportunity for the Parliament to provide a special church status for organisations engaged in religious activities. The detailed conditions and procedure of this recognition shall be defined in a cardinal law.

According to the proposal for a cardinal act amending Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities (hereinafter: Proposal), related to the Amendment, **the organisational framework of religious activities is the religious community**, that has two types: the **"church"** recognised by Parliament and the **"organisation engaged in religious activities"** A church recognised by Parliament is an accepted church, while an organization engaged in religious activities is a legal entity under private law operating as a special type of association. By its recognition an accepted church becomes a legal entity under public law.

Every religious community may make use of the legal frameworks provided by the State **under equal conditions**. The difference is that legal status regulated by private law may be achieved on significantly favourable terms in comparison with the conditions for accepted churches, since organisations engaged in religious activities do not need to comply with the conditions valid for accepted churches. Conditions for making use of private law frameworks result from the concept of the organisation engaged in religious activities. This means that such a legal entity has to be engaged in religious activities and its members shall be natural persons sharing the same principles of faith. A special feature of this legal status is that **the legislator wishes to grant** organisations engaged in religious activities **a more favourable position compared to that of other civil organisations**, with regard to the religious activities they perform.

In a theological sense organisations engaged in religious activities which are not granted this special church status by Parliament continue to operate as churches. At the same time, from the legal aspect of the State, they are special legal entities (organisations engaged in religious activities) as ensured by the Proposal and operate in accordance with their own internal rules within the legal framework established by the State. The church concept of state law does not follow the theological concept of the church; this distinction also follows from the principle of the separation of the State and the church. It has to be emphasized therefore that when **Parliament** appreciates the suitability for

cooperation, **its decision adopted based on its deliberation does not affect the theological self-determination of the organisation engaged in religious activities.**

The special **church status or the lack thereof does not affect the right of organisations engaged in religious activities to the freedom of religion and the prohibition of discrimination** under Articles 9 and 14 of the European Convention on Human Rights. Both recognised churches and other organisations engaged in religious activities enjoy this right on the basis of Article VII(1) of the Fundamental Law. Organisations engaged in religious activities which are not granted by Parliament the special church status may, regardless of this circumstance, **freely practise their religions or other religious convictions as churches in a theological sense**. The law reserves a specific status for them under a description that is similar to civil organisations but against the availability of further guarantees. Based on this specific status within the realm of civil organisations, they may obtain (higher) fiscal subsidies in respect of the educational, health care, social or other institutions they operate. Organisations engaged in religious activities are independent; the State may not monitor or supervise them. The new Article VII(3) of the Fundamental Law clarifies that **the principle of the separation of the State and the church equally applies to organisations enjoying the special church status and organisations engaged in religious activities,** regardless of the individual or communal practising of religious or other convictions.

It is important to highlight that **the Constitutional Court, too, recognised the constitutionality of the distinction** between churches enjoying the special church status and organisations engaged in religious activities. ["*The church is not the same for the given religion and state law. The neutral State cannot follow the church concepts of different religions. It may, however, have regard for that in which religious communities and churches in general are different, in respect of their history and social role, from the social organisations, associations and interest representation organisations that may be established on the basis of the Fundamental Law (Article VIII). The Fundamental Law guarantees that „religious communities may, in addition to the organisational forms that may be adopted on the basis of the right of association, also avail themselves, based on their free deliberation, of the legal form defined by state law as 'church'. It is via this legal institution that the State has regard for the specific features of churches and enables them to integrate into the legal system in that specific capacity. Religious communities obtain the status that corresponds to the legal organisational form of their choice; they cannot enforce their specific features arising from their being religious communities within the boundaries of that choice. [Decision No. 4/1993. (II. 12.), ABH 1991, 48, 53.] Similar to the Constitution, the Fundamental Law therefore uses the term 'church' within the meaning of a religious community recognised in a specific legal form compared to the organisational form that is generally available on the basis of the freedom of association." [Decision No. 6/2013. (III.1.)]*

According to the Constitutional Court, **there is no constitutional requirement to the effect that all churches should have the same entitlements or that the State should cooperate with all churches in the same manner, provided that such distinction is based on reasonable criteria**. *["It is not a constitutional expectation for all churches to have the same actual entitlements or for the State to cooperate with all churches to the same extent. The practical differences that exist in the enforcement of the rights related to the freedom of religion remain within constitutional*

boundaries as long as these do not stem from discriminatory legislation or are not the results of a discriminatory practice." Decision No. 6/2013. (III.1.)]

The purpose of the Amendment and that of the Proposal is to amend the Fundamental Law in accordance with the decision of the Constitutional Court by specifying the special church status, the determination of objective and reasonable requirements guaranteeing the constitutionality of such distinction and making legal remedy available against the decision relating to recognition.

The recognition of religious communities and the regulation of their status is rather varied in Europe. In Lithuania, the status of the various religious communities is multi-level. The traditional religious communities, nine in total, are listed by law. In addition to these traditional religious communities with a priority status, the other non-traditional religious organisations must be registered. However, the State recognises some of the registered religious communities, while not others. Based on the recommendation of the Ministry of Justice, Lithuania's Parliament, the Seimas may recognise non-traditional religious communities, provided that these communities have been operational as associations for minimum 25 years. If Parliament refuses recognition, the given community may next seek recognition in ten years' time, at the earliest. Religious communities with different statuses have different entitlements and an inferior status entitles its holder to less state subsidy. The top of the hierarchy is occupied by the traditional church communities listed in the law; the second tier is occupied by non-traditional communities recognised by Parliament (only two to three communities have gained such recognition), while the third tier is reserved for registered communities not recognised by Parliament. By comparison, for the acquisition of the highest status in Hungary, the given community must operate as an association engaged in religious activities for minimum 20 years and a request may be repeatedly submitted within one year. Further, in Hungary 32 religious communities enjoy the highest status at present. **In Austria,** recognition falls within ministerial competence but Parliament may additionally also decide on these matters. This is what happened, for instance, in the case of the Syrian Orthodox Church. **In Belgium,** Parliament decides on recognition, based on the recommendation of the Minister of Justice, and recognition must be committed to a federal law and there is no appeal. Non-recognised churches operate as non-profit associations. **In Spain,** the historical churches entered into contracts with the State, while the recognition of other religious communities falls within ministerial competence. Additionally, the constitutions of the individual Member States of the EU themselves provide for the ruling religions of the given State by placing them above the rest of the religious communities. For instance, in **Denmark** and **Finland,** the Evangelical Lutheran Church, **in Greece,** the Eastern Orthodox Church, while **in Malta,** the Roman Catholic Church are priority religious communities specifically so mentioned in their constitutions.

7 The question of political advertisings

In order to reduce election **campaign costs and create equal opportunities for the parties,** the Amendment establishes **new rules** with respect to **political advertisings**. The Amendment prohibits the publication of paid political advertisings both in public service and commercial media (including radio and television channels). This general prohibition extends to both the electoral campaign period and the period outside the campaign. However, the Amendment **ensures the possibility for the publication of political advertisings free of charge through broadcasting services on equal basis.** Besides, the Amendment does not affect at all the political advertisings

that are executed not through broadcasting services (e.g. posters, flyers). It is to be remarked that, in relation to the review of the regulation of an earlier act on the electoral procedure, the Constitutional Court also stipulated that: "*in the interest of the realisation of balanced information, the legislator may set up restrictions and conditions for the publication of political advertisings*" [Decision No. 27/2008. (III. 12.) of the Constitutional Court, ABH 2008, 289, 295.].

As regards the electoral campaign period of national and European parliamentary elections, the **aim** of the Amendment **is that public broadcasting services** ensure **the publication of political advertisings of political parties with nationwide support on equal basis and free of charge**. This solution – which, on the one hand, excludes paid political advertisings in broadcasting services, and on the other hand, requires as a positive obligation broadcasting services to publish political advertisings free of charge during the campaign period – **is similar to the method followed by several European countries**, as can be derived from the 2008 judgement of the European Court of Human Rights in case "TV Vest AS & Rogaland Pensjonistparti v. Norway". The judgement also refers to the fact that **paid political advertisings are prohibited in the media in the vast majority of Western European countries, namely, in Belgium, Denmark, France, Germany, Ireland, Malta, Norway, Portugal, Sweden, Switzerland and the United Kingdom**. Moreover, in certain states (for instance, in Denmark and Ireland), the general rule is that political advertisings are completely prohibited in the media; in France, the publication of commercial advertisings with a political aim and that of paid political advertisings in public broadcasting services is prohibited. Nonetheless, several countries (Belgium, the Czech Republic, Estonia, France, Germany, Greece, Ireland, Italy, Latvia, Luxembourg, Malta) also require that a certain amount of free air-time is provided in the media for political advertisings. In most cases (e.g. the Czech Republic, Estonia, France, Latvia, Luxembourg), this obligation is set only for the public broadcasting services.

Nevertheless, it is to be noted that the facts of the case serving as the basis of the above judgement of the European Court of Human Rights – condemning Norway – were not identical to the provisions of the Amendment, as this latter – contrary to the Norwegian case and the regulation of several other European states – does not prohibit the publication of political advertisings, only excludes paid advertisings and – in specific cases – allows publication during the campaign period only in the public broadcasting services in order to create equal conditions. Furthermore, it is to be emphasised that the **European Court of Human Rights also noted in its judgement that there is no European consensus in this matter**, and the lack of uniform solutions reinforces that in the area of the regulation of political advertisings, the member states are to be granted greater discretion than would normally be allowed in decisions with regard to restrictions on political debate.

8 Provisions concerning the freedom of the expression of opinion and securing human dignity

The Amendment **supplements the Fundamental Law provision defining the freedom of the expression of opinion with two basic elements**.

One – according to which **the exercise of the freedom of the expression of opinion must not be aimed at the violation of human dignity of other individuals – incorporates the earlier practice of the Constitutional Court in the Fundamental Law**. Namely, the Constitutional Court stated explicitly as a principle that *"human dignity, which is under constitutional protection (...),*

may limit the freedom of expression realised in value judgements". [Decision No. 36/1994. (VI. 24.)]. The Amendment stipulates this constitutional principle, and does not overrule earlier constitutional interpretations, which, for instance, established more stringent conditions with respect to public actors.

The **other innovation** of the Amendment is aimed at **securing the possibility of bringing civil law actions against conducts violating the dignity of communities**. In several of its decisions – for the first time in Decision No. 30/1992. (V. 26.) – the **Constitutional Court pointed out that "*the dignity of communities may serve as a constitutional limit on the freedom of the expression of opinion*".** The Constitutional Court also laid down that even though the dignity of communities cannot be interpreted as an independent fundamental right, it is the inalienable right of individuals to be protected by law and order against the violation of their human dignity which relates to them on account of being members of a community [Decision No. 96/2008. (VII. 3.)]. It must be emphasised that this latter decision of the Constitutional Court expressly acknowledged the constitutional possibility of the legislator to provide civil law instruments against hate crimes. In connection with this, the statements of Decision No. 30/1992. (V. 26.) should be recalled, which were also quoted by this body at a later stage: "reviling must be answered by criticism. **The prospect of large amounts of compensation** is also part of this process. However, criminal sanctions must be applied in order to protect other rights and only when unavoidably necessary, and they should not be used to shape public opinion or the manner of political discourse, since the latter approach is a paternalistic one". In Decision No. 18/2004. (V. 25.), the Constitutional Court developed the following argument: "As established by the Constitutional Court in the decision examining the constitutionality of the statutory definition of scare-mongering, »"[…] the role of the system of criminal law sanctions as an *ultima ratio* undoubtedly means that these must be applied if the measures of other branches of law prove insufficient. However, in assessing the above, the Constitutional Court does not take into account the actual state of the legal system but considers the potentials of its development as well. The incompleteness of the system of legal sanctions available is not an acceptable argument in itself to declare a certain conduct as a criminal offence; the criminal law restriction of constitutional fundamental rights is made neither necessary, nor proportionate on such grounds.« As **there exist instruments for the protection of personality rights restricting the freedom of speech in a narrower circle and a in less unsparing but effective manner,** more precisely, for stepping up against conducts of commission included in the facts of the case of disparagement, in the case of the conduct of disparagement or humiliation, the Constitutional Court considers holding out criminal law sanctions as a disproportionate restriction of the right to the freedom of the expression of opinion, specified in Section 61(1) of the Constitution."

The Amendment takes into consideration primarily these theoretical statements of the Constitutional Court. Thus, it is not the Amendment that introduces this constitutional regulatory possibility into the Hungarian legal system. Nevertheless, in reaction to the provisions of Decision No. 96/2008. (VII. 3.), the Amendment also states explicitly as a principle that individuals belonging to a community can enforce their claims against expressions of opinion insulting to the community, for the violation of their human dignity, before the court. Thus, the Amendment makes it clear that an insult aimed at the community may result in the infringement of the subjective rights of the member of the community, and this infringement of rights can be repaired through the means of civil law.

Moreover, attention must be called to the fact that the **legal policy reason** of these provisions **is primarily that declarations insulting national, ethnic, racial or religious communities (especially Jewish and Romani communities) have strengthened in the public debates recently**: the Parliament is committed to put an end to racist and anti-Semitic speeches; to which it also calls attention by making the text of the Fundamental Law unambiguous. It is to be noted in connection with this that the recommendation of the Council of Europe on hate speech adopted in 1997 [Recommendation No. R (97) 20.] contains a proposal that expressly encourages the member states to enhance the possibilities of combating hate speech through civil law, for example by allowing interested non-governmental organisations to bring civil law actions, providing for compensation for victims of hate speech and providing for the possibility of court orders allowing victims a right of reply or ordering retraction.

It is noteworthy that **the civil representatives of the communities to be awarded** civil law **protection** (for instance, the Uniform Israelite Community in Hungary and "Action and Protection" Foundation) **welcomed** the provisions of the Amendment.

Furthermore, it is important to emphasise that in **Europe, at least 14 countries,** among them **Belgium, France, Germany, Switzerland, Sweden, the Netherlands,** and the **United Kingdom**, as well as, from among our neighbours, **Serbia** and **Croatia, penalize hate speech**. According to the **German** regulation, for instance, the following conducts are punishable with imprisonment:

"The person who, in a way suitable for disturbing public peace

1. incites to hatred against any national, ethnic, religious or racial group or certain segments of the population, or against any individual for belonging to these groups or a segment of the population, or calls upon some violent or arbitrary act, or

2. injures the human dignity of others by insulting, despising or slandering the above-specified group, certain segments of the population, or any individual for belonging to these groups or a segment of the population."

Instead of the criminal law regulation dominant in Europe, **the constituent legislator leaves the possibility of the assertion of a right to less restrictive civil law instruments**. One should also see that, during the course of civil law regulations executing the provision of the Fundamental Law, **it will be the task of the courts to weigh in every single case in what situation the infringement of personal rights has indeed occurred**, and within this framework, they are to act by taking into account the special system of requirements of lawsuits relating to personality rights. It is also to be taken into account that the Constitutional Court will have the opportunity to annul the rules adopted in any law if those are not in line with the Fundamental Law.

Section 2:54 (5) of Act V of 2013, on the new Civil Code, which enters into force on 15 March 2014, **concretizes** the provisions included in the Fundamental Law. According to this, "in the event of any legal injury made before great publicity, to some essential trait of his or her personality, in relation to him or her belonging to the Hungarian nation or to some national, ethnic, racial or religious community, severely offensive to the community or unreasonably insulting in its manner of expression, any member of the community is entitled to enforce his or her personality right within a thirty-day term of preclusion from the occurrence of the injury. With the exception of surrendering the material advantage achieved through the infringement, any member of the

community may enforce any sanction of the infringement of personality rights." By virtue of the Civil Code, the following sanctions can be demanded: *a)* the declaration of the occurrence of legal injury by the court; *b)* termination of the legal injury and prohibiting the offender from further legal injury; *c)* the offender to provide appropriate amends, and to allow appropriate publicity for this at his or her own cost; *d)* termination of the injurious situation, the restatement of the status preceding the legal injury, destruction of the object produced through legal injury or depriving it from its injurious nature; *e)* damages for infringement.

There is a similar solution in **Germany** as well, where the Civil Code contains no independent regulation for this case, however, according to the judicial practice developed on the basis of the general damages clause of Section 823 of the German Civil Code (BGB), private law claims can be enforced in the event of injuries to the community. Through this rule, a far reaching civil law protection of the dignity of communities is also secured.

Mention must also be made of the **French** press act of 1881, which, on the one hand, regulates hate speech with criminal law sanctions, on the other hand it also allows that the member of the affected community enforce a civil law claim (for instance, damages) in the criminal procedure brought for hate speech (Sections 48-1, 48-6).

As far as the protection of the personality rights of the members of the Hungarian nation is concerned, attention is to be called to the fact that **the provisions of the Criminal Code sanctioning hate crimes have always traditionally penalized injuries suffered by the members of the Hungarian nation.** The criminal offence of incitement against a community [Section 269 of Act IV of 1974 on the Hungarian Criminal Code (hereinafter: the Hungarian Criminal Code)] have contained since 15 October 1989 that inciting to hatred is to be punished also if it is committed against the Hungarian nation. The criminal offence of violence against the member of a community (Section 174/B of the Hungarian Criminal Code) have contained since 15 June 1996 that the offence is also realised by the person who assaults someone because he or she belongs to a national group. It is apparent that the criminal code conducts within the remit of hate crimes require that criminal acts against the Hungarian nation or members of the Hungarian nation also be punished, not only the acts against individuals belonging to the minority groups. These legal traditions are carried on by the Amendment enabling to bring a civil law action for hate crimes against the Hungarian nation.

It may be also noted that the German legislation quoted above does not exclude that incitement against the German nation may be sanctioned under that provision (to that effect, see the commentary compiled by the Administration of the Bundestag: http://www.bundestag.de/dokumente/analysen/2009/volksverhetzung.pdf). Furthermore, several recent news reports have discussed the increase of hate crimes against "white Britons" in **Scotland** which imply that such attacks are sanctioned under British law. Article 30(7) of the **Romanian** constitution expressly prohibits – inter alia – defamation of Romania or the Romanian nation ("Any defamation of the country and the nation […] shall be prohibited by law").

9 Provisions concerning higher education

a) Government supervision of the financial management of state institutions of higher education

In the interest of the efficient management of public funds, the Amendment **includes the determination of the method of financial management of state institutions of higher education, as well as the supervision of their financial management in the tasks of the Government,** with a view to the fact that these institutions form a part of the system of state organs, and **their operation is financed from the central budget**. This task includes the Government to establish – within the legal framework – rules for the financial management of these institutions, as well as for exercising supervisory rights with respect to financial management, within the framework of maintainer's rights, through the appropriate institutions. **This regulation** of financial management powers **does not affect the predominance of the freedom of research and education**.

b) Student Contracts

In the interest of the enforcement of the right to education, the Fundamental Law ensures the accessibility of participation in higher education and the support of those who can participate in higher education on the basis of their abilities – which support is in line with the specifications of the law, namely, it does not extend to everybody and it is not without conditions. In order that the exercise of the right to education with a state subsidy, also serves the interest of the community as well as the individual in accordance with Article O) of the Fundamental Law, the **Amendment allows that the law ties the subsidy of participation in higher education as a student (financing of the training by the state) to a condition**. The two components of this condition specified in Section (1) of Article M of the Fundamental Law, is the existence of **value creating work**, and that this work **serves the interest of the communities of Hungary**. Accordingly, legislation may determine the obligation of work within the framework of employment or enterprise, requiring that it is realised within a legal relationship – in Hungary or abroad – governed by Hungarian law. The period – following the completion of studies – that constitutes a condition proportionate to the subsidy provided for participation in higher education is determined by the legislator as a period equivalent to the duration of the studies (which may be determined by the Government in a decree as a shorter period in the interest of former students); in the same vein the legislation also provides for the cases where the requirement of employment under Hungarian law must not be fulfilled (exemption).

It is to be emphasised that financing of the studies by the state and related **conclusion of a student contracts is not the only opportunity for a student to conduct studies** in higher education **without his or her own financial sources**: in the **preferential "Student Loan 2"** construction, one can participate in higher education without the conclusion of a student contract, under terms and conditions defined in advance. On the other hand, naturally, the student **studying with state subsidy is not restricted either in taking employment abroad, even in other member states of the European Union, after he or she has completed his or her studies;** in this case, however, he or she will be **obligated to pay** the tuition fee **subsequently**. By virtue of the relevant legislation, this subsequent reimbursement obligation becomes due in the **twentieth year** after graduation and, upon the student's request, also depending on the amount of grant, **payment by instalment** can be authorised for a period of ten or fifteen years. It is also significant that a student with a (partial) scholarship, who has satisfied only a part of his or her domestic employment, must only repay the amount which covers the non-completed portion. Moreover, it must be emphasised that the term of employment shall include the disbursement period of the pregnancy and child bearing aid, child care aid and child care allowance and the period when the former student is a job seeker and is

hence entitled to a benefit. The legislation defines further cases of exemption in addition to those above.

It must also be clarified within this context that, **in its earlier decision, the objection the Constitutional Court had against the rule was not directed against its content;** it has declared unconstitutionality exclusively with respect to the level of regulation (due to the subject matter being regulated in a government decree). The body prescribed that student contracts are to be regulated by a legal norm of a higher level.

Furthermore, it must also be noted that in **several European countries** (for instance, in Portugal, the Netherlands, the United Kingdom and Italy), **participation in higher education is accessible only through the payment of tuition.** In addition to avoiding the obligation to pay tuition, it is also among the objectives of the Hungarian legal regulation to **strengthen social responsibility, and achieve at least a partial domestic utilisation of the knowledge acquired from the contribution of Hungarian taxpayers**. The regulation, which, by itself – by taking into consideration the text of the Fundamental Law – **is merely a possibility**, it is flexible as the student him or herself can decide whether to use state financing for his or her studies. If he or she does not use it (either because he or she does not need material support at all, or because, by using the opportunity offered by the preferential "Student Loan 2", he or she provides the material conditions necessary for the continuation of his or her studies), he or she is by no means bound by the criteria of domestic employment. Furthermore, even if he or she makes use of the state subsidy, subsequently, after he or she has finished his or her studies, he or she will still have the opportunity to pay back the subsidy, and thus become exempt from the requirement of domestic employment.

As far as the objections based on EU law in connection with student contracts are concerned, it is to be emphasised that neither the provisions of the Fundamental Law – of an essentially authorising nature – nor the provisions in the Act on higher education can be considered as rules unlawfully restricting the free movement of workers. The reason for this is that it is up to the individual deliberation and decision of every student, based on clear and unambiguous regulation, whether he or she satisfies the conditions of exemption from the repayment obligation emerging from the contract or instead he or she chooses to pay the cost of his or her training subsequently, by satisfying this repayment obligation. The term and deadline of employment under Hungarian law, set as a condition in the regulation, does not otherwise exclude long-term employment abroad and further studies in a foreign country. Measures preventing or restricting the free movement of employees are acceptable if they serve a lawful objective and are supported by overriding reasons of public interest. Preventing the migration of recent graduates and securing appropriately qualified employees in professions suffering from a shortage can be defined as the lawful objective pursued by the Hungarian legislation. **The student contract is nothing else but a kind of student contract. In the case of** this **contract form widely known in the European Union, for the support of his or her studies, the contracting pupil or student works at the supporting company or institution for a certain period of time. This is the form the Hungarian legislator used as the basis when reorganising the system of higher education.**

10 The question concerning the use of public places

The Amendment **does not criminalise homeless people and it is not aimed at prohibiting homelessness.** By taking into consideration the observations of Decision No. 38/2012. (XI. 14.), the

Amendment provides the constitutional possibility for the **state and local governments to prohibit** – in certain public areas and based on a specific stringent system of aspects – habitual residing **in public places**.

The Amendment unquestionably **adjusts to the international practice that – using the phrase of the European Convention on Human Rights – allows the individual states to take measures in the interest of securing public order, public safety and public health**. Such is, for instance, the **Italian** Constitution, which draws the boundaries of the freedom of movement at the restriction of health and safety, or the **Croatian** and **Polish** Constitutions, which set out the boundaries of every fundamental right and freedom at the enforcement of the rights of other people, as well as securing public order, public morality and public health. The restriction of the freedom of movement of this form is established in the **Slovenian, Maltese, Japanese, Estonian and Lithuanian** Constitutions as well. The **Spanish** Constitution protects the citizens' right to public health in a separate article, while the **Romanian** Constitution names it together with the possibility of the introduction of restrictive measures related to public safety and national security.

The Hungarian solution secures the possibility for state intervention in the interest of the protection of constitutional values clearly set out, also mentioned in international examples (public order, public safety, public health and cultural values). The Hungarian solution renders the possible direction of the restriction unambiguous by securing a possibility for regulation for the state and local governments to classify habitual residing in public places illegal.

In addition to securing the possibility of classification as illegal – **also with a view to the related decision of the Constitutional Court –** the Amendment **establishes guaranteed constitutional requirements**: instead of unconditional authorisation, the **prohibition can be enforced exclusively in the interest of the protection of public order, public safety and public health, as well as cultural values**. Thus, the state and local governments can introduce the prohibition **only related to an aim,** that is, for instance, in the case of an uninhabited area not bearing cultural value, the restriction of rights might be in violation of the Fundamental Law, while in railway stations, metro stations or in the public area in front of the Parliament, the prohibition might prove to be constitutional.

An important guarantee requirement is that the prohibition **can be introduced only for a specific part of the public places**: it will be in violation of the Fundamental Law, for instance, if a local government establishes the prohibition for its entire area.

The constitutional legislator establishes a further element of guarantee in the Amendment: the prohibition can be introduced **exclusively in a law or a local government decree**, that is, the **Curia or the Constitutional Court is to be allowed to review** the rules **in any case**, and repeal the regulations in violation of the above requirements. Consequently, it must be emphasised that according to an earlier decision of the Constitutional Court, the unlimited, *bianco* authorisation given for the creation of local government regulations rendered the earlier regulation unconstitutional; thus, the **Amendment's regulation satisfies the criteria defined by the Constitutional Court,** without criminalising homeless people, and containing no prohibitive provisions of general nature in connection with homelessness.

It must be noted that the earlier situation was detrimental not only to the majority of society but to the homeless as well; before the introduction of the previous prohibition, according to the data of the Local Government of the Capital, between 2006 and 2010, 131 homeless people froze to death in the streets of Budapest. By comparison, in the year following the introduction of the prohibition, altogether one person died for the same reason. Clearly, through the regulation, the state stepped up not only for the protection of public order, public safety and public health on the side of the majority of society but it also satisfied its obligation to protect the lives of the homeless.

Attention must also be called to the fact that the **prohibition of sleeping or begging in public areas is also common international practice.**

In Belgium, for instance, there is an act against people setting up and living in tents in inhabited areas and cities.

In the Czech Republic, almost all the large Czech cities have prohibited begging in city centres recently, and have driven the homeless out of the central public areas.

In Italy, cities handle the problem of the homeless independently: in Bologna and Padua, for instance, the city police may fine those finding shelter in gateways and on benches, and for using or messing up public areas.

In Slovakia, there are regulations at the level of the local governments of larger cities aimed at forcing back the presence of the homeless (prohibition on drinking in public areas and using benches owned by the city).

In several European countries (for instance, in the **Czech Republic**, **France, Croatia, Germany and Romania**) begging – especially if it is performed in a manner insulting or threatening to others – is strictly punished. In **Germany**, the police may, referring to a threat to public security, instruct the homeless to move to an institution or apartment which fulfils basic human needs in order to supress involuntary homelessness.

In the **USA,** according to the survey of the non-profit organisation the National Law Center on Homelessness and Poverty (NLCHP) executed last year with the involvement of 234 cities, in 40 per cent of the settlements it is forbidden to sleep in a public place, in 56 per cent it is forbidden to loiter in such places, and in 53 per cent it is forbidden to beg. In 33 per cent of the cities, it is not allowed to be sitting or lying in public areas.

In Canada, begging and washing windscreens have been prohibited, punishing "perpetrators" with a fine or imprisonment. The Safe Streets Act was passed in Ontario, Canada in 2000, which prohibited the different forms of aggressive begging, and within that, it put special emphasis on earning money by washing windscreens.

In Australia, begging is also illegal in most of the states, and can be punished with a fine of fifty dollars to two years imprisonment (Walsh 2004).

Finally, it is to be remarked in connection with the regulation that, by supplementing the **state goal** included in Article XXII, providing every person with decent housing – as a way of strengthening solidarity and social responsibility towards homeless people – the **Amendment** makes it clear that,

among others, this state goal can be realised by the **state and local governments striving to provide accommodation for all homeless people**.

It must also be noted in relation to the Amendment that the Government proposes legislation to the Parliament, based on the guarantees provided for in the Fundamental Law. The proposal of the government defines habitual residing in public places as a contravention, but this conduct is only unlawful if the following two conjunctive conditions are met:

1. the habitual residing in a public place is realised within the areas determined by the local government in a decree established with regard to the constitutional guarantees presented above;

2. the area designated is not left by the person after being instructed to do so by the authorities.

It must be notes that according to the Government's intentions, as a general rule, the contravention may only be sanctioned by public work duty.

11. Specific reference to Parliamentary Guards in Fundamental Law

The Amendment **elevates to a constitutional level the rule set out in the Act on Parliament,** on the basis of which the Parliamentary Guards provide for the security of Parliament under the supervision of the Speaker of the House on office. **Following from the fundamental principle of the separation of powers, it must be a constitutional rule amounting to a guarantee** that it is not the Government which Parliament itself is meant to oversee that should take care of the physical security of Parliament.

In the international practice, there are generally two types of model. The difference between the models lies in whether, in guaranteeing the physical security of Parliament, the Speaker of the House primarily relies on external help (police, military) or leaves these responsibilities to an organisation and personnel coming under his/her supervision. The Hungarian legislation implements the solution resorted to **in the vast majority of the world's democracies (for instance, in Austria, Denmark, France, Greece, the Netherlands, Ireland, Poland, Malta, Germany, Italy, Portugal, Spain and Sweden)** which entrusts the duties of law enforcement in the building of the legislature to persons who are under the supervision of the Speaker of the House.

12. Changes concerning the administration of justice

a) Elevating the rules governing the President of the National Judicial Office to a constitutional level

The Amendment **elevates the rules relating to the body responsible for the central administration of the judicial organisation to a constitutional level** and also defines the rules of election. Pursuant to the Amendment, Article 25 of the Fundamental Law lays down, **on the one hand, that the central responsibilities related to the administration of courts are performed by the President of the National Judicial Office (hereinafter referred to as „NJO") and, on the other hand, stipulates unchanged that the judicial self-government organs participate in the administration of courts**. The Amendment further states that the President of the NJO is elected by Parliament with the two-third majority of Members of Parliament from among judges for a period of nine years.

It should be noted, nonetheless, that the elevation of the statutory rules to a constitutional level and the more detailed constitutional regulation relating to the administration of courts, also urged by the Venice Commission, does not change the current legal situation on its merits. The following facts must be repeatedly emphasised in connection with the administration of courts.

The National Council of the Judiciary (hereinafter referred to as „NCJ") that was in charge of the administration of courts was unable to perform its duties effectively, inter alia, because administrative and professional leadership merged through the President of the Supreme Court (who was also the President of the NCJ). The judicial reform set out to separate professional and administrative leadership; as a result, the professional leader is the President of the Curia, while the administrative powers were delegated to the President of the NJO in accordance with Act CLXI of 2011 on the Organisation and Administration of Courts (hereinafter referred to as the „Act on the organisation of the courts").

The Act on the organisation of the courts guarantees the administrative independence of courts by virtue of the fact that only a judge may be elected as President of the NJO. It is further a rule that the judge must have a minimum service relationship of 5 years.

The President of the NJO performs his/her duties under effective controls. This is guaranteed, on the one hand, by the public nature of the activities of the President of the NJO and, on the other hand, by the controlling and overseeing role of the National Judicial Council (hereinafter referred to as the „NJC") and the controlling functions exercised by Parliament which may lead to the removal of the President of the NJO.

Based on the provision of the Fundamental Law which stipulates that the judicial local government organs also take part in the administration of courts, the **Act on the organisation of the courts, passed with a two-third majority, established the NJC as the supreme judicial self-government body**. The NJC monitors and oversees the activities of the President of the NJO. The NJC is comprised of 15 members, all of whom are judges; its 14 members are elected by judges from amongst themselves, and the President of the Curia is a member of the NJC appointed ex officio.

The NJC

- oversees the central administrative activities of the President of the NJO and, if necessary, provides feedback for the President of the NJO,

- reviews the rules and recommendations issued by the President of the NJO,

- monitors the financial management of courts, and

- exercises a right of agreement in respect of the powers of the President of the NJO, based on which he/she may appoint another court instead of the presiding court in the interest of the assessment of cases within a reasonable time,

- based on personal hearings, states its preliminary opinion on the persons nominated for the offices of the President of the NJO and the President of the Curia,

- determines the principles for the assessment of job applications in respect of the powers of the President of the NJO and the President of the Curia when they wish to give a job to the applicant ranked second or third,

- exercises a right of agreement in respect of the assessment of job applications when the President of the NJO or the President of the Curia wishes to give a job to the applicant ranked second or third,

- exercises a right of agreement in the case of the appointment of court leaders when the applicant failed to obtain the consent of the consulted organ [Section 132(6)],

- decides on the issue of granting its consent to the repeated appointment of the presidents and vice-presidents of courts of appeal, tribunals, public administration and labour courts and district courts if the president or vice-president had previously held the same office for two prior terms,

- appoints the president and members of the service court.

Based on its experience gained in the course of the exercise of its above powers, the NJC may exercise its most important and most powerful competence granted in respect of the President of the NJO: based on a decision adopted with the votes of the two-third majority of the members of the NJC, it may initiate the removal of the President of the NJO from his/her office before Parliament (this may be initiated not only by the NJC but also by the President of the Republic who has the right to nominate candidates for the office).

In the context of the judicial self-government organs involved in the administration of courts mentioned in the Fundamental Law, **the Act on the organisation of the courts also provides for further self-government bodies, in addition to the NJC,** which operate at the given courts.

Plenary conferences operate at the Curia, courts of appeal and tribunals. These are attended by the judges appointed to the Curia, the court of appeal and, in the case of tribunals, to the tribunal and the district courts and public administration and labour courts operating in the territory of the tribunal.

Duties of the plenary conference are:

- elect delegates for the election of the members of the NJC,

- review the applications of court leaders and decide on the initiation of investigations regarding court leaders,

- elect the judicial council and hold the judicial council accountable minimum once annually,

- decide on the initiation of the removal of the court leaders appointed by the President of the NJO, and

- initiate the placement on the agenda of the NJC any items falling within the responsibilities of the NJC and the discussion thereof by the NJC.

There are **judicial councils** at the Curia, courts of appeal and tribunals whose members are elected by the plenary conferences.

Duties of the judicial councils are:

- state their opinion on the appointment, title and transfer of judges and the assignment of judges without their consent,

- may initiate the investigation or removal of the presidents, vice-presidents, group heads and deputy group heads of district courts and public administration and labour courts,

- review the court's annual budget and the utilisation of the approved budget, and

- review the court's rules of organisation and operation and case allocation plan.

The **college** is a body of judges allocated to a specific phase of cases which operates at the Curia as well as at courts of appeal and tribunals.

Duties of the college are (as a professional reviewing body):

- review judicial job applications, not including applications submitted for jobs at district courts and public administration and labour courts,

- participate in the evaluation of the professional activities of judges,

- review the case allocation plan,

- review managerial job applications, and may initiate the investigation or removal of court leaders.

It should be noted that **in Germany,** the independence of the administration of justice in an administrative sense is not associated with the independence of the presiding judge; there is no organ similar to the Hungarian NJO. According to the constitution, the judges of federal courts are nominated by the federal minister responsible for the field concerned in agreement with the judicial election council comprised of the ministers of the provinces responsible for the field concerned and an equal number of individuals with a law degree and passive franchise elected by the lower house of federal legislation (Bundestag), and they are appointed by the head of state. The procedures are effectively the same in the case of provincial courts as well. The administrative influence of executive power over the judicial organisation is also exerted in other respects; for instance, the finance minister(s) provide or may reduce, subject to the fiscal situation, the fiscal aid of courts. In the context of the independence of the judiciary, a number of criticisms have been levelled, both by academics in the field of law and by judges, at the constitutional solution used in Germany, based on which the body that is vested with the power of selecting judges is not independent of executive power, and the (organisational) independence of the entirety of the judiciary as a branch of power is not enforced in the field of the administration of courts.

In Austria, the constitution does not provide for the details of the administrative structure. Most of the responsibilities corresponding to the duties of the President of the Hungarian NJO are fulfilled by the justice minister. The constitution lays down that the justice minister makes recommendations for the appointment of judges.

b) Right of the President of the National Judicial Office to transfer cases

The Amendment adopts the much-disputed **provisions relating to the right of transferring cases**, introduced in the interest of the enforcement of the fundamental right to obtain judicial decisions within a reasonable time, from the Transitional Provisions **with changes that serve as guarantees**. Accordingly, on the one hand, **the relevant powers of the chief prosecutor have been removed;** in the future, the chief prosecutor will no longer have the power to transfer cases.

Another highly **significant change that also serves as a guarantee** is that, **based on the decision of the President of the NJO, only case groups pre-defined in a cardinal law** may be heard in departure from the rules of jurisdiction determined by law.

The purpose of the rule is to guarantee the fundamental right to a decision within a reasonable time and to distribute the case-loads of courts evenly.

It must be noted the legal institution of referral was not a new instrument in either the Transitional Provisions or the Act on the organisation of the courts. The institution of the appointment of the court figured in the previous legislation on the organisation of the courts, it has not been established by the Transitional Provisions or the Act on the organisation of the courts in effect from 1 Januarys 2012. Previously the Supreme Court could, on the initiative of the President of the National Council of the Judiciary – also the President of the Supreme Court – appoint a different court of the same jurisdiction if the adjudication of the case or a given group of cases arriving at the given court would not have been possible in a reasonable time due to the extraordinary and disproportionate workload of the court.

According to the Fundamental Law and the Act on the organisation of the courts the President of the NJO is authorised to make the decision on the appointment of a court. The reason for this is that the Curia is the successor of the Supreme Court only in judicial work while in administrative questions the successor is the President of the NJO. Given that the appointment of the court is an administrative means of distributing caseload, these powers have been allocated to the President of the NJO.

Bill No. T/10593 on the amendment of certain acts related to the Fourth Amendment to the Fundamental Law (hereinafter referred to as the „Bill") presented in conjunction with the Amendment **integrates further constitutional guarantees into the appointment procedure** through the amendment of the Act on the administration of the courts, compared with the rules identified also with regard to the earlier remarks of the Venice Commission; the basic principles of the appointment procedure will change.

Based on the Bill, the **President of the NJO adopts a resolution, in response to the motion of the president of a tribunal or a court of appeal or the chief prosecutor,** to the effect that another court or other courts will proceed instead of a given court **in cases falling within a specified case group** received by the court during a specified period. This is possible if, based on the case statistics of a period of six months, the court is compelled to cope with a case load in excess of the national average. The President of the NJO **appoints courts as proceeding courts whose case load does not reach the national average, based on the case statistics of a period of six months**. The law defines the case groups, in respect of which another court may be appointed instead of the court with jurisdiction on the basis of the rule of law.

The Bill creates an arrangement which, by replacing the individualised system of the appointment of the proceeding court, **introduces a procedure with respect to future cases that is based on objective criteria and features no case-to-case deliberation, in the interest of the assessment of cases within a reasonable time and the balanced case-loads of courts.**

The above measure of the President of the NJO is overseen by the National Judicial Council (NJC) inasmuch as the President of the NJO **may adopt his/her resolution of appointment with the agreement of the NJC**. Additionally, the Bill **offers legal remedies** against both the resolution of the President of the NJO and the measure implemented on the basis thereof.

Based on an appeal, the Curia reviews the resolution of the President of the NJO. The appellant is required to substantiate a legal interest for the submission of an appeal. The Curia's review extends to the investigation of formal and procedural issues. Based on this, the Curia sustains or repeals the resolution; however, it may not alter the resolution.

The Bill **also establishes the Curia's role as a review court for the event of any irregularities that may emerge in the actual forwarding of cases** and guarantees the right of the parties to the proceedings concerned to a complaint. In this case, the Curia investigates whether the individual cases concerned were forwarded to the appointed court in accordance with the resolution of appointment of the President of the NJO. Additionally, in each instance, a constitutional complaint may be submitted to the Constitutional Court against the final decision of the Curia.

It should be stressed that the appointment may only relate to the court, not to the appointment of the adjudicating judge. There is no further appointment in a transferred case. An appointment may only be made in response to a motion. The president of a court of appeal or tribunal and the chief prosecutor are entitled to make such a motion; the President of the NJO himself/herself may not initiate the appointment of a different court. At the appointed court, the adjudicating judge is appointed on the basis of the general rules, in accordance with the case allocation procedure set forth in the Act on the administration of the courts. The legislation therefore guarantees the right to a legal judge.

The Bill **guarantees full publicity for decisions on the appointment of courts;** the decisions of the President of the NJO and the related decisions of the Curia must be published on the central website of courts.

It should be noted that **in Germany,** the constitution does not provide for the possible transfer of individual cases between courts and stipulates that no one may be withdrawn from his/her legitimate judge. According to the stringent constitutional practice enforced on the basis of this rule, a judge (in a formal sense) is „legal" if his/her competence and jurisdiction are defined in express statutory provisions in such a way that the legislation precludes, as a matter of course, the appointment of judges for individual cases. The competence and jurisdiction rules must cover all possible individual cases in order to minimise any manoeuvring in the application of the law. **An exception to this rule in German law, and a disputed one, may be the option in criminal proceedings, on the basis of which the prosecution service may, in specified cases, select the court before which it presses charges.**

Article 46a of the Act on the organisation of the courts of **the Netherlands** makes it possible that in the event of a lack of capacity the justice minister, after consulting the Council of the Judiciary, may transfer certain categories of cases to other courts. The transfer of cases is possible for a given period; it may not exceed three years and may be prolonged once for a further year. In criminal cases the transfer is only possible by the justice minister after hearing the council of the prosecutors. The transfer must be published in the official journal (http://wetten.overheid.nl/BWBR0001830/Hoofdstuk2/Afdeling3/Paragraaf1/Artikel46a/geldigheidsdatum_11-04-2013).

c) Upper age limit of judges (prosecutors, notaries, bailiffs)

The Transitional Provisions previously laid down that if a judge or prosecutor completed the general old-age retirement age prior to 1 January 2012, his/her service is terminated on 30 June 2012, while if he/she completes the general old-age retirement age during the period between 1 January 2012 and 31 December 2012, his/her service is terminated on 31 December 2012. In the case of notaries and bailiffs, the Transitional Provisions additionally stipulated that, as of 1 January 2014, the general old-age retirement age will be the maximum age in these two professions.

The Amendment did *not* incorporate the transitional provisions referred to into the Fundamental Law. However, the Fundamental Law continues to contain reference to the general retirement age of judges and prosecutors, that was featured in the core text of the Fundamental Law also earlier, inasmuch as it lays down that, with the exception of the President of the Curia and the chief prosecutor, judges and prosecutors may no longer serve after the completion of the general retirement age.

It should be stressed that these rules did not need to be amended because the Fundamental Law does not state the exact age, which must be stated in a cardinal law, and **in contrast to the Transitional Provisions, the Fundamental Law does not determine the specific calendar date of the cessation of the service relationship**. Simultaneously with the Amendment, **Parliament also passed** the bill which is designed to determine the retirement age **in line with Decision No. 33/2012. (VII. 17.) of the Constitutional Court and the Judgment of the European Court of Justice of 6 November 2012 in case C-286/12.** Based on this, **the upper age limit in the profession and the general retirement age will be harmonised gradually and proportionately by 2023.**

The Government drafted Act XX of 2013 on the Amendments relating to the upper age limit applicable in certain judicial legal relationships (hereinafter referred to as the „Act") after the consultations conducted with the European Commission and dispersed all concerns that emerged from the decisions of the European Court of Justice and the Constitutional Court.

The premise of the Act is that it is necessary to create uniform rules for judges and prosecutors. **The Act sets the upper age limit for judges and prosecutors at 65 years** (the highest retirement age that ensures old age pension according to the Act on old age social security pension) **from 1st January 2023, after a transitional period that is aligned with that of the Act on old age social security pension.**.

Before 1st January 2023 an appropriate transitional period is provided for. During this period the upper age limit for judges and prosecutors should be lowered according to a scale which corresponds to the scale of the increase of the social security retirement age. Consequently at the end of the transitional period (1st January 2023) the upper age limit and the social security retirement age shall be the same (65 years).

During the transitional period (before 1st January 2023) upon reaching his/her retirement age the judge or prosecutor will be entitled to decide whether, until he/she reaches the upper age limit,

- remains at his/her post (the service relation is upheld),

- transfers to a "reserve pool" (the service relation is upheld with particularities) or

- retires.

The same applies to judges the service relation of which had been terminated on the basis of the regulation subsequently annulled by the Constitutional Court and to prosecutors the service relation of which had been terminated during 2012 on the basis of the new regulation. The judges and prosecutors are entitled by virtue of the law to decide without the need to initiate legal proceedings, if such proceeding has been already initiated, the proceeding will lose purpose as regards the questions covered by the right to decide.

The "reserve pool" would be a temporary institution (until 1st January 2023), it would be available for the period between the social security retirement age and the (gradually decreasing) upper age limit.

The main characteristics of the "reserve pool":

- The service relation of the judge or prosecutor transferred to the "reserve pool" is upheld.

- During the period of reserve, the judge or prosecutor transferred to the "reserve pool" shall be entitled to a supplementary remuneration that, added to the old age pension ensures a remuneration equivalent to 80% of the previous remuneration. If actual judicial activity/work is executed, the remuneration shall be equivalent to the previous remuneration.

- The judge or prosecutor transferred to the "reserve pool" may be called to execute actual judicial activity/work for a period the maximum of which is fixed by law – 2 years in a 3 year period.

The judges the service relation of which had been terminated on the basis of the regulation subsequently annulled by the Constitutional Court and prosecutors the service relation of which had been terminated during 2012 on the basis of the new regulation, who wish to return their previous posts are entitled by virtue of the law to their outstanding remuneration, including all benefits and court leader supplements for the duration of previously held fixed term appointment as court leader; they may claim any damage in excess before court based on the general rules of unlawful termination. Judges and prosecutors who do not wish their service relation to be reinstated and wish to retire will be entitled by virtue of the law to a lump sum compensation equivalent to 12 month's salary, with the possibility of claiming damages in excess before court.

The Act states that the reinstated judges will be employed at the previous service post, meaning the same court and the same filed of law. Moreover, judges who wish to be reinstated and have previously held the position of president of chamber shall be reinstated in these positions by virtue of law. Other court leader positions of fixed term will be reinstated – upon request of the judge concerned – if the position has not been occupied in the meantime; the court leader supplement element of the remuneration of the judge will be however compensated for the whole period of the previous appointment as court leader.

The Act sets the upper age limit of notaries and bailiffs also at 65 years. In the case of notaries the upper age limit is 70 years according to the regulation in force until 31st December 2013 (this would have changed to the social security retirement age from 1st January 2014). The adopted proposal sets the upper age limit for notaries – like in the case of judges and prosecutors – at 65 years (the highest retirement age that ensures old age pension according to the Act on old age social security pension) from 1st January 2023, after a transitional period that is aligned with that of the Act on old age social security pension. In the case of bailiffs the upper age limit is 65 years according to the regulation in force until 31st December 2013 (this would have changed to the social security retirement age from 1st January 2014). The Act sets the upper age limit for bailiffs – like in the case of judges and prosecutors – at 65 years (the highest retirement age that ensures old age pension according to the Act on old age social security pension). Given the fact that upper age limit for bailiffs is currently set at 65 years, there is no need for a transitional period or transitional rules.

13. Possibility of imposing special taxes

The Amendment identifies **the – narrowly construed – cases where the imposition of a special tax is provided for**. This provision **transposes a rule set out in the earlier Transitional Provisions** into the Fundamental Law.

First, it should be stressed that the referenced rule **can only be applied in a period when public debt exceeds 50 per cent of gross national product**. The underlying reason for the limitation is that **until the fiscal state of the country is stable, any expenses arising from unforeseeable decisions** beyond the government's control (thus, in particular, decisions by national and international courts) **need to be immediately counterbalanced with revenues** so that the convergence criteria of the adoption of the euro pertaining to the fiscal deficit and the government debt-to-GDP ratio can be met.

The foregoing notwithstanding, **the Amendment imposes limitations upon the use of the levying of separate taxes for the above purpose**. If the **central budget has adequate funding to cover** the payment obligations specified in a (court) ruling (decision), levying taxes are to be avoided. Funds in satisfactory amounts can be raised through rearranging fiscal costs.

It should be emphasised, however, that the aforementioned provision of the Amendment **does not grant any additional powers to the legislator**, for Parliament **may, at any time, adopt a law introducing a new tax type even without having such additional powers.** Furthermore, the 'separate' nature of a tax does not mean that the general guarantee rules of taxation can be waived in this case. **The laws adopted on the basis of** the affected provision of the Fundamental Law

must also satisfy the procedural and content-related requirements set forth in the Fundamental Law (e.g. legal certainty and prohibition against discrimination).

As regards the concerns that this provision have given rise to in relation to EU law, it should be clearly pointed out that the conditions set forth in the provision by no means prejudice EU law, as the situation is not that some tax that the European Court of Justice may deem as contrary to EU law is not refunded in accordance with EU law to those affected or that the refund rights of those affected are curbed. In order that the very refund obligations stemming from such a court ruling or similar court rulings can be fully complied with, the provision at issue calls upon the legislator to impose a special tax if there is no adequate funding available. Consequently, the provision, inter alia, facilitates the implementation of eventual condemning rulings of the European Court of Justice. It should also be pointed out that under the jurisprudence of the European Court of Justice regarding the refunding of taxes that proved to be contrary to EU law, the autonomy of the individual member states prevail in respect to procedural law with the proviso, however, that the principles of equivalence and effectiveness are observed. Looked at from this perspective, the provision at issue meets both requirements because **it applies the same rules to the decisions of national, international and EU courts**, and because **it does not in any manner limit the implementation of these decisions, on the contrary, it expressly serves their implementation by helping to raise the necessary funds.** The issue that may arise in the course of examining the individual tax regulations adopted exclusively on the basis of the provision at hand is whether these tax regulations limit the implementation of the national or international court rulings that serve as their basis; however, no such tax regulation has been adopted as yet, and no such limitation follows from the provision of the Fundamental Law.

14. Amendments affecting public prosecutors

Pursuant to the Amendment, aimed at clarification, the following amendments of no principal relevance have been made to the provisions of the Fundamental Law applicable to the public prosecutors:

Article 29 (1) The Prosecutor General and the Public Prosecutors are independent and shall, as agents of public prosecution, contribute to the administration of justice by enforcing the punitive authority of the State. The Public Prosecutors shall prosecute criminal offences, take action against other unlawful acts or omissions, and contribute to the prevention of unlawful acts.

(2) The Prosecutor General and the Public Prosecutors shall **[in accordance with the applicable statutory provisions]**

a) exercise under the applicable statutory regulations rights in connection with investigations;

b) represent public prosecution in court proceedings;

c) supervise the legality of the execution of punishments;

d) as defender of the public interest, perform further tasks and exercise further competences specified in the Fundamental Law or other applicable statutory regulations;

(3) The organisation of the Public Prosecutors shall be headed and directed by the Prosecutor General, who shall appoint public prosecutors. With the exception of the Prosecutor General, the service relationship of public prosecutors shall terminate upon their reaching the general retirement age.

(4) The Prosecutor General shall be elected from among the public prosecutors for nine years by Parliament at the proposal of the President of the Republic. A majority of two-thirds of the votes of all Members of Parliament shall be required to elect the Prosecutor General.

(5) The Prosecutor General shall report annually to Parliament on his or her activities.

(6) Public prosecutors shall not be members of a political party or engage in any political activity.

(7) The detailed rules of the organisation and operation of the Public Prosecutor's Office, of the legal status of the Prosecutor General and of public prosecutors, as well as their remuneration shall be laid down in cardinal statutory regulations.

15. Powers of government offices to issue regulations and decisions in the case of local governments' omission

Without affecting the very essence of earlier regulations, the Amendment stipulates – **as clarification rather than a new element of principal relevance – that metropolitan and county government offices may request that the relevant courts establish the failure by local governments to issue *regulations,* and as a new element, their failure to comply with their statutory obligation to issue *decisions*.** The court may order that the head of the metropolitan or county government office should, instead of the local government in omission, issue both the regulation and the local government's decisions.

Based on the Fundamental Law, it is clear that acts on the part of the government offices to draw up local governmental regulations in lieu of the local governments **are not in contradiction with the elements of the right to local government as specified in the European Charter of Local Self-Government**. Pursuant to the Fundamental Law, heads of government offices may issue local governmental regulations or, henceforth, decisions on behalf of local governments only if local governments have failed to fulfil their statutory obligation to draw up regulations and have also failed comply with this obligation despite a court ruling ordering compliance. The right of government offices to issue regulations and decisions does not apply to the settlement or resolution of prevailing local social status quos not regulated by the law (it only applies to 'transferred' issues based on statutory authorisation); furthermore, the local government in omission may, at any time, modify the local governmental regulations (decisions) issued by the government office on its behalf.

In an international comparison, the supervisory powers of government offices can be broken down into different categories of stringency as regards **the statutory supervision that they exercise over local governments**. The basis for categorisation is the set of instruments that a government office or rather an organ exercising statutory supervision over a local government has at its disposal to remedy the breach of law by the local government.

Supervisory organs with **the most powerful set of instruments** may, within the scope of their powers, annul local government's acts, whether regulations or decisions. Some European countries use this solution, e.g. **Germany**, where authorities may annul the challenged acts or, in more serious cases, appoint an agent, dismiss the mayor or dissolve the local council.

Less stringent solutions are adopted in the countries where organs exercising statutory supervision over local governments, though not entitled to annul acts, may independently suspend the implementation or, in some cases, even the scope of the acts concerned while initiating a constitutional court/court proceeding aimed at the annulment of the decision. **Romania** and the **Czech Republic** use this solution.

Instruments less stringent that those mentioned above have been adopted by Hungary, where, similar to the regime in operation in the above member states, local governments, if found in breach of law, are first called upon to voluntarily discontinue this breach of law. Subsequently, in keeping with the principle of graduality, and allowing for the possibility that the local government may comply of its own accord, it may, as a last resort, make a decision in lieu of the local government exclusively on the basis of the relevant court ruling and only within a limited range of issues if failure by the local government to comply with its statutory obligation to pass decrees and resolutions has been established.

In order that regulations can be drawn up and decisions passed instead of local governments, a regime similar to the instruments adopted in Hungary for statutory supervision **is operational in France** where, in certain cases, a prefectural decision substitutes for a local governmental decision. More stringent powers are exercised in **Italy**, where a commissioner is appointed and dispatched to to make the decisions that have failed to be made and in the **UK**, where management of a local government may temporarily be transferred to another local government.

In light of the fact that these measures generate significant supervisory influence, as, in essence, they deprive local governments of their decision-making powers, providing legal measures instead of local governments is subject to very stringent conditions incorporated into the constitution of the relevant country and laws governing the system of local governments and adopted by a qualified two-third majority. The deprivation of decision-making powers may only be temporary and limited; local governments have legal recourse to remedy against this deprivation and further guarantee provisions are incorporated into the applicable regulations. These guarantee provisions include, e.g. the procedural rules governing prefectural measures in France. Prefects in France are obliged to seek the opinion of regional audit offices on the legality or other aspects of the measures to be taken by them prior to decisions on financial matters.

A special regime of instruments has been adopted in Austria, where supervision over local communities is exercised jointly by the federal state and the *bundesländer*. The supervisory authority may annul the decisions of the local government after seeking the opinion of the village concerned. The authority may make decisions of major financial consequence conditional upon authorisation (approval) and **the supervisory authority may make these decisions** in lieu of the local government. Judicial review is available in the interest that local governments can manage funds (cash) prudently, frugally and efficiently.

In conformity with the European Charter of Local Self-Government, the right to adopt measures for substitution purposes in the Hungarian system of statutory supervision has been regulated within the framework provided by the Fundamental Law and the cardinal statutory regulations on local governments.

16. A társadalmi felzárkózásra vonatkozó alaptörvényi utalás

By virtue of the Amendment, Article XV (4) of the Fundamental Law has been completed by the text "and social inclusion", therefore **this provision sets out, as of 1 April 2013, that "Hungary shall adopt special measures to promote the implementation of equality of opportunity and social inclusion". Promoting social inclusion is one of the explicit methods for eliminating inequalities of opportunity**, and constitutes a main element in the programme of Government. Displaying this element in the Fundamental Law expresses that **the constituent Parliament considers social inclusion of groups in disadvantageous situation as an important priority.**

Bill T/10593 on the amendment to certain acts in relation with the Fourth Amendment to the Fundamental Law (hereinafter referred to as the "Bill"), following the terminology of the new text of the Fundamental Law, consistently inserts the notion of "social inclusion" also in the Act CXXV of 2003 on the Equal Treatment and Promotion of Equal Opportunities (hereinafter referred to as: "Equal Treatment Act") in the same manner and under the same conditions as the "promotion of equal opportunities" appears in this Act.

The Bill does not affect the regulatory concept of Equal Treatment Act in force, which invariably continues to require the equal treatment and sets out that direct negative discrimination, indirect negative discrimination, harassment, unlawful segregation, retaliation and any orders issued to realise the aforementioned constitute a violation of the principle of equal treatment. Besides, the Equal Treatment Act, in line with the provisions in force and the international human rights instruments, also provides for the situations where positive discrimination may be applied, without breaching the requirement of equal treatment. Among provisions relating to positive discrimination the Bill displays the promotion of social inclusion, by using the drafting below in which new text as compared to the text currently in force is underlined.

"Positive discrimination

Article 11 (1) An act aimed at the elimination of inequality of opportunities <u>or at the promotion of social inclusion,</u> <u>deemed to be necessary on the basis of an objective assessment</u>, of an expressly identified social group is not considered as a violation of the principle of equal treatment if

a) it is based on an Act, on a government decree based on an Act, or on a collective contract, and provided that it is effective for a fixed term or until a specific condition is met,

b) it pertains to the election of a party's executive and representative body, or the designation of candidates to stand in elections held pursuant to the Act on the Electoral Procedures, and is implemented in line with the internal statutes of the given party.

(2) The act defined in paragraph (1) shall not violate any fundamental rights, shall not provide unconditional advantages, and shall not exclude the consideration of individual circumstances."

III. REASSERTION OF THE PARTS OF THE TRANSITIONAL PROVISIONS THAT HAVE BEEN CONSIDERED TO BE FACTUALLY OF A TRANSITIONAL NATURE

17. Termination of the mandate of the President of the Supreme Court, differences between the Supreme Court and the Curia

Although unaffected by the decision of the Constitutional Court on the Transitional Provisions, **all the rules of the Transitional Provisions that the Constitutional Court declared to be de facto transitional, including the questions of legal succession related to the Supreme Court have, without any change to them, been incorporated into the Fundamental Law by the Amendment.** As regards the issues of legal succession, the following should be borne in mind.

Pursuant to the provision of the Transitional Provisions that has been incorporated through the Amendment into the Fundamental Law, taking effect from 1 January 2012, **the legal successor of the Supreme Court, the National Council of the Judiciary** ("NCJ") **and their Presidents is the Curia in judicial matters and the President of the National Office for the Judiciary in terms of the administration of courts**, with the exception defined by the applicable cardinal statutory regulations. Under the earlier arrangements, organisationally the Supreme Court and the NCJ in effect constituted one unit especially in light of the fact that they had the same person as their presidents. The judicial reform effective as of 1 January 2012, having discontinued the organisational uniformity of the two judicial organs, implemented major institutional transformations. **The institutional transformation was intended to enhance efficiency**. Close to 15-years of experience relying on operational practice revealed that the NCJ had been unable to make decisions quickly and efficiently under the earlier organisational arrangements, as its president also doubled as the president of the Supreme Court and the simultaneous holding of two offices was hardly compatible. Likewise, the other members of the NCJ were also not full-time positions, therefore the NCJ was rarely in session, only once a month. Furthermore, most members of the NCJ held senior positions at courts, thus, in fact, the NCJ supervised its own members, which was an unequivocal dysfunction.

The Curia and the National Judicial Office are the legal successors of the Supreme Court and the NCJ respectively, however, it is not a simple renaming of offices as **powers have also been changed in part**. For instance, as a rule, the Curia is a legal successor only in judicial matters; nevertheless, it also exercises administrative powers in respect to its own activities instead of the former National Council of the Judiciary.

The Fundamental Law defines the **Curia** as the principal judicial organ at the highest level of the hierarchy of the judiciary system, **also tending to new duties that are constitutional in nature**: It decides on whether a local government decree is contrary to other statutory regulations and on its possible annulment, and the establishment of the failure of a local government to comply with its statutory legislative obligation. Furthermore, **the Curia has also been granted new instruments in respect to ensuring legal uniformity:** Besides passing resolutions on legal uniformity and judicial resolutions on theoretical issues, it may also make judicial decisions on theoretical issues; a working groups analysing judicial practice have been established; furthermore, the college of the Curia may publish a resolution passed by the Curia's trial council as a resolution on theoretical issues if the resolution also covers theoretical issues in cases that affect a wide realm of society or

that bear the utmost relevance to the public interest. Moreover, the college of the Curia may also decide on whether to publish – as judicial resolutions on theoretical issues – lower court decisions also covering theoretical issues in cases that affect a wide realm of society or that bear the utmost relevance to the public interest. Besides providing new instruments, the new regulations have also renewed the legal uniformity-related proceedings. **Thus the Curia that is tending to an increased number of duties, as well as the judicial system both required focussed and efficient technical management**, an organisational management regime where **the president of the Curia** has the ultimate responsibility for professional issues had to be established, and in order that this responsibility could be carried out to a high standard, **the president of the Curia had to be relieved of its central administrative powers.** This is indeed why the position of a senior official in charge of professional issues (president of the Curia) and that of the administrative executive (president of the National Judicial Office) have been separated. However, it should be emphasised that **legal succession** related to the Supreme Court and the Curia **does not affect the legal status of the judges on the Supreme Court**, and notionally, involvement in respect to the power to appoint judges as one of the powers exercised by the President of the Republic can be ruled out. It is safe to say that **the judicial reform has put an end to the dysfunctions that stemmed from the duplications and personnel-related overlapping inherent in the two positions**.

Thus, the Transitional Provisions have clarified the foregoing with regard to legal succession, with the Amendment stipulating the technical "relocation" of this rule of succession. **As a result of the structural reforms and changes, the Parliament had to elect the new presidents of the newly established Curia and the NOJ** with a two-thirds majority. In order that the two new organs may start operating effective from 1 January 2012, the Constitution of 1949, still in force until the end of 2011, and the new statutory regulations governing the organisation of courts stipulated that the presidents of the Curia and the NJO be elected by the end of 2011.

Changed institutional frameworks and competences as well as new judicial tasks create high expectations of candidates for all executive positions in general. Therefore, tightening the criteria of appointment in respect to all judicial executives was fully justified. **The largest association of judges** (comprising over half of the Hungarian judiciary) **proposed that the legislator should apply more stringent requirements to judicial executives**. It is on the basis of this proposal that the new statutory regulations governing the organisation of courts stipulate that only persons with at least 5 years of judicial service may be elected presidents of the Curia and the National Judicial Office. (Moreover, the Act on the organisation of courts, further tightening conditions, also stipulates that only judges appointed for an indefinite time hold a senior position. It follows then that applications for a senior position may be submitted only after 3 years of judicial practice, for, as a rule, judges may be awarded appointment for an indefinite time only after a fixed appointment of 3 years.) The fact that it is a consensus-based regulation is aptly confirmed by the fact that, setting out the above conditions, the motion for amendment to the bill, which had been put forth by the Parliamentary Committee for Constitutional, Legislative and Judicial Matters, was supported by all the members of the Committee including members of the opposition. Therefore, in the case of the senior officials of newly established organs, the requirements, which were now stricter than they used to be due to changes in duties and powers, made it necessary that the persons to be appointed be re-appraised on the basis of the new statutory conditions. In nominating and electing candidates,

both the president of the Republic and the Parliament had to comply with statutory provisions, thus, only persons satisfying the appointment criteria could be nominated and elected, respectively.

It should be underscored that **the principle of prohibition of the removal from office of judge had to be observed in the case of senior judicial officials and, hence, the president of the Supreme Court as well.** Accordingly, **only the senior position of the president of the Supreme Court has been terminated, but not his judicial service relationship**. The president of the Supreme Court remains a judge on the Curia, legal successor of the Supreme Court, and has been nominated president of chamber in a manner that no application procedure has been prescribed.

It is clear from the foregoing that the **changes have not interfered with the independence of courts**: both presidents have been nominated from among judges and elected by the Parliament. Contrary to the practice in a number of European countries, the National Judicial Office, as an organ in charge for the administration of courts, is completely independent of the executive branch.

It should be pointed out that **the foregoing was also acknowledged by the Constitutional Court in its Decision No. 3076/2013. (III. 27.) AB**, in which it rejected a constitutional complaint challenging the termination of the mandate of the vice-president of the Supreme Court. In its resolution the Constitutional Court established that "in addition to organisational transformations, a major change to the functions, i.e. the tasks and powers, of a particular organisation may also warrant and justify legislative intervention, because it stands to reason that the suitability (eligibility) and appropriateness criteria arising from changed competences could not be applied to the senior official holding the office when this official was selected; however, it cannot be excluded that the performance of the new functions requires persons adopting a different approach, having a different track record and following different practice". "**The Constitutional Court finds that a comprehensive transformation of the organisation of courts and major changes to the duties and powers of the Curia and its president have altered the legal status of the president to a large extent** relative to the situation prevailing as of the date of the appointment of the vice-president of the Supreme Court. These naturally ensued from changes to the functions, tasks and powers of vice-presidency." Referring also to the need for trust between president and vice-president, the Constitutional Court established that "**the Constitutional Court is of the opinion that these changes provide adequate justification for the statutory early termination of the mandate of former senior officials**".

18. Termination of the mandate of the Data Protection Commissioner

Although it was not affected by the decision of the Constitutional Court on Transitional Provisions, **the Amendment introduced, without any changes,** all rules of **the Transitional Provisions into the Fundamental Law actually qualified** by the Constitutional Court **as transitional, including the provision which stipulates that "[t]he mandate of the Commissioner for Data Protection shall be terminated with the entry into force of the Fundamental Law."**

It is worth noting here that the justification for the transitional provision, recognised as such by the Constitutional Court, for the termination of the mandate of the Data Protection Commissioner as of 1 January 2012 was as follows.

Article VI of the Fundamental Law – besides determining the right to the protection of personal data and the right to access and dissemination of data of public interest as fundamental rights – stipulates that an independent authority set up by a cardinal act controls the enforcement of the right to the protection of personal data and the right to access data of public interest, thereby elevating the independence of the authority entitled to control these fundamental rights to a constitutional level.

The institution of the Data Protection Commissioner was not regulated expressly by the Constitution in force until 31 December 2011, as opposed to the institution of the Parliamentary Commissioner for Citizens' Rights and the Parliamentary Commissioner for National and Ethnic Rights. It has been established during the operation of the institution of the Data Protection Commissioner that the means and competence of the Ombudsman does not provide for the necessary scope and possibility for examining and penalising infringements. **Due to the spread of information technology that resulted in a change of social habits and in the conditions caused by globalisation, a substantially more effective action by the authorities is necessary than the institution of the Ombudsman established in the mid 1990's.** The most suitable organisational form for this purpose is an authority, therefore, an authority capable of tackling new challenges had to be established instead of the institution of the Ombudsman.

New circumstances made it necessary to establish a new regulation and organisation in this field which could easily integrate into the concept of the Fundamental Law and meet European Union expectations.

This regulation is contained in Act CXII of 2011 on informational self-determination and freedom of information (hereinafter the Act on Freedom of Information), which established the National Authority for Data Protection and Freedom of Information (hereinafter the Authority).

Pursuant to the general assessment of the Venice Commission included in its opinion No 672/2012 of 18 October 2012, the Act on Freedom of Information "may be considered, as a whole, as complying with the applicable European and international standards."

The Fundamental Law therefore ensured the requirement of the independence of the Authority at a constitutional level. The Act on Freedom of Information supports from various aspects the requirement of the independence of the Authority arising from this norm and other European Union norms regulating this subject and fully provides for the independence of the Authority as regards its organisation, scope of authority and functions, person, as well as economy and budget.

In this regard, opinion No 672/2012 of the Venice Commission emphasised that "[t]he current version of the Act includes particularly detailed provisions aiming at guaranteeing – directly and, in most cases, indirectly – the Authority's independence. It is worth saying that some of these guarantees may not always be found in corresponding legislation of other European countries." It must be noted that, for instance, in recent years the European Court of Justice has found **Germany** and **Austria** to be in default by violating the relevant European Union law that governs the independence of the data protection authority.

The Act on Freedom of Information preserved the procedures of the Data Protection Commissioner as fundamentally similar to that of the Ombudsman with regard to the fact that in practice in certain cases this examination is not regarded as a formal administrative procedure, the recommendation

prepared for the data controller on the basis of the examination and the power of the public are proved to be adequate means to enforce the lawful management of personal data.

However, the Act on Freedom of Information also provides the new and independent Authority with new legal instruments in order to ensure that the enforcement of the right to the protection of personal data and the right to access data of public interest is transparent and duly efficient.

It appears as new in the system of the Act on Freedom of Information that, besides the possibility to conduct a procedure similar to that of the Ombudsman, **the Authority received substantial official powers.** Thus, the Authority may initiate an administrative procedure after or instead of using means similar to that of the Ombudsman, if it deems the announcement well-founded. In this procedure the Authority proceeds in line with the general rules on public administrative procedures and also provides for the efficient implementation of its decisions. In the procedure the Authority, by way of derogation from previous regulation, may impose a penalty of up to HUF 10 000 000 on data controllers violating data protection provisions.

On the basis of the above it becomes clear that **the Authority differs from the Data Protection Commissioner model not only in its name, but also in that, although both bodies comply with the legal requirements of European Union law, there is a substantial difference between the two organisational solutions in their legal status and procedures and the legal consequences that can be applied by them.**

The Parliament of Hungary, in its constitutional power, decided to change the organisational model applied for the previous Data Protection Commissioner by establishing the Fundamental Law. **The Data Protection Commissioner model (the model of the Ombudsman) as an organisational framework was terminated pursuant to the provision of the Fundamental Law** and according to Hungary, this is in line with the freedom of Member States provided by Union law to choose between models.

With regard to the fact that nobody can occupy the position of Data Protection Commissioner following the entry into force of the Fundamental Law due to the absence of this legal institution, the provision included in Article 16 of the Transitional Provisions, and, as of 1 April 2013, introduced with the same content into Point 17 of the "CLOSING PROVISIONS" of the Fundamental Law ordered the termination of the mandate of the Data Protection Commissioner in office, pursuant to this provision of the Fundamental Law.

In this connection, **it must be emphasised that** in its Decision No. 3076/2013. (III. 27.) **the Constitutional Court** confirmed its case-law [Decisions No. 7/2004. (III. 24.) AB and 5/2007. (II. 27.) AB], pursuant to which it **is of the opinion that the restructuring an organisation may be an explicit constitutional reason for the shortening of the mandate of civil servants.** By elaborating on this practice, the Constitutional Court also established the following: "in addition to organisational transformations, a major change to the functions, i.e. the tasks and powers, of a particular organisation may also warrant and justify legislative intervention, because it stands to reason that the suitability (eligibility) and appropriateness criteria arising from changed competences could not be applied to the senior official holding the office when this official was

selected; however, it cannot be excluded that the performance of the new functions requires persons adopting a different approach, having a different track record and following different practice."

According to Hungary, the consistent case-law of the Constitutional Court governs and applies to the restructuring of the data protection controlling authority as well.

19. Suffrage of persons under guardianship

Although it was not affected by the decision of the Constitutional Court on Transitional Provisions, **the Amendment introduced, without any change,** all rules of **the Transitional Provisions into the Fundamental Law qualified** by the Constitutional Court **as transitional, including the provision which stipulates that "[a] person under guardianship restricting or excluding his or her capacity under a final judgement at the effective date of the Fundamental Law shall not have suffrage until this guardianship is terminated or until a court determines the existence of his or her suffrage."**

It is worth noting here that the transitional provision, recognised by the Constitutional Court as such, is linked to the provision of the Fundamental Law [Article XXIII(6)], pursuant to which "[t]hose disenfranchised by a court [...] for limited mental capacity shall not have the right to vote."

Although Article XXIII(6) of the Fundamental Law provides for the possibility to restrict the suffrage of persons with mental disabilities, this provision **constitutes a great improvement compared to the provisions of the previous Constitution, because it does not stipulate this restriction to be compulsory and automatic.**

Pursuant to the previous Constitution, persons who were under guardianship limiting or excluding their capacity for any reason were automatically and generally excluded from the exercise of the right to vote, regardless of the degree of their mental disability. Contrary to the above, the new Fundamental Law, in compliance with the judgment of the European Court of Human Rights in the case of Alajos Kiss v. Hungary, provides that the examination of the lacking or limited mental capacity of persons under guardianship should clearly be extended to their ability to exercise the right to vote. Accordingly, **persons under guardianship may only be excluded from the exercise of the right to vote by an individual judicial discretion – which takes account of the requirement of necessity and proportionality and which may also be contested by a constitutional complaint – considering the actual capacity and circumstances of that individual from the point of view of right to vote.**

Criticisms voiced against the Fundamental Law point out that Article 29 of the UN Convention on the Rights of Persons with Disabilities on participation in political life does not provide for even this restriction. According to our position, the Article referred to above cannot be interpreted on its own; it must be examined in conjunction with other provisions of the Convention, in particular with Article 12 that allows for the restriction of legal capacity and the exercise of related rights under appropriate safeguards. It must be added that the rights ensured in international human rights conventions do not usually entail that the restriction of these rights in line with the requirement of necessity and proportionality is not allowed at all. Contrary to the previous Constitution – which

allowed for automatic restriction – the Fundamental Law complies with the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

It must be emphasised that Article XXIII(6) of the Fundamental Law **does not contain any discriminatory provision**, and its content does not hinder the enforcement of the requirement of non-discriminatory examination of mental capacity affecting the right to vote. Although the legal provisions implementing the Fundamental Law associate the examination of mental capacity affecting the right to vote with the procedure on exclusion of legal capacity or placement under guardianship and the lack of capacity for the right to vote cannot be determined in itself without the extension of the restriction of mental capacity to other areas, the procedure on placement under guardianship can be initiated against anybody.

The arguments of the critics that exaggerate the provisions on non-discrimination against persons with disabilities and the ensuring of equal rights stipulated in the UN Convention on the Rights of Persons with Disabilities are in contrast with the rules – also to be found in said Convention – that otherwise recognise proportionate measures on the restriction of legal capacity (see Article 12). If the argument, according to which the right to vote cannot be restricted in any way on the basis of mental disability, was true, then on the basis of the same logic the other rights stipulated in the Convention could not be restricted either, and in the end no measure on the restriction of legal capacity could be justified. Although the Convention may provide for contradictory interpretations in these issues, the possibility that the main intention of the contracting parties was to eliminate the rules on legal capacity can be excluded as well.

In addition, it must be emphasised that **Hungarian law allows for the examination of mental capacity affecting the right to vote in individual procedures with the inclusion of an expert,** but at the same time, **it does not determine in any way the individual decision of an executive body taken in this matter.** As a consequence, the adequate expert examinations must be carried out during the individual procedures, and **in case the executive body determines on the basis of the state-of-the-art expert examination that the mental capacity excluding the exercise of the right to vote cannot be proved, its consequences, i.e. the non-exclusion from the exercise of the right to vote must be drawn in the individual procedures.** Neither the Fundamental Law, nor other Hungarian legal provisions hamper this action.

According to the 2010 survey of the European Union Agency for Fundamental Rights, in the majority of Member States, for instance in **Germany, Poland, Belgium, Czech Republic, Denmark, Bulgaria, Greece, Estonia, Latvia, Lithuania, Luxemburg, Malta, Portugal, Romania and Slovakia,** a full and general prohibition is in force on the right to vote of persons under guardianship, similarly to that provided for in the previous Hungarian Constitution.

IV. THIRD AMENDMENT TO THE FUNDAMENTAL LAW OF HUNGARY – THE ACT ON AGRICULTURAL LAND PROVIDED FOR AS A CARDINAL ACT

20. The Act on agricultural land and other cardinal Acts

a) Article P(2) of the Fundamental Law **was amended by the third amendment** to the Fundamental Law **(that is, not by the latest Amendment) and has been in force since**

22 December 2012. Pursuant to the Fundamental Law, agricultural land and forests **form the nation's common heritage; "the State and every person shall be bound to protect, maintain and preserve them for future generations": this is of a special constitutional interest. Accordingly, it was reasonable to provide for a cardinal act which determines the restrictions and conditions necessary for the acquisition and use of agricultural land and forests.** The third amendment therefore amended the text of Article P of the Fundamental Law with the requirement to adopt the Act on agricultural land as a cardinal act to ensure the stability of the relevant regulation.

The third amendment only establishes one subject in which cardinal acts should be adopted, and it only contains the issues which must be settled in cardinal acts. Consequently, the amendment of December 2012 does not include any substantial rule relating to the acquisition and use of agricultural land and forests, therefore the provisions of the Fundamental Law may in no way be in contradiction with EU law. The hierarchical level of the legal instrument (i.e. a cardinal act or any other provision) in which a Member State regulates a certain issue bears no relevance to EU law.

At the same time, it must be noted that the protection of natural resources which must be regulated in a cardinal act under Article P(2) of the Fundamental Law fully complies with EU law, because Article 191 of the Treaty on the Functioning of the European Union determines a similar objective to protect environmental and natural resources.

b) Among the criticisms voiced against the Hungarian Fundamental Law, certain objections were raised against the high number of cardinal acts. It must be stated that **in Hungary it is a constitutional tradition that the Constitution determines various subjects, the detailed rules of which must be laid down in a cardinal act (i.e. to be amended by a qualified, two-thirds majority).** The new Fundamental Law does not raise the number of cardinal acts, on the contrary, it slightly reduces their number compared to the previous Constitution. **The number of subjects to be determined in cardinal acts does not exceed, even after the third amendment of the Fundamental Law, the number of cardinal acts stipulated by the previous Constitution.**

The previous criticism formulated by the Venice Commission made reference to the fact that the Fundamental Law refers to cardinal acts more than fifty times, and thereby creates the false notion that cardinal acts need to be established in all of these subjects. **However, the more than fifty references cited in the opinion of the Venice Commission also include repetitive and technical references, therefore a substantially lower number of provisions provides a legal basis for the establishment of cardinal acts.** By way of example, the Venice Commission has come to an incorrect conclusion when it has found that the provisions on the designation of ministries fall under the scope of cardinal acts, on the contrary, the Fundamental Law, in order to ensure the freedom of the government in office to reshape its structure, stipulates that a simple act may also modify the provisions of a cardinal act containing designation of ministries (and ministers or administrative bodies).

The **"cardinality clause"** included in cardinal acts allows for the narrow interpretation of the subjects determined in the Fundamental Law falling under the scope of cardinal acts, and it clearly specifies the provisions that are deemed cardinal pursuant to the Fundamental Law from among the provisions of the given act. For instance, in the new data protection act only the provisions on the

organisation of the data protection authority that ensure the independence of the authority are cardinal (slightly more than ten per cent of the act). Therefore, not all provisions from the interrelated provisions of a given act are necessarily provisions to be amended by two-thirds majority.

It must also be pointed out that in Hungary cardinal acts are below the Fundamental Law in the hierarchy of law, and as a consequence, **the Constitutional Court may fully examine their compliance with the Fundamental Law and may annul them as well. However, in Austria for instance,** various two-thirds acts are considered acts having constitutional power; they have the same rank in the hierarchy of law as the constitution, and the constitutional court cannot review them.