

IN THE NAME OF THE REPUBLIC OF HUNGARY

In a procedure for a posterior examination of the unconstitutionality of a statutory provision and for the examination of an unconstitutional omission of legislative duty, the Constitutional Court has adopted the following

decision:

1. The Constitutional Court holds that it is a constitutional requirement following from the basic principle of equal voting rights guaranteed in Article 71 para. (1) of the Constitution that in all single-member constituencies the numbers of persons with a right to vote be as close to one another as possible, and that the number of parliamentary mandates obtainable in the various regional constituencies be closely related to the number of persons with a right to vote.

2. Acting *ex officio*, the Constitutional Court holds that through an omission of its legislative duty, the Parliament has caused an unconstitutional situation by not fully providing the statutory conditions securing the enforcement of the requirements resulting from the principle of equal voting rights enshrined in Article 71 para. (1) of the Constitution.

The Constitutional Court calls upon the Parliament to comply with its legislative duty after the election of the Members of Parliament in accordance with Article 20 para. (1) of the Constitution, by 30 June 2007.

3. The Constitutional Court rejects the petition seeking the establishment of the unconstitutionality and the annulment of Annex 2 to Act XXXIV of 1989 on the Election of Members of Parliament, and of the Annex to Council of Ministers Decree 2/1990 (I. 11.) MT on the Establishment of Single-Member and Regional Parliamentary Constituencies.

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

Reasoning

I

1. In the petitioner's opinion, Annex 2 to Act XXXIV of 1989 on the Election of Members of Parliament (hereinafter: the AEMP) and the Annex to Council of Ministers Decree 2/1990 (I. 11.) MT on the Establishment of Single-Member and Regional Parliamentary Constituencies (hereinafter: the DPC) violate the constitutional provision enshrining the principle of equal voting rights [Article 71 para. (1) of the Constitution]. According to the petitioner, the unconstitutionality has been caused by the AEMP "not providing for the amendment of the borders of the constituencies and the numbers of mandates obtainable in the regional constituencies as may be necessitated by demographic changes." As there has been a significant mobility of population in certain areas of the country since the adoption of the AEMP and the DPC, the number of voting citizens registered in the single-member constituencies has also changed. On the basis of data from the Central Data Processing, Registration and Election Office of the Ministry of the Interior, the petitioner concludes that in the case of certain constituencies the current number of voting citizens is twice the corresponding figure of another constituency. Thus – in the opinion of the petitioner – the right to vote "cannot be considered equal either in the mathematical or in the legal sense", and this violates the principle of equal voting rights. With reference to the above, the petitioner initiates the establishment of the unconstitutionality and the annulment of the challenged statutory annexes.

2. Article 20 para. (1) of the Constitution:

"Article 20 para. (1) The general election of Members of Parliament – with the exception of elections held due to the declaration of the Parliament's dissolution or the Parliament having been dissolved – shall be held in the month of April or May in the fourth year following the election of the previous Parliament."

Article 71 para. (1) of the Constitution:

"Members of Parliament, Members of the European Parliament, members of representative bodies of local governments, Mayors and the Mayor of the Capital are elected by direct, secret ballot by voting citizens, based on their universal and equal right to vote."

Section 52 of the AEMP:

“The Annexes to this Act shall determine

- a) repealed
- b) the number of single-member constituencies in the counties and the capital as well as the number of mandates obtainable in each regional constituency;
- c) the number of nominations required in single-member constituencies for the creation of a regional list;
- d) the calculation procedure for the totalling of votes and the determination of election results;”

Section 50 para. (2) of the AEMP:

“The Council of Ministers is authorised to determine the serial numbers, centres and areas of single-member and regional constituencies.”

Section 1 of the DPC:

“On the basis of its authorisation in Section 50 para. (2) of Act XXXIV of 1989 on the Election of Members of Parliament, the Council of Ministers establishes the serial numbers, centres and areas of single-member and regional parliamentary constituencies as laid down in the Annex to this Decree.”

II

First the Constitutional Court examined whether a requirement of having the same number of voting citizens registered in the lists of voters in the constituencies follows from the principle of equal voting rights guaranteed in Article 71 para. (1) of the Constitution. In this context, another constitutional question is whether the number of parliamentary mandates obtainable in each of the regional constituencies is required to be precisely proportionate with the number of voting citizens registered in the list of voters.

1. The principle of equal voting rights guaranteed in Article 71 para. (1) of the Constitution is to be regarded as a special rule on equality related to Article 70/A para. (1) on the prohibition of negative discrimination. The Constitutional Court considers Article 70/A para. (1) to be a general rule on equality providing that individual persons must be treated under the law as

persons of equal dignity, and their interests must be weighed on the basis of the same standards. Thus, the prohibition of negative discrimination is a manifestation of the constitutional principle of equal human dignity based on Article 54 para. (1) of the Constitution. [Decision 9/1990 (IV. 25.) AB, ABH 1990, 46; Decision 61/1992 (XI. 20.) AB, ABH 1992, 280-281]

In constitutional democracies, the self-governance of the members of the political community has been realised on the basis of the principle “one person – one vote”, which ensures the right of equal participation in the democratic procedure. The equality (equal value) of the members of the political community having voting rights is manifested in the equal rights of the participants of the decision-making process based on popular sovereignty, and in every voting citizen’s vote having the same value. Besides, the election of representatives, i.e. decision-making based on popular sovereignty, is undoubtedly a fundamental institution of democracy. Consequently, the equality of voting rights enshrined in Article 71 para. (1) of the Constitution is closely related to the principle of the democratic state under the rule of law contained in Article 2 para. (1) of the Constitution.

However, the principle of equal voting rights goes beyond the equality of voting citizens, as Members of Parliament represent all members of the political community. This is expressed, among others, in Article 20 para. (2) of the Constitution: “Members of Parliament shall carry out their duties in the public interest.” In this sense, equal representation also applies to persons not having a right to vote (Article 70 of the Constitution). The Constitutional Court presumed that in the whole population the proportion of those with a right to vote does not show significant differences among the regions of the country, therefore in the present Decision it interpreted the equality of voting rights in respect of voting citizens. (If such a difference is found in some regions, then all inhabitants – rather than only the voting citizens – residing in the area must be taken into account.)

The manner of the enforcement of the constitutional requirements resulting from the principle of equal voting rights enshrined in Article 71 para. (1) of the Constitution is significantly affected by the election system established by the legislator. The Hungarian Constitution does not provide for the statutory institutionalisation of any specific system of election. As pointed out by the Constitutional Court earlier, “in the Constitution – except for the basic principles of election defined in Article 71 – there are no provisions on the manner of exercising the right

to vote. Consequently, the Parliament has a wide scale of discretion in establishing the system of election and the rules of procedure of the election. The legislator is free to define the constituency systems and the rules pertaining to the nomination of candidates, voting and the obtainment of mandates. The Parliament may exercise this freedom of discretion in establishing the rules of election only within the constitutional limits, and it is required to adopt rules that do not violate the provisions of the Constitution and do not unconstitutionally restrict any fundamental right regulated in the Constitution.” [Decision 63/B/1995 AB, ABH 1996, 509, 513; Decision 31/2000 (X. 20.) AB, ABH 2000, 210, 212-213]

The mixed election system introduced in Hungary contains elements of both majority and proportional election systems. A mandate can be obtained on the basis of the majority principle in single-member constituencies, in regional constituencies following the principle of proportionality (county and metropolitan lists), and from the national list (on which voting citizens do not directly cast votes) intended to provide compensation on the basis of fragmentary votes.

2. The constitutional framework for the establishment of the election system is primarily set by the basic principles of election – including the principle of equal voting rights – defined in Article 71 para. (1) of the Constitution. As established by the Constitutional Court in general in Decision 809/B/1998 AB, “The constitutional principle of equal voting rights sets two requirements to be complied with by the legislator adopting the Act on elections: on the one hand, voting rights must be of equal value from the point of view of voting citizens, and on the other hand the votes must preferably be of equal weight in respect of electing each of the Members of Parliament.” (ABH 2000, 783, 784)

The equal value of votes means that all voting citizens have the same number of votes, and, in counting the votes, all votes have the same value. In this respect, Article 71 para. (1) of the Constitution gives no option for plural voting rights, in the case of which preferential groups of voting citizens enjoy more votes or votes with a special value during the elections. According to the Constitutional Court, this requirement is of an absolute nature: the enforcement of the constitutional principle “one person – one vote” may not be restricted in this regard for any reason. (In the present election system, this requirement logically applies separately to voting for single-member candidates and the regional list.)

The Constitutional Court established in respect of the weight of the votes that “The equality of voting rights does not and should not mean the precisely equal enforcement of the political will expressed through the election. Although the Constitution provides for the equality of voting rights, the expression of citizens’ political will through representatives, i.e. indirectly, inevitably results in disproportionality.” [Decision 3/1991 (II. 7.) AB, ABH 1991, 15, 17-18]

In Decision 6/1991 (II. 28.) AB, the Constitutional Court emphasised that “it considers the right of voting citizens enshrined in Article 71 para. (1) of the Constitution to be a political right of paramount importance” as “voting citizens can only have an influence on the composition of the supreme body of State power and popular representation by exercising their active voting rights every four years”. In the opinion of the Constitutional Court “– especially as it is a particularly important civil right – any restriction on the equality or generality of this right can only be accepted as constitutional on the basis of a significant reason of principle.” (ABH 1991, 19, 20)

In view of the above, the Constitutional Court pointed out in 2000 that “Due to the different sizes of the single member constituencies (election geography) and the actual number of votes necessary for obtaining a single mandate (election mathematics), absolute equality is not possible after the elections – knowing the results of the election – in respect of the weight of votes.” (Decision 809/B/1998 AB, ABH 2000, 783, 784) As expressed in Decision 33/2000 (X. 20.) AB on the basis of the equality of voting rights that “voting rights must be of equal value from the point of view of voting citizens, and votes must be of almost the same weight.” (ABH 2000, 221, 226)

3.1. In the present system of parliamentary elections, the requirements resulting from Article 71 para. (1) of the Constitution and pertaining to the equality of voting rights apply to voting in the case of both candidates in single-member constituencies and regional lists. (With due account to the particular features of certain elements of the election system.) In the case of both types of voting, the equality of votes is ensured through procedural rights to be equally enjoyed by all voting citizens. They include, among others, the rules pertaining to nomination, voting and legal remedies. In terms of content, all votes are equal as all voting citizens have – in accordance with the principle of equal human dignity – one vote which is of the same value as of the other voting citizens’ with regard to both the single-member candidate and the regional list.

3.2. The equality of votes in terms of procedure and content is to be judged differently in the case of the constitutional requirement about the weight of votes. Here too, the starting point is that the statutes must reflect the equality of voting citizens: the regulations may not make any unjustified discrimination between certain groups of voting citizens, for example, due to their place of residence, or – indirectly – due to their political views or national or ethnic belonging. Accordingly, the votes can only be considered to be of almost equal weight when it is possible that mandates are the result of decisions by equal numbers of voters. It follows from Article 71 para. (1) of the Constitution that the determination of the boundaries of the constituencies and the mandates obtainable from the lists can neither be aimed at nor result – without justification – in the disadvantageous position of persons belonging to certain groups of voters in comparison with others.

From the point of view of equality in terms of content, the actual number of votes resulting in a mandate in the course of the parliamentary elections is irrelevant. In majority-based systems, inevitably, different numbers of votes result in a mandate even in constituencies of the same size, as the number of and the level of support for the competing candidates (parties) may differ in the various constituencies, and there may be different numbers of voting citizens actually participating in the voting. As a consequence, the requirement that the votes be “preferably of equal weight” and “of almost the same weight” cannot be applied to the actual votes – for single-member candidates and regional lists – cast by voting citizens and to their interrelations. Differences caused by the rate of participation at the elections and by the activity of voting citizens, as well as the actual distribution of votes do not influence the enforcement of the principle of equal voting rights resulting from Article 71 para. (1) of the Constitution.

In the opinion of the Constitutional Court, the requirement of having the same number of voting citizens registered in the lists of voters in each of the constituencies cannot be deduced from Article 71 para. (1) of the Constitution. Similarly, it cannot be expected that the number of parliamentary mandates obtainable in each of the regional constituencies be precisely proportionate with the number of voting citizens registered in the list of voters. This would only be possible at the given date of regulation, as the number of voting citizens registered in the lists of voters is continuously changing, due to reaching the age of 18 (obtaining suffrage), deceases, changes in residence and other circumstances.

3.3. In determining the content of the constitutional requirements resulting from the equality of voting rights, the Constitutional Court has taken into account Opinion No. 190/2002 of the Venice Commission of the Council of Europe, in which the Code of Good Practice in Electoral Matters qualifies the equality of voting rights as a key element of the joint European heritage of electoral law. According to the document, equality includes the requirement of the even distribution of mandates between the constituencies, in the following manner:

- the distribution of representatives' seats must be performed in a balanced way, on the basis of clear rules, with consideration to the following potential criteria: population, the proportion of national minorities, the number of registered voters, the proportion of those expected to exercise their right to vote;
- geographical, administrative and historical boundaries may be taken into account;
- with regard to the number of voters per seats in the Parliament, the deviation per constituency may not be more 10% and shall never exceed 15%. Derogation from these rules may only be allowed in exceptional circumstances (protection of concentrated minorities, sparsely populated administrative entity);
- distribution of parliamentary seats must be reviewed at least every ten years, preferably outside election periods;
- in the case of redefining the boundaries of constituencies, the following aspects must be taken into account: impartiality, the prevention of detriment to national minorities, consultation with a committee the majority of whose members are independent persons. (The committee should preferably include a geographer, a sociologist and a balanced representation of the political parties, and, if necessary, representatives of national minorities.)

4.1. Based on the above, the Constitutional Court has established – interpreting Article 71 para. (1) of the Constitution – that the principle of equal voting rights requires the even distribution of parliamentary seats among constituencies. The Constitutional Court set as a constitutional requirement addressed to the legislator that in the single-member constituencies the numbers of persons with a right to vote must be as close to one another as possible, and that differences are only allowed on the basis of due constitutional grounds. The least possible deviation must also be striven for by the legislator when determining the mandates obtainable from the regional lists. This means that the number of parliamentary mandates obtainable in each of the regional constituencies is required to be closely adjusted to the number of voting citizens registered in the list of voters. (As from the regional lists mandates are obtained on

the basis of the principle of proportionality rather than that of majority, the size of a regional constituency and the number of registered voting citizens are only relevant in relation to the mandates obtainable in the given region.) Therefore, as far as possible, the legislator must strive for the enforcement of the principles of equal representation in both single-member constituencies and regional lists.

4.2. The legislator may only deviate from utmost compliance with the constitutional requirements on the weight of votes – resulting from the equality of voting rights – in the case of due constitutional reasons. The bigger the gap is among the numbers of persons with a right to vote and – in the system of regional lists – among the numbers of mandates obtainable in the various constituencies, the stronger constitutional reason is required to justify the deviation. Due reasons include, among others, geographical features, administrative borders and the proportions of national and ethnic minorities. At the same time, slight – statistically insignificant – differences may be unconstitutional if they result from the manipulation of the borders of the constituencies. In a historical perspective, such changes aimed at influencing the results of the elections in advance (gerrymandering) have usually served the purpose of the artificial transformation of the political situation or that of hindering political participation by minorities.

4.3. Obviously, there may be extraordinary differences among single constituencies and regional lists that violate Article 71 para. (1) of the Constitution in themselves, independently from the cause of the difference. The Constitutional Court considers that it is contrary to the principle of equal voting rights – under any circumstances – when the number of voting citizens registered in the list of voters pertaining to a single-member constituency is twice the corresponding figure of another single-member constituency. A regulation entailing a twofold difference does not affect the equality of votes as the first element of equal voting rights, since each and every one of voting citizens living in various parts (in various constituencies) of the country has the same number of votes, and each vote has the same value in the course of counting the votes. At the same time, the twofold difference causes such disparity in respect of the second element of equal voting rights – i.e. the weight of the votes of voting citizens belonging to various communities – that violates the general [Article 54 para. (1); Article 70/A para. (1)] and special [Article 71 para. (1)] rules of the Constitution on equality. In such a case, the difference in the number of persons with a right to vote is so great that it cannot be constitutionally justified on any basis.

Specific, less than twofold differences in the regulations constitute a separate constitutional issue not examined in the present case. Therefore, the Constitutional Court has not taken a stand in the present Decision about the precise level of difference in the case of which the cause can be examined. (Studies in the professional literature cover not only the difference between the smallest and largest constituencies but also the deviations of specific constituencies from the average.)

4.4. The continuous changes in the number of voting citizens registered in the specific constituencies, and especially internal migration, justify the revision of the borders of the constituencies from time to time, as well as that of the proportions of mandates obtainable from the regional lists. However, the too frequent modification of the borders of the constituencies may endanger the stability of the election system, and – especially when it is performed soon before the elections – may raise a suspicion of modifying the political situation in a prohibited manner.

III

On the basis of the petition, the Constitutional Court has examined the challenged provisions in the light of the principle of equal voting rights contained in Article 71 para. (1) of the Constitution and explained in point II of the present Decision.

1. On the one hand, Annex 2 to the AEMP determines the number of single-member constituencies in the specific counties and in the capital (altogether 176). On the other hand, the Annex includes the distribution of the 152 mandates obtainable in the regional constituencies among the counties. The Annex to the DPC establishes the serial numbers, centres and areas of single-member and regional parliamentary constituencies. The petitioner requests the establishment of unconstitutionality and the complete annulment of both Annexes.

In the opinion of the Constitutional Court, the statutory annexes reviewed are provisions for the implementation of Article 71 para. (1) of the Constitution. The enforcement of the principle of equal voting rights depends on the contents of Annex 2 to the AEMP and the Annex to the DPC. The distribution of single-member constituencies among the counties

(Annex 2 to the AEMP) and the description of the areas of the specific constituencies (the Annex to the DPC) have a fundamental effect on the weight of the votes for single-member candidates. The distribution of mandates obtainable in the regional constituencies among the counties (Annex 2 to the AEMP) determines the weight of the votes for the regional lists. Consequently, in the regulations in force, it is basically the two annexes under review that are to ensure compliance with the two constitutional requirements specified by the Constitutional Court in point II of the Reasoning of the present Decision: in the single-member constituencies the numbers of persons with a right to vote must be as close to one another as possible, and deviations must be duly justified by constitutional reasons; the number of parliamentary mandates obtainable in the specific regional constituencies must be closely adjusted to the number of persons with a right to vote. Any deviation from the above must be duly justified by constitutional reasons.

2. According to the Constitutional Court, the entire Annex 2 to the AEMP and the Annex to the DPC cannot be held unconstitutional, and, consequently, cannot be annulled on the basis of a twofold difference among the numbers of voting citizens registered in certain single-member constituencies. This initiative of the petitioner has been rejected by the Constitutional Court partly on the basis of the fact that only part of the challenged annexes is related to the constitutional concern raised. (The part of Annex 2 to the AEMP providing for the distribution of the number of single-member constituencies among the counties, and the description of the areas of the specific single-member constituencies contained in the Annex to the DPC.) The Constitutional Court cannot establish – in the framework of a posterior examination of statutes – the comparative relations between the numbers of voting citizens registered in the specific single-member constituencies and their deviation from the average. It is not possible, either, to perform a posterior constitutional examination and annulment in respect of the concrete provisions pertaining to constituencies where excessive differences can be identified, as the modification of specific elements of the election system would directly affect the operation of the entire system. It may be an exception if, in the case of amending the statutes on the election system or the annexes thereof, the constitutional examination is related to amendments which have not yet entered into force. However, the petitioner requests the complete annulment of two statutory annexes, and in the opinion of the Constitutional Court, that would make the operation of the election system impossible.

Therefore, the Constitutional Court has rejected the petition seeking the establishment of the unconstitutionality and the annulment of Annex 2 to the AEMP and the Annex to the DPC.

IV

1. Pursuant to Section 49 para. (1) of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC), “If an unconstitutional omission to legislate is established by the Constitutional Court *ex officio* or on the basis of a petition by any person because the legislature has failed to fulfil its legislative duty mandated by a statute, and this has given rise to an unconstitutional situation, it shall call upon – by setting a deadline – the organ in default to perform its duty.” Section 21 para. (7) of the ACC – in line with Section 49 para. (1) quoted above – provides that the Constitutional Court may start a procedure for examining an unconstitutional omission of legislative duty even acting *ex officio*.

In the present case, in his petition seeking posterior examination, the petitioner objects to the AEMP “not providing for the amendment of the borders of the constituencies and the numbers of mandates obtainable in the regional constituencies as may be necessitated by demographic changes.” With consideration to this objection and to the theoretical considerations explained in point II of the Reasoning of the present Decision, and on the basis of Section 49 para. (1) of the ACC, the Constitutional Court has examined – acting *ex officio* – whether the statutes on the election system provide adequate guarantees in respect of the constitutional requirements on the approximately same weight of votes following from the principle of equal voting rights contained in Article 71 para. (1) of the Constitution.

In the practice of the Constitutional Court, Section 49 para. (1) of the ACC may be applied when two conditions exist at the same time: the omission of the legislator and the unconstitutional situation resulting therefrom. [Decision 22/1990 (X. 16.) AB, ABH 1990, 83, 86; Decision 1395/E/1996 AB, ABH, 1998, 667, 669; Decision 35/1999 (XI. 26.) AB, ABH 1999, 310, 317; Decision 49/2001 (XI. 22.) AB, ABH 2002, 351, 355]

The Constitutional Court establishes an unconstitutional omission of legislative duty not only when there is no statute at all regarding a certain subject but also if any statutory provision required by the Constitution is missing from the existing statutes. As pointed out by the Constitutional Court in many Decisions, an unconstitutional omission of legislative duty may

also be established when the legislator has performed its legislative duty resulting from the Constitution or other statute, but with such regulatory deficiencies that have resulted in an unconstitutional situation. [Decision 22/1995 (III. 31.) AB, ABH 1995, 108, 113; Decision 29/1997 (IV. 29.) AB, ABH 1997, 122, 128; Decision 15/1998 (V. 8.) AB, ABH 1998, 132, 138; Decision 22/1999 (VI. 30.) AB, ABH 1999, 176, 196, 201; Decision 49/2001 (XI. 22.) AB, ABH 2001, 351, 355]

2.1. Article 71 para. (3) of the Constitution provides that “Separate laws shall establish provisions for the election of Members of Parliament, Members of the European Parliament and members of representative bodies of local governments and mayors. A two-thirds majority vote of the Members of Parliament present is required to pass such laws.”

As stressed by the Constitutional Court in Decision 63/B/1995, “The right to vote is a “fundamental right that is aimed at ensuring the participation of citizens in the exercise of State power and the enforcement of which requires the State to secure the conditions of its exercise; the manner, rules and guarantees of its exercise are to be determined in a statute, more specifically in an Act of Parliament in line with Article 8 para. (2) of the Constitution.” (ABH 1996, 509, 513)

In respect of the content of the constitutional requirements pertaining to the weight of votes, rules are provided by Act C of 1997 on the Election Procedure (hereinafter: the AEP).

Pursuant to Section 9 of the AEP:

“(1) Constituencies shall be established in such manner that the number of the population per constituency should be approximately the same.

(2) When establishing constituencies, attention shall also be paid to ethnic, religious, historical, geographical and other local characteristics.”

Section 88 of the AEP under the title “Constituencies, Electoral Districts” is as follows:

“Principles of establishing constituencies:

- a) the single-member constituency shall be within the area of the capital or county,
- b) the entire area of the local government of the settlement shall be within the single-member constituency; in the capital the single-member constituency may cover two or more districts; districts of the capital and towns of county rank may be divided into two or more single-member constituencies,

- c) the centre of the single-member constituency shall be in a town if possible,
- d) a town and its related areas may constitute one constituency,
- e) the regional constituency is identical with the area of the capital or the county.”

Section 50 para. (2) of the AEMP provides that “The Council of Ministers is authorised to determine the serial numbers, centres and areas of single-member and regional constituencies.” An authorisation with the same content is included in Section 152 of the AEP: “The Government is authorised to determine the serial numbers, centres and areas of single-member and regional constituencies.” Pursuant to Section 52 items b)-c) of the AEMP, the annexes to the AEMP determine – among others – “the number of single-member constituencies in the counties and the capital as well as the number of mandates obtainable in each regional constituency”.

2.2. Thus, provisions pertaining to the establishment of single-member and regional constituencies can be found in the AEP and the AEMP. According to the regulations in force, the determination of the areas of constituencies is within the Government’s competence, while the Parliament is entitled to decide on the distribution of single-member constituencies among the counties and on the number of mandates that can be obtained from the regional lists.

In the opinion of the Constitutional Court, the rules pertaining to the establishment of single-member and regional constituencies are rather incomplete. Section 9 of the AEP, according to which the number of the population in each constituency must be approximately the same, basically only provides a rule corresponding to the abstract constitutional requirement explained in point II of Reasoning of the present Decision. Previously, Annex 1 to the AEMP entitled “Principles of Establishing Constituencies” provided, among others, that “The number of the population in a single-member constituency is approximately 60 thousand.” Annex 1 was repealed by Section 155 item a) of the AEP. (Repealed as of 6 November 1997.) Currently neither the AEP nor any other Act of Parliament determines the criteria of modifying the areas of the constituencies. It is unclear what the Government may and must consider when deciding on changes. There is no statutory rule providing for the level of acceptable deviation either by defining the differences among the numbers of voting citizens in the specific constituencies or the deviation of the specific constituencies from the average (along with any exceptions). Furthermore, there are no statutory guarantees to ensure that the Government’s procedure leading to decision-making is balanced and unbiased.

The Constitutional Court considers that the lack of provisions on the regular review of the number of mandates belonging to the areas of the single-member constituencies and to the regional lists is a serious deficiency in the statutory regulations. In the past fifteen years there has not been any comprehensive review of the boundaries of the constituencies and the number of list-based mandates fixed at the time of the constitutional transformation. Generally, the DPC has only been modified when required by a change in public administration. (For example, when a settlement seceded from a county to join another one.) Besides, an Act of Parliament must specify the exceptional cases where the boundaries of single-member constituencies may be modified in the period immediately preceding the parliamentary elections. Thus, it is the duty of the legislature to adopt provisions on the institution performing regular review, the date of the review and the restrictions on modification before the elections.

When adopting regulations on constituencies, the legislature can align the number of mandates with the number of persons with a right to vote, or with the total number of the population. It must, however, be taken into account that – as explained in point II of the Reasoning of the present Decision – equal representation also applies to those not having a right to vote. Therefore, the alignment of the number of mandates to the number of people with voting rights is only constitutional if the proportion of voting citizens in the total population does not show significant deviations among the various parts of the country. If this condition is not met, all inhabitants – rather than only the voting citizens – residing in the area must be taken into account. In the present case, the Constitutional Court has not examined the rates of voting citizens in the population.

2.3. In the framework of the posterior constitutional examination – in the absence of a relevant petition – the Constitutional Court has not taken a stand concerning the level of the regulations in force in the hierarchy of sources of law. However, when examining the unconstitutional omission, the Constitutional Court took account of the fact that in the present system the areas of the constituencies depend on the structure of the State's public administration. Pursuant to Article 41 of the Constitution: “(1) The territory of the Republic of Hungary is divided into the following administrative units: the capital, the counties, the cities and communities. (2) The capital is divided into districts. Districts may be formed in cities as well.” According to Article 19 para. (3) item 1) of the Constitution and Section 93

para. (4) of Act LXV of 1990 on Local Governments (hereinafter: the ALG), the Parliament is in charge of deciding on merging and separating counties, on changing their boundaries, on their name and seat, as well as on granting county rank to towns and on the establishment of districts in the capital. At the same time, according to Section 94 item b) of the ALG, the President of the Republic shall decide – upon the initiative of the local governments concerned – on granting town titles, establishing and merging communities, separating merged communities and on the names of towns and communities. As the establishment, merging, etc. of communities and towns have an impact on single-member constituencies, under the regulations in force, the changes usually make it necessary to amend the Annex to the DPC.

It does not follow from the Constitution that the establishment or merging of communities and the granting of town titles (in relation to which the Parliament has no competence) necessitate the amendment of the Acts of Parliament – requiring a two-thirds majority – on the election system. If the amendment of the Acts on election failed to follow the changes made from time to time in public administration or if it followed them belatedly, the elections could not be held properly. Therefore, the Constitutional Court considers it essential to ensure the flexibility of the regulations.

Nevertheless, significant constitutional concerns might arise if the Government may define the boundaries of the constituencies without adequate statutory restrictions. As referred to by the Constitutional Court in point II of the Reasoning of the present Decision, manipulating the boundaries of the constituencies and influencing the election results prior to the elections for the purpose of artificially changing the political situation are contrary to Article 71 para. (1) of the Constitution under any circumstances. It follows from the Constitution that an Act of Parliament must provide for the essential guarantees which adequately delimit the scope of discretion of the Government and that of future legislatures – possibly not subject to the requirement of two-thirds majority – and which ensure the enforcement of the principle of equal voting rights stemming from Article 71 para. (1) of the Constitution.

3. In the opinion of the Constitutional Court, the above deficiencies in the statutory regulations violate the principle of equal voting rights specified in Article 71 para. (1) of the Constitution, more specifically the constitutional requirements pertaining to the weight of votes. As emphasised by the Constitutional Court in point II of the Reasoning of the present

Decision, the election regulations may not make any unjustified discrimination between any groups of voters. From another point of view: the determination of the boundaries of the constituencies and the mandates obtainable from the lists can neither be aimed at nor result – without justification – in the disadvantageous position of persons belonging to certain groups of voters in comparison with others.

As the present statutory regulations do not contain the guarantees necessary for the enforcement of Article 71 para. (1) of the Constitution, the Constitutional Court has established – acting *ex officio* – that through an omission of its legislative duty, the Parliament has caused an unconstitutional situation by not fully providing the statutory conditions securing the enforcement of the constitutional requirements resulting from the principle of equal voting rights enshrined in Article 71 para. (1) of the Constitution.

4. Concurrently with establishing an unconstitutional omission, the Constitutional Court has called upon the Parliament to meet its legislative duty by 30 June 2007. In setting the deadline, the Constitutional Court has paid attention to the significant constitutional concerns about the amendment of the Act directly before the elections and – accordingly – about the comprehensive review of the areas of single-member constituencies and the numbers of mandates obtainable from the regional lists.

Pursuant to Article 20 para. (1) of the Constitution: “The general election of Members of Parliament – with the exception of elections held due to the declaration of the Parliament’s dissolution or the Parliament having been dissolved – shall be held in the month of April or May in the fourth year following the election of the previous Parliament.” Accordingly, the next – not extraordinary – parliamentary elections shall be held in April or May 2006. Thus, it will be the duty of the new Parliament formed after the election of Members of Parliament in accordance with Article 20 para. (1) of the Constitution to remedy the unconstitutional omission of legislative duty.

The Constitutional Court notes that its Decision does not affect the constitutionality of the parliamentary elections held before the required amendment of the Act and the comprehensive review of the areas of single-member constituencies and the numbers of mandates obtainable from the regional lists. The statutes on the election system must guarantee the enforcement of the election principles listed under Article 71 of the Constitution

in a long term and in a stable manner. This can be elaborated and the missing provisions can be adopted after the elections. Furthermore, the Constitutional Court points out that although the present Decision has established an unconstitutional omission in respect of the regulations pertaining to the election of Members of Parliament, the principles detailed in point II of the Reasoning of the Decision also apply, as appropriate, to the other elections listed in Article 71 para. (1) of the Constitution.

5. In view of the establishment of a constitutional requirement and an unconstitutional omission, the Constitutional Court has ordered the publication of the present Decision in the Hungarian Official Gazette (*Magyar Közlöny*).

Budapest, 14 June 2005

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