



Number: U-I-445/20

U-I-473/20

Date: 11 October 2021

**CONCURRING OPINION OF JUDGE DR MATEJ ACCETTO
REGARDING DECISION NO. U-I-445/20, U-I-473/20, DATED 16
SEPTEMBER 2021**

1. I concur with the operative provisions and was able to support the Decision. However, I have strong reservations regarding the assessment carried out in Part B – III of the reasoning of the Decision. Since the disagreement with my colleagues forming the majority over this part of the reasoning does not affect my decision regarding the operative provisions, I was able to support the Decision. However, I feel obliged to draw attention to this divergence of positions and to explain it briefly.

2. In Part B – III, the assessment of the conformity of the challenged implementing regulations with the principle of legality was carried out, i.e. that the functioning of the administration is based on laws, as determined by the second paragraph of Article 120 of the Constitution, even though, as is also stated in the Decision (in paragraph 30 of the reasoning), the petitioners do not allege such inconsistency, but only substantive inconsistency of the challenged implementing regulations with the second paragraph of Article 120 of the Constitution. In the Decision, this is explained with the argumentation that a substantive assessment of measures is only sensible if the measures are based on a sufficient statutory basis and that, therefore, even before a substantive assessment is carried out, an assessment of consistency with the principle of legality must also be carried out, at least in instances where "a manifest doubt arises" regarding the latter, even if there are no arguments for that in the petition.

3. Such an approach to assessing legality is, in my view, erroneous or deficient. In its most extreme logical derivation, it means that the Constitutional Court, while assessing the constitutionality or legality of implementing regulations, should regularly, as a sort of a "preliminary question", also carry out the assessment of the constitutionality of their statutory basis, regardless of whether the application contains any allegations as to a presumed unconstitutionality of a specific statutory provision. In such instance, the same would perhaps also apply to any alleged disproportionality of an interference with a human right by a law – even there, the Constitutional Court would then always be required to carry out the assessment of the constitutionality of the statutory provisions regulating that measure even before carrying out the assessment of whether the objective is constitutionally admissible and the strict test of proportionality, again irrespective of whether there was any basis for such an assessment in the specific application.

4. In my view, the Decision also at this point appropriately determines the order of reasoning or assessment when the court carries out the complete assessment. In such an instance, the assessment of the appropriate statutory basis or the appropriate chain of legal bases that are



directly or indirectly based on the Constitution¹ must certainly be carried out before the substantive assessment of the proportionality of the measure. If a measure interfering with fundamental rights has no appropriate legal (statutory) basis, the question of its proportionality in practical terms does not even arise.² However, in my view, the Court must not disregard the applicant's burden of allegation in this respect and assess the constitutionality of the statutory basis even if the latter is not disputed by the applicant.³ The applicant's allegation that the measure is substantively disproportionate does not in itself include an allegation that the (sub)statutory basis is inconsistent with the principle of legality, nor is the assessment of the latter in itself an inevitable part of the strict test of proportionality or the test of the constitutional admissibility of the objective of the measure as its prerequisite. Insofar as the latter at least indirectly touches upon the question of statutory basis, it is in my assessment not possible to state that the requirement of the *existence* of a statutory basis automatically also entails a requirement that its constitutional consistency must be substantively assessed.

5. The fact that the emphases made in the preceding paragraph of this opinion hold true is, after all, confirmed by the Decision itself where it states that, even in the absence of proper arguments in the petition, an assessment of consistency with the principle of legality must be carried out even prior to the substantive review, at least in instances where a “manifest doubt arises” as to such consistency. Hence, also in accordance with the reasoning of the Decision, the allegations of substantive inconsistency do not in themselves also include an allegation of inconsistency with the principle of legality, nor is this assessment inextricably connected with the substantive assessment of proportionality, since the assessment from the perspective of the principle of legality is not necessarily carried out in all instances, but only (or at least) in those instances in which a manifest doubt arises as to the consistency of the challenged measure with the Constitution. The chosen criterion (where “a manifest doubt arises”) can also be understood as an attempt to limit the far-reaching nature of the position adopted in the Decision – however, in my assessment, it is neither substantively justified nor sufficiently procedurally defined to be able to justify a departure from the normal requirement that the applicant's burden of allegation be observed.

6. From a somewhat distant systemic perspective of constitutional review, the question of the appropriate order of hearing cases may arise, at least pragmatically, when several applicants challenge the same (sub)statutory regulation, and (only) some of them do so also from the perspective of the principle of legality. In such circumstances, I am prompted to consider that

¹ See, e.g., A. Barak, *Proportionality: Constitutional Rights and Their Limitations*, Cambridge University Press, Cambridge 2012, pp. 108–110.

² Similarly, I have long advocated the observance of the order of assessment when applying the strict test of proportionality – see concurring opinion of judge Accetto regarding Decision of the Constitutional Court No. Up-320/14, U-I-5/17, dated 14 September 2017 (Official Gazette RS, No. 59/17, and OdIUS XXII, 9).

³ The situation is to some extent different when constitutional complaints are considered if the Constitutional Court, once it concludes that the procedural requirements have been fulfilled and once it takes into account the allegations of the complainant, establishes that the challenged individual act is based on a potentially unconstitutional regulation and carries out a review of its constitutionality *ex officio* in accordance with the second paragraph of Article 59 of the CCA.



the assessment of applications that (also) include allegations of an inconsistency with the principle of legality should be carried out before the assessment of those applications in which the allegations made are limited to claims of substantive inconsistency of the measures with the requirements of proportionality, in particular if the assessment of the latter alone would lead to a finding of the constitutional conformity of the challenged measures, as was the case in Decision No. U-I-83/20.⁴ For a similar reason, I had no difficulty this time in supporting the approach whereby the Constitutional Court first ruled in Case No. U-I-8/21 and only then in the present case. However, I remain strongly reserved towards the approach according to which the Constitutional Court would carry out an assessment of conformity with the principle of legality even in cases where there are no appropriate arguments for such an assessment in the application, but where, according to the Constitutional Court, a manifest doubt arises as to the constitutional conformity of the challenged regulation from this perspective.

7. I would therefore delete Part B – III in its entirety from the reasoning, notwithstanding the fact that substantively, I would otherwise concur with the Court's reasoning in that part. In my view, the Constitutional Court should namely not have carried out at all such an assessment in the absence of appropriate arguments. Since my disagreement with the reasons provided in the Decision does not change my decision regarding the operative provisions, I was nevertheless able to vote in favour thereof, despite the strong reservations described above.

Dr Matej Accetto
Judge

⁴ Decision of the Constitutional Court No. U-I-83/20, dated 27 August 2020 (Official Gazette RS, No. 128/20).