

CONSTITUTIONAL COURT

W I 6/2016-125

1 July 2016

IN THE NAME OF THE REPUBLIC

The Constitutional Court,
chaired by President
Gerhart HOLZINGER,

in the presence of Vice-President
Brigitte BIERLEIN

and the members
Markus ACHATZ,
Eleonore BERCHTOLD-OSTERMANN,
Sieglinde GAHLEITNER,
Christoph GRABENWARTER, Christoph HERBST,
Michael HOLOUBEK,
Helmut HÖRTENHUBER, Claudia KAHR,
Georg LIENBACHER, Rudolf MÜLLER,
Johannes SCHNIZER, and
Ingrid SIESS-SCHERZ

as voting members, in the presence of the constitutional clerk
Heinz VERDINO
as judge rapporteur,

has ruled on the challenge to the run-off election of the Federal President on 22 May 2016, which was filed on 7 June 2016 by Heinz-Christian STRACHE, c/o Freedom Party of Austria (*Freiheitliche Partei Österreichs, FPÖ*), Friedrich-Schmidt-Platz 4/3a, 1080 Vienna, represented by B&S Böhmdorfer Schender Rechtsanwälte GmbH, Gusshausstrasse 6, 1040 Vienna, after a public oral hearing held on 20, 21, 22, 23 and 29 June 2016 and on 1 July 2016, after the presentation of the case by the judge rapporteur, and after the statements of the representatives of the challenging party, lawyers Dieter Böhmdorfer, Rüdiger Schender and Michael Rohregger, of the representative of the Federal Electoral Authority, Robert Stein, and of the representatives of the interested party, lawyers Maria Windhager and Georg Bürstmayr, pursuant to Article 141 of the Constitution, and has today pronounced as follows:

The challenge is allowed. The run-off election of the Federal President of 22 May 2016 is annulled as of the date of announcement by the Federal Electoral Authority on 2 May 2016, inasmuch as this announcement ordered the holding of a run-off election on 22 May 2016.

Reasoning

I. Facts, Challenge and Preliminary Proceedings

1. The challenging party is the representative authorised to accept service of the election proposal for the Federal President in the name of Norbert Hofer. This election proposal was published on 24 March 2016 by the Federal Electoral Authority (cf. announcement file no. BMI-WA1220/0070-III/6/2016). The first round of the election of the Federal President, which had been announced by regulation of the federal government, Federal Law Gazette *BGBI. II 28/2016*, was held on 24 April 2016. 1

2. On 2 May 2016, the Federal Electoral Authority publicly announced the result of the election of the Federal President of 24 April 2016; as none of the candidates standing for election attained an absolute majority of the valid votes pursuant to section 17 of the Law Governing the Election of the Federal President 1971 (*Bundespräsidentenwahlgesetz 1971, BPräsWG*), a run-off election was ordered pursuant to section 19 paragraph 1 *BPräsWG*. Sunday 22 May 2016 was set as election day. 2

Based on the outcome of the first round of the election (cf. announcement by the Federal Electoral Authority of 2 May 2016 on the result of the election of the Federal President of 24 April 2016 and on holding a second round on 22 May 2016, file no. BMI-WA1220/0213-III/6/2016), Norbert Hofer and Alexander Van der Bellen stood as candidates in the run-off election on 22 May 2016.

3. According to the announcement by the Federal Electoral Authority of 1 June 2016, 164,875 votes of the total of 4,637,046 votes cast in the election of the Federal President were found to be invalid. Out of the total of 4,472,171 valid votes, the two candidates obtained the following number of votes:

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Norbert Hofer	2,220,654
Alexander Van der Bellen	2,251,517

Alexander Van der Bellen was declared president elect.

4. By means of the present electoral challenge of 7 June 2016, which is based on Article 141 paragraph 1 point (a) of the Constitution and on section 21 paragraph 2 *BPräsWG*, the challenging party is seeking that "the entire proceedings governing the election of the Federal President as announced by Federal Law Gazette *BGBI II 28/2016* be repealed and declared null and void as of the date on which the second round of elections was announced by the Federal Electoral Authority on 2 May 2016".

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4.1. In its statement of challenge, the challenging party essentially argues that the procedural requirements for challenging an election have been met as follows: The challenging party is the representative authorised to accept service of an election proposal in conformity with the law pursuant to section 9 *BPräsWG*, i.e. that of 17 March 2016, by which the Third President of the National Council, Norbert Hofer, Member of the Austrian Parliament, born on 2 March 1971, was proposed for election as Federal President. The challenge had been filed with the Constitutional Court within one week after the announcement of the final result of the election of the Federal President on 1 June 2016 – and therefore, at any rate, within the one-week period allowed for filing a challenge according to section 21 paragraph 2 *BPräsWG* (as for the constitutional reservations raised against this deadline in this statement of challenge, see I.4.3.1.).

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4.2. The challenging party then claimed shortcomings in the election procedure and substantiated these as follows: 6

4.2.1. First, concerns were raised that infringements of the law had occurred regarding the principles of free and secret elections (as they arise for the present case in particular from Article 60 of the Constitution, Article 8 of the Vienna State Treaty, and Article 3 of the First Additional Protocol to the European Convention on Human Rights) and the principle of personal election, the fundamental principle of the rule of law and democracy set out in the Austrian Federal Constitution, as well as the principle of equality. 7

The *BPräsWG* and the supplementary decree by the Federal Ministry of the Interior of 27 April 2016, file no. BMI-WA1220/0196-III/6/2016 ("Guidance for the second round of elections for the Federal President on 22 May 2016" – in the following: election decree), it is argued, contain precise rules governing the application for, hand-out or transmission, recording, validity and counting of absentee ballots. Pursuant to Article 10 paragraphs 6 and 7 and section 14a *BPräsWG* and the corresponding rules in the election decree, the counting proper of the absentee ballots cast by post, as well as all related activities, such as the verification of the absentee ballots as to their validity, the opening of absentee ballots, and the removal of the ballot paper envelopes and of the official ballots, are exclusively reserved to the district electoral authority. All of these activities must not be carried out before 9:00 a.m. of the day following the day of the election; up to that time, absentee ballots received or handed in must be officially kept under seal. These rules are to prevent manipulations by unauthorised persons as, it is argued, a risk of manipulation exists, in particular, with absentee voting by post. This emerges from the legislative materials on the 2011 Act on the Amendment of the Election Law (*Wahlrechtsänderungsgesetz 2011*), Federal Law Gazette *BGBI. I 43/2011*, by way of which, in response to the risk of manipulation of absentee ballots recognised by the legislator (cf. *IA 1527/A 24. GP*), identical adjustments were made in the 1992 Act on Elections to the National Council (*Nationalrats-Wahlordnung 1992, NRWÖ*) and in the *BPräsWG*, which took effect concurrently. 8

It was further argued that the Constitutional Court had already held earlier that violations of provisions governing "official duties of safekeeping under seal" in election laws, which are to ensure the correct counting of votes and to prevent manipulations of elections, are to be taken up regardless of whether a 9

manipulation which alters the election result can actually be proven or not. The same, it is argued, must therefore also hold for the provisions of the *BPräsWG*.

As regards the election now challenged, it is argued that, in particular, the provisions governing the counting of absentee ballots cast by post have been blatantly infringed in the entire national territory:

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"V. Justification of the electoral challenge

[...]

2. Unlawfulness of postal voting

[...]

2.3 Specific infringements of the law

[...]

2.3.1 Premature counting of absentee ballots cast by post and/or counting by non-authorised persons:

[...]

a) Electoral district Villach-Stadt

In the district Villach-Stadt, absentee ballots were sorted into void votes and such which are to be included in the ascertainment of the result, opened and counted already on Sunday, 22 May 2016 in the absence of the members of the district electoral authority. At the statutory beginning of counting by the district electoral authorities (23 May 2016, 9:00 a.m.) all official ballots cast by absentee voting had already been counted. This emerges from the declaration in lieu of an oath given by the Assistant Electoral Officer Ms ***** dated 6 June 2016. The result of the counting of the absentee ballots was available and informally reported to ***** on 23 May 2016, 9:00 a.m. already by Mr ***** (staff member of the electoral office of the city of Villach). This result reported to Ms ***** was confirmed in the meeting scheduled for 23 May 2016, 4:30 p.m. of the district electoral authority (see invitation).

This unlawful premature counting by non-authorised persons was arranged by the District Chief Electoral Officer, Mayor *****, on his own accord – and without the other members of the district electoral authority being informed. Neither was there a decision to sort the absentee ballots in advance (into void ballots and such which were to be included in the ascertainment of the result), nor was there a decision to prematurely count the ballots (outside the district

electoral authority without Assistant Electoral Officers and election witnesses being present).

Neither the Assistant Electoral Officer Ms ***** nor the Assistant Electoral Officer Mr ***** were present during the verification and counting of the absentee ballots (votes).

This unlawfulness was also reported in the media. While the City of Villach, in the person of the deputy head of the municipal administration, *****, denied vis-à-vis the Austrian Press Agency (APA) that ballots had been prematurely counted, the head of the Carinthian Province electoral authority, *****, confirmed vis-à-vis the APA that the City of Villach had confirmed that absentee ballots had been counted earlier than stipulated by law.

The fact that this unlawfulness was not recorded in the minutes, as requested by the Assistant Electoral Officers ***** and ***** – even though this had been promised by the head of the district electoral authority, Mayor ***** – does not affect the objectively proven unlawfulness, but, on the contrary, reinforces concerns as to possible manipulations which the law in actual fact wishes to preclude. The statement recorded in point G of the minutes (page 3 et seq.), according to which the procedure prescribed by the *BPräsWG* had been adhered to, is a false certification. The statements recorded in the minutes are incorrect, as – in actual and correct fact – the absentee ballots were verified and counted on 22 May 2016 already without participation of and/or monitoring by the members of the district electoral authority (Assistant Electoral Officers). Any record in the minutes to the contrary is therefore downright incorrect.

The unlawfulness outlined was addressed by the Assistant Electoral Officer ***** who requested that the infringement of the law be recorded in the minutes. The District Chief Electoral Officer promised that the objection would be recorded, but this was never done. This emerged in the course of a meeting of the Carinthian Province electoral authority on 24 May 2016 and was revealed by the members delegated by the Freedom Party (*FPÖ*), ***** and ***** . ***** and ***** then refused to sign the minutes of the Carinthian Province electoral authority on the meeting held to determine the final election results on 24 May 2016 and the provincial election file. The minutes of the Carinthian Province electoral authority of 24 May 2016 were not signed by the members ***** and ***** , because the counting in the districts of Villach and Villach-Land had already been done on Sunday. In the districts of Hermagor and Wolfsberg, the ballot paper envelopes had been opened (see enclosure) before 9:00 a.m.

Likewise, the result of the absentee votes cast by post in the district Villach-Stadt, compared with the overall result in the electoral district Villach-Stadt, is conspicuous:

According to point J of the minutes, the total number of votes validly cast (29,773) was attributable as follows:

Norbert Hofer 16,097 votes (equalling 54.07 %)

and

Alexander Van der Bellen 13,676 votes (equalling 45.94 %).

This result deviates significantly from the result of absentee voting. The 3,443 validly cast (absentee) votes were attributable as follows:

Norbert Hofer 1,305 votes (equalling 37.9 %)

and

Alexander Van der Bellen 2,138 votes (equalling 62.10 %).

Considering the fact that the numbers shown under point J are aggregate numbers (i.e. polling stations plus valid absentee ballots), the difference between polling station votes and absentee votes becomes even more marked: deducting the absentee votes, the result of the votes cast on 22 May 2016 at the polling stations in the electoral district of Villach Stadt is as follows:

Total number of valid votes 26,330, of which for

Norbert Hofer 14,792 (= 56.18 %)

and for

Alexander Van der Bellen 11,538 (= 43.82 %).

Objectively considered, this striking difference between the result of the votes cast at the polling stations (56.18 % for Hofer and 43.82 % for Van der Bellen) and absentee votes cast by post (37.9 % for Hofer and 62.10 % for Van der Bellen) raises serious concerns as to the correctness and accuracy of the ascertained result of absentee voting, which had been counted already on 22 May 2016 in the absence of Assistant Electoral Officers and election witnesses for the electoral district Villach Stadt. This case in point clearly illustrates the importance of complying with statutory requirements governing the evaluation of absentee ballots by the district electoral authority (i.e. a majority of persons). Only by the presence of a majority of persons (in the form of the district electoral authority set out in law) is it possible to preclude manipulation and to counteract the mere suspicion of electoral manipulation.

On 24 May 2016, the Federal Ministry of the Interior informed the Central Prosecution Office to Fight Economic Crime and Corruption of this unlawfulness in a statement of facts, followed by a supplementary statement of facts on 25 May 2016.

[...]

b) Electoral district Villach-Land

In the electoral district Villach-Land as well, the absentee and postal ballots, respectively, were counted already on Sunday, 22 May 2016. In the electoral district Villach-Land as well, the absentee (postal) ballots were counted before the time set out in the law, excluding the district electoral authority, in contravention of section 14a *BPräsWG*.

The members of the district electoral authority Villach-Land delegated by the Austrian Freedom Party (*FPÖ*), ***** and *****, did not have an opportunity to take part in the verification of the absentee ballots as to any nullity and in the counting of the postal ballots. The district electoral authority Villach-Land was convened only for Monday 23 May 2016, 2:00 p.m. This notwithstanding, the Assistant Electoral Officer ***** went to the district electoral authority on 23 May 2016 in order to be present during the counting of the absentee ballots cast by post, aware that the law stipulates 9:00 a.m. on the day following the election. ***** found that, at that moment in time, (Monday, 23 May 2016, 9:00 a.m.) the counting of the absentee ballots cast by post had already been completed.

Moreover, the evaluation (screening for nullity, counting) was performed by staff of the district administration authority Villach-Land, i.e. by persons [...] who were not members of the district electoral authority.

The meeting of the district electoral authority convened on 23 May 2016 at 2:00 p.m. merely served to formally sign the minutes which had been prepared in advance by the district electoral authority. This also is clearly an infringement of the law.

This unlawfulness was identified by the Assistant Electoral Officers ***** and ***** in the meeting of the Carinthian Province electoral authority, who refused to sign the minutes of the province electoral authority, invoking the unlawfulness described and stating the reasons set out under point a).

On 25 May 2016, the Federal Ministry of the Interior transmitted a statement of facts to the Federal Prosecution Office to Fight Economic Crime and Corruption concerning infringements in the evaluation and counting of the absentee ballots (cast by post) in the electoral district Villach-Land.

[...]

c) Electoral district Leibnitz

In the electoral district Leibnitz, the meeting of the district electoral authority started already on Sunday, 22 May 2016 at 5:00 p.m., and the absentee ballots

cast by post were counted.

The premature evaluation of the absentee ballots cast by post is in contravention of the law, which is not altered by the fact that they were counted in the presence of the Assistant Electoral Officers on 22 May 2016.

Regarding the premature counting of the absentee ballots cast by post and their relevance, reference is made to the earlier statements (in particular point (a) concerning the electoral district Villach Stadt), which hold equally for the electoral district Leibnitz.

[...]

d) Electoral district Südoststeiermark

In the electoral district Südoststeiermark, the evaluation and counting of the absentee ballots cast by post was performed in its entirety by a 'team of the district administration authority' and therefore consistently not by the district electoral authority. This is a serious infringement of the law, which is not altered by the fact that this approach is based on a decision taken by the district electoral authority.

The Assistant Electoral Officers of the district electoral authority had not received an invitation for the meeting of the district electoral authority [...] on 23 May 2016, 9:00 a.m. to evaluate and count the absentee ballots cast by post. Nor were the Assistant Electoral Officers of the district electoral authority invited to 'unofficially' evaluate and count the absentee ballots and were hence not at all informed of the time and place of the evaluation and counting of the absentee ballots cast by post. Not even theoretically would it have been possible for the members of the district electoral authority to take part in the evaluation and counting of these votes. On the contrary, the Assistant Electoral Officers were invited to a meeting of the district electoral authority on 23 May 2016 at 3:00 p.m., at which they were merely informed of the final result that was available by then.

After the Assistant Electoral Officers ***** and ***** had been made aware by a third party that the evaluation and counting of the absentee ballots had to start on 23 May 2016 at 9:00 a.m., they went to the district electoral authority where they arrived at 10:30 a.m. At that moment, the evaluation of the absentee ballots was already well under way. Asked by the two Assistant Electoral Officers, a certain Mr ***** [...] told them that the district electoral authority had given instructions to carry out the 'preliminary work' required for counting the absentee ballots cast by post, which meant slitting open all envelopes, evaluating (=counting) them and immediately discarding those envelopes which could not be included anyway (missing signature etc.). When Mr ***** provided the information on 23 May 2016 at 10:37 a.m., this had already been done. The ballots, which the two Assistant Electoral Officers identified as having already been counted, were placed in separate stacks in a locked room.

According to information provided by Mr ***** , the evaluation of the absentee ballots cast by post had already started on 23 May 2016 between 6:00 a.m. and 7:00 a.m. (i.e. before the time stipulated by section 14 paragraph 1 *BPräsWG*).

Arriving on 23 May 2016 at approx. 10:30 a.m., the Assistant Electoral Officers ***** and ***** were denied access to the district electoral authority.

The official meeting of the district electoral authority on 23 May 2016 started as late as 3:00 p.m. At that moment in time, the absentee ballots had already been evaluated and the result of the counting of the absentee ballots cast and transmitted by post was available and announced to the members of the district electoral authority.

The discarded absentee ballot paper envelopes (i.e. those found to be null and void) were not presented and had already been separated.

Hence, as regards the electoral district Südoststeiermark

- the evaluation and counting of the absentee ballots cast by post had started before 23 May 2016, 9:00 a.m., contrary to section 14a *BPräsWG*, and
- the absentee ballots of the electoral district had been evaluated and counted by non-authorized persons, i.e. not by the district electoral authority.

The statement made under point (a) (concerning the district Villach-Stadt) also holds for the minutes of the district electoral authority Südoststeiermark on the counting of the absentee ballots. The same form was used, unchanged and without presentation of the true facts, merely the number of votes ascertained was filled in. These minutes do not even distinguish between the male and female forms of District Chief Electoral Officer ('*Bezirkswahlleiterin*' and '*Bezirkswahlleiter*' respectively). Similarly, these minutes merely use the wording of the law as set out in the form.

The Federal Ministry of the Interior reported the infringement as outlined to the Central Prosecution Office to Fight Crime and Corruption in a statement of facts dated 25 May 2016, submitting the minutes of the district electoral authority Südoststeiermark, the notice of irregularities by Mr ***** to the head of the Styrian Province Electoral Authority, ***** , and adding a verbatim from memory dated 23 May 2016 by the Assistant Electoral Officers ***** and *****.

[...]

e) Electoral district Graz-Umgebung

In the electoral district Graz-Umgebung the absentee ballots were counted by

public employees; the election witness ***** is not aware whether an Assistant Electoral Officer was present.

[...]

f) Electoral district Innsbruck-Land

In the electoral district Innsbruck-Land the absentee ballots were already counted on 22 May 2016. The counting was performed in the absence of the Assistant Electoral Officers, i.e. not by the district electoral authority. The district electoral authority (including the Assistant Electoral Officers) was informed at the meeting on 23 May 2016 at 4:00 p.m. of the result of the counting of the absentee ballots cast and transmitted by post.

[...]

g) Electoral district Kitzbühel

In the electoral district Kitzbühel [...] the absentee ballots were not counted by the district electoral authority, but by staff members of the municipality of Kitzbühel and staff members of the Kitzbühel district administration authority.

Hence, the evaluation of the absentee ballots was in its entirety not performed by the district electoral authority, but by unauthorised persons. As the members of the district electoral authority were not involved, it is unknown whether, or to what extent, the counting started before the date stipulated by law. However, the challenging party assumes and submits that, given the blatant infringement of the provisions set out by the *BPräsWG*, the counting also started prematurely.

[...]

h) Electoral district Schwaz

In the electoral district Schwaz, the evaluation and counting of the absentee ballots reserved to the district electoral authority pursuant to section 14a *BPräsWG* was in its entirety not carried out by the district electoral authority.

In a meeting of the district electoral authority of 22 May 2016 it was agreed that the evaluation (counting) of the absentee ballots was to start earlier than prescribed by law, i.e. on 23 May 2016 at 7:00 a.m. For this reason, the Assistant Electoral Officer ***** went to the district electoral authority at 7:00 a.m. However, the absentee ballots were neither evaluated nor counted at that time. It appears that the counting duly started at 9:00 a.m., but in the absence of the Assistant Electoral Officers.

[...]" (quote without the highlightings contained in the original)

It is argued that a comparison of the results of absentee voting and the total result shows discrepancies in the electoral districts of Südoststeiermark, Innsbruck-Land, Kitzbühel and Schwaz, comparable to those observed in the electoral district Villach. The challenging party then goes on to state:

"2.3.2. Premature sorting and (partly) premature removal of the ballot paper envelopes from the absentee ballots and sorting into void ballots and such which are included in the ascertainment of the result, opening of the absentee ballots before the beginning of the meeting of the district electoral authority on 23 May 2016, 9:00 a.m.

In a total of 17 electoral districts, the absentee ballots had already been

(i) sorted into such which had to be discarded and such which were to be included in the ascertainment of the result,

(ii) opened,

before the official beginning of the counting (23 May 2016, 9:00 a.m.)

In 11 electoral districts, the beige envelopes inside the absentee ballots (containing the official ballot papers) had already been removed.

These cases constitute blatant infringements of the statutory provisions of section 14a paragraph 1 *BPräsWG* governing the evaluation and counting of absentee ballots by the district electoral authorities:

[...]

[...] The mere sorting into void absentee ballots and such which are to be included in the ascertainment of the result is a clear infringement of the law, not only according to the wording of the law, but is most relevant for the ascertainment of the result – in particular in view of the potential for abuse. The risk of abuse exists to an even higher degree in the cases described in the following, where absentee ballots were prematurely opened in violation of the statutory provisions without the involvement of the members of the district electoral authorities and where, to some extent, even the ballot paper envelopes were removed from the absentee ballots.

If absentee ballots cast by post were opened unauthorised and unmonitored (by unauthorised persons and/or without being monitored by the Assistant Electoral Officers), it is evident that the ballot paper envelopes (containing the ballot papers) inside the opened absentee ballots could have been removed, viewed, added to, falsified, or even replaced.

Following established case law, as has already been outlined, it is not necessary

to prove a concrete manipulation which would actually alter the election result. If those provisions of the election laws are violated which are to ensure a correct scrutiny of the counting of votes, the possibility of abuse, which the law absolutely wants to preclude, exists even if no concrete manipulation is proven, and needs to be taken up by the Constitutional Court (cf. ruling of the Constitutional Court of 8 October 2014, collection of rulings *VfSlg 19.908*).

In the cases described in the following, specifically those provisions of the election laws which are to ensure a correct scrutiny of the counting of votes and to preclude the possibility of abuse, were infringed." (quote without the highlightings contained in the original)

In the following, the challenging party argues, in summary, that the absentee ballots cast by post had already been sorted into void ballots and such which are to be included in the ascertainment of the result, and that the ballot paper envelopes had been removed from the absentee ballots in the electoral districts of Wien-Umgebung, Landeck, Kufstein and Hermagor at the beginning of the meeting of the respective district electoral authority on 23 May 2016; this, it is argued, was carried out by "unauthorised persons, at any rate not by the District Chief Electoral Officer under the monitoring of the election witnesses and not by the district electoral authority in any other way". With the exception of the (identifiable) removal of ballot paper envelopes from the absentee ballots, this "infringement of the provisions of the *BPräsWG*" had also happened in the electoral districts of Wolfsberg, Hollabrunn, Freistadt, Liezen and Bregenz (with not all absentee ballots having been opened in the electoral district Hollabrunn at the beginning of the meeting of the district electoral authority on Monday, 23 May 2016). Hence, in the electoral districts of Wien-Umgebung, Landeck, Kufstein and Hermagor, the absentee ballots had been opened and the ballots removed by the district electoral authority, while in the electoral districts of Wolfsberg, Hollabrunn, Freistadt, Liezen and Bregenz the ballot paper envelopes had, in addition, been (previously) removed from the absentee ballots by the district electoral authority. According to information provided by a named Assistant Electoral Officer in the electoral district of Hermagor, this procedure had been adopted following a decision taken in 2013, which would, however, not alter the unlawfulness in respect of section 14a *BPräsWG*; the Federal Ministry of the Interior had transmitted a statement of facts to the Central Prosecution Service to Fight Economic Crime and Corruption. In the electoral district of Liezen, the incidents described had been raised by a named Assistant Electoral Officer and the District Chief Electoral Officer had agreed that they would be recorded in the minutes; it is not known whether they were actually recorded in the minutes. Besides, 10 ballots were missing in the electoral district of Wien-

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Umgebung, another three were discarded as void after a second count. These shortcomings had not been recorded in the minutes, "because the Assistant Electoral Officer [...], though having asked several times, had been (wrongly) assured by the Deputy Electoral Officer and by the staff members of the district administration authority Wien-Umgebung responsible for election matters that it was customary and in conformity with the law to open the absentee ballots in the presence of the Assistant Electoral Officers".

The challenging party further submits as follows:

"2.3.3. Pre-sorted absentee ballots

In 82 out of a total 117 electoral districts, the absentee ballots had been pre-sorted before the official beginning of the counting (23 May 2016, 9:00 a.m.) into such which were to be discarded (void) and such which were to be included in the ascertainment of the result.

These cases, as well, are a clear infringement of section 14a paragraph 1 *BPräsWG*, as the latter assigns this task to the District Chief Electoral Officer under the monitoring of the attending Assistant Electoral Officers and stipulates 9:00 a.m. of the day following the election as the time of beginning.

The separation of the absentee ballots to be discarded [...] from those to be included is an activity that is part of the evaluation of the absentee ballots. Consistently, the legislator recognises a risk of manipulation already in this process. The mere decision which absentee ballot is to be included in the ascertainment of the result or which is to be discarded has an influence on the outcome. This becomes obvious, in particular, in the following scenarios:

(i) The law stipulates that a vote cast by absentee ballot is void, if the verification of integrity has revealed that the absentee ballot is damaged in a manner that an [earlier] abusive removal or returning of the envelope inside cannot be precluded (section 10 paragraph 5 subparagraph 8 *BPräsWG*).

This reason for nullity applies in the case of absentee ballots where the ballot paper envelope could have been removed and/or reinserted. That abuse in such cases is possible is evident from the mere fact that it would be possible to exchange an envelope (together with the official ballot(s) it contains). If these absentee ballots are not discarded, prior manipulation cannot be precluded.

(ii) The reason for nullity set out in section 10 paragraph 5 subparagraph 8 *BPräsWG* equally applies to absentee ballots that were received by the district electoral authority in a non-sealed condition (e.g. if an absentee ballot is handed in personally at the district electoral authority or a polling station). In these cases, it would be possible to exchange the ballot paper envelope (containing the

official ballot paper) unnoticed, and to even reseal the absentee ballot, and thereby transform it into a 'formally' valid absentee ballot.

(iii) The decision whether a statement was verifiably not made by a person entitled to vote (section 10 paragraph 5 subparagraph 1 *BPräsWG*) is equally far-reaching. If such a decision is made by one single (unauthorised) person without involvement of the Assistant Electoral Officers, and if an absentee ballot is discarded, there is a possibility of manipulation. This may be relevant, in particular, if the person who performs the sorting is acquainted with the person voting by absentee ballot and thinks to know the latter's (at least presumable) voting decision. The latter argument, incidentally, also holds if no declaration in lieu of an oath was submitted (i.e. the statement was not signed), and if the sorting happens unmonitored, as is this case – a 'substitute signature' could simply be affixed (which, in actual fact, is not verifiable).

(iv) The same (at least theoretical) risk of manipulation exists in the case of nullity for the reason set out in section 10 paragraph 5 subparagraph 9 *BPräsWG*; here as well, independent alterations of the absentee ballot could affect the decision to either discard it or include it in the ascertainment of the result. [*sic*]

(v) In general terms, the decision as to whether an absentee ballot is to be discarded or included in the ascertainment of the result constitutes an (at least factual) interference with the result of the counting and, for good reason, must be taken by the District Chief Electoral Officer under the monitoring of the Assistant Electoral Officers. If there is pre-sorting and if pre-sorted ballot paper envelopes are submitted to the district electoral authority, a scrutiny (at least in factual terms) is, as a rule, no longer performed. There is the evident risk that absentee ballots which ought to be included (based on the arbitrary decision taken earlier by an unauthorised person) are not included in the ascertainment of the result, or that absentee ballots which ought to be discarded are considered.

The legislator has provided safeguards to counteract possible manipulations by assigning this task to the district electoral authority (specifically the District Chief Electoral Officer under the monitoring of the Assistant Electoral Officers). In order to ensure that the Assistant Electoral Officers are actually present, the law also prescribes the time when the sorting and counting is to begin. Sorting of absentee ballots into such that are to be discarded (because they are void) and such that are to be included in the ascertainment of the result before the official beginning of the counting therefore constitutes an infringement of the provisions of section 14a paragraph 1 *BPräsWG*, by which the legislator wanted to preclude any abuse. Following the case law of the Constitutional Court (*VfSlg. 19.908*) already presented, these infringements are infringements of the election laws which should ensure the correct scrutiny of the counting and preclude the possibility of abuse. The mere infringement of this provision of the electoral laws must be taken up by the Constitutional Court, regardless of whether a concrete manipulation has been proven or not.

2.3.3.1. Pre-sorting of absentee ballots without a possibility of monitoring the

exclusion process by the district electoral authorities

In the following electoral districts, the void absentee ballots had already been separated (pre-sorted) from those to be included in the ascertainment of the result before the statutory beginning of the meeting of the district electoral authority on Monday 23 May 2016, 9:00 a.m., and the Assistant Electoral Officers and election witnesses did not have a (theoretical) possibility, not even ex-post facto, to review the sorting process.

a) Electoral district Gänserndorf

In the electoral district of Gänserndorf, the absentee ballots were pre-sorted. Moreover, there was yet another irregularity in Gänserndorf: on 23 May 2016, at around 1:30 p.m., after the counting had already been completed (shortly before the establishment of the final result), a staff member of the district administrative authority Gänserndorf arrived and reported that a further 11 absentee ballots had been 'found'. While these ballots had been handed in timely at the district administrative authority (as district electoral authority), the staff member had failed to forward them. The district electoral authority unanimously decided to no longer consider those absentee ballots.

Owing to this circumstance, and regardless of whether the non-consideration was lawful or not, absentee ballots which had been correctly handed in by voters were, as a result, excluded, which constitutes a violation of those voters' right to vote.

Moreover, the absentee ballots cast by post in Gänserndorf were not opened by the District Chief Electoral Officer as is prescribed by law. Likewise, shuffling was not performed.

The absentee ballots cast by post which had been discarded on Sunday, 22 May 2016 had already been packed in boxes (!). Only 9 absentee ballots (including cases bearing the signature of a legal guardian) were presented to the district electoral authorities.

[...]

b) Electoral district Völkermarkt

In the electoral district of Völkermarkt it was not possible to scrutinise the absentee ballots which had been discarded as void. Moreover, the Assistant Electoral Officer ***** had not seen the minutes but, by placing his signature, had merely signed a 'list of attendance'. Apparently, only the last page was presented to the Assistant Electoral Officer for signing, not the complete minutes.

[...]

c) Electoral district Reutte

In the district of Reutte as well, the discarded absentee ballots could not be scrutinised, as they were not even stored (for safe-keeping) in the room in which the counting took place". (quote without the highlightings contained in the original)

Moreover, absentee ballots cast by post had been "pre-sorted" in several electoral districts with the – at least hypothetical – possibility of being reviewed by the Assistant Electoral Officers and the election witnesses of the district electoral authorities; the challenging party refers to the electoral districts of Zell am See, Leoben, Murau, Murtal, Voitsberg, Eisenstadt-Umgebung, Güssing, Oberpullendorf, Rust, Feldkirchen, Klagenfurt-Land, St. Veit an der Glan, Spittal an der Drau, Amstetten, Baden, Bruck an der Leitha, Korneuburg, Lilienfeld, Mistelbach, Mödling, St. Pölten (Land), Scheibbs, Waidhofen an der Ybbs, Zwettl, Braunau am Inn, Kirchdorf an der Krems, Linz, Ried im Innkreis, Schärding, Steyr, Steyr-Land, Vöcklabruck, Wels-Land, Hallein, Flachgau, Lungau, Imst, Osttirol, Bludenz, Dornbirn, Feldkirch, Mürzzuschlag and all electoral districts in Vienna with the exception of those for the 4th and 5th districts (in the 9th district, absentee ballots which would have had to be classified as void pursuant to section 10 paragraph 5 subparagraph 8 *BPräsWG* were included against the vote of a named "substitute member of the district electoral authority").

15

Moreover, it is stated that in 44 (specified) electoral districts ballot paper envelopes had been found in absentee ballots cast by post which did not meet the specified requirements as to colour set out in section 5a paragraph 7 *BPräsWG*. In 29 electoral districts, a total of at least 292 of these absentee ballots containing ballot paper envelopes had not been included – for the reason of nullity set out in section 10 paragraph 5 subparagraph 4 *BPräsWG* (with a total of 1,082 absentee ballots cast in Austria having been declared void based on the provisions of section 10 paragraph 5 subparagraph 4 *BPräsWG*); this had created a situation in which "the will of the voter could not be respected and that therefore the right to vote of the voter concerned had been violated, as in the majority of the cases the authority issuing the absentee ballot was responsible for the underlying mistake, in that it had attached a wrong-coloured ballot paper envelope to the absentee ballot". Conversely, a total of at least 210 absentee ballots had unlawfully been declared void in 15 electoral districts.

16

The challenging party then continued to state:

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"2.4 Relevance of the infringements of section 10 paragraph 6 and paragraph 7, section 14a *BPräsWG*

As shown in the description of the specific infringement of the law under V.2.3, massive infringements of the provisions of the *BPräsWG* occurred in 97 out of a total of 117 [...] district electoral authorities. These infringements are proven by the ample and comprehensive evidence offered by the challenging party.

According to the final result of the run-off election announced on 1 June 2016, Alexander Van der Bellen won by a decisive margin of 30,863 votes. Following established case law, the instances of unlawfulness of the election process must have had an impact on the outcome of the election in order to justify its repeal. The Constitutional Court has repeatedly held that such relevance concerning an election result is established already if the unlawfulness could have had an impact (cf. inter alia *VfSlg* 14.556, 14.847, 15.028, 17.705, 18.552, 19.734). [...] 'Relevance' as understood in case law is given, according to the electoral challenge, if a total of 15,432 votes are concerned by the alleged unlawful incidents. [...]" (quote without the highlightings contained in the original)

Following the case law of the Constitutional Court, "the possible impact on the result of the election is to be assumed in the case of infringements of formal provisions that are aimed at precluding manipulation or abuse in the election process, [...], without there being a need for evidence of a concrete manipulation which actually alters the election procedure [...]"

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Against this background, each of the incidents of unlawfulness claimed under V.2.3. of this statement of challenge in itself would qualify as "justification to annul the second round of elections from the beginning of the voting". In fact, as the challenging party is arguing in essence, regardless of whether one were to consider the most serious or the less serious of the alleged infringements, in any case more than 15,432 ballots used for postal voting were affected by infringements in respect of section 10 paragraphs 6 and 7 and section 14a *BPräsWG* (specifically, 30,295 absentee ballots cast by post were concerned by premature counting, 58,374 by counting that was not performed by the district electoral authorities, 80,953 by premature removal of the ballot paper envelope from the absentee ballot, 120,067 by pre-sorting of the absentee ballots after their opening, and 573,275 by pre-sorting of the unopened absentee ballots).

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It emerges from the case law of the Constitutional Court on comparable infringements of the law that, whenever the result of a challenged postal ballot cannot be objectively and reliably ascertained, the election is to be repealed from the beginning of the voting procedure so as to remedy the incidents of

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unlawfulness mentioned.

4.2.2. In the view of the challenging party, violations of the fundamental principles of free and secret elections within the meaning of Article 60 paragraph 1 of the Constitution, Article 3 of the First Additional Protocol to the European Convention of Human Rights and Article 8 of the Vienna State Treaty (Article 1 Constitution, resp.) would emerge not only from the (alleged) infringement of electoral law provisions in a narrow sense. Rather, such infringements would, in essence, result also from the fact that the provincial electoral authorities and the Federal Ministry of the Interior, in contravention of the said election principles, and contrary to the requirement of official secrecy pursuant to Article 20 paragraph 3 of the Constitution, had passed on information on election results to the Austrian Press Agency (APA) and *ARGE Wahlen* several hours before the end of voting or that some local authorities had published such information themselves (e.g. the municipality of Mauthausen via the internet platform "Facebook" or the municipality of Grossraming on the municipal website); in this way, this information had been accessible instantly and before the end of the vote to a wider public with the following consequences:

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"[...] Such information doubtlessly affected the 'strategic' voting behaviour of some voters who had not yet gone to the polls. [...] Given the fact that the first published information forecast a victory of the candidate Norbert Hofer in the election, it can be taken for certain that this had the following effect:

- Voters who had not intended to go to the polls but preferred Alexander Van der Bellen were ultimately motivated to go to the polls after all.
- Voters with a preference for Norbert Hofer who were considering at this moment in time whether they should go to the polls at all, eventually did not exercise their right to vote.
- Voters who were undecided or had no preference for any of the two candidates, but were at any rate determined to go to the polls, voted for Alexander Van der Bellen. This emerges from the scientifically uncontested Prospect Theory [...].

However, it is not possible to precisely quantify the number of voters who were influenced by such unlawful advance information, which specifically contravenes the maxim of official secrecy. For all practical purposes, it is certain that this influenced (considerably) more than 30,863 persons entitled to vote. In this context, it should be mentioned that in the event of violations of formal provisions aimed at precluding manipulation or abuse in the election process, the possible impact on the result of the election is to be assumed, without there

being a need to prove a concrete manipulation (*VfSlg 15.375 and 19.278*). [...]"
(quote without the highlightings contained in the original)

Against this backdrop as well, the challenge, it is argued, is to be allowed.

22

4.2.3. Moreover, photographs showing voters with ballots filled in for the candidate Alexander Van der Bellen had been published in large numbers in the (internet) media. This runs counter to the principle of secret elections. Moreover, there had been factual limitations resulting in a violation of the principle of free elections. It is argued that numerous voters had felt "considerable psychological pressure" forcing them unlawfully to vote for Alexander Van der Bellen contrary to their (actual) will, so as not having to fear any social disadvantage. According to the challenging party, it is doubtful that the result of the election reflects the true will of the electorate. Given the fact that, again, the number of voters actually influenced cannot be precisely determined, the challenging party then states that "with a probability close to certainty, (considerably) more than 30,863 voters have been influenced" and that, following the case law of the Constitutional Court, it is sufficient for an electoral challenge to prevail if "the unlawfulness of the election procedure identified might have influenced the result". For this reason as well, the electoral challenge is to be allowed.

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4.2.4. Moreover, infringements of the law had occurred due to the media coverage in the run-up to the challenged election, which are relevant in view of Article 141 of the Constitution. In essence, the challenging party submits on this point that the media coverage by the public-service broadcasting station *Österreichischer Rundfunk (ORF)*; media coverage in the narrower sense and hosting of "face to face TV debates") and the coverage by several (print) media, which received state funding in the form of adverts and media cooperations, was objectively biased, i.e. directed against the candidate Norbert Hofer. Any such coverage by media that are under the state's sphere of influence would violate the state duty of equidistance in elections, as well as the principles of free elections and equal treatment, and is capable of influencing the result of the election:

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"[...] This media coverage had the effect that, on the one hand

- voters of Alexander Van der Bellen could be better mobilised and hence went to the polls in greater numbers, and, on the other hand

- voters of Norbert Hofer did not go to the polls owing to the negative

campaign. [...]"

Here again, it would not be possible to provide evidence for the precise number of voters who were actually influenced. For an electoral challenge to prevail, it suffices that the "unlawfulness identified might have been of influence"; whenever formal provisions are violated, which are aimed at precluding manipulation or abuse in the election process, a potential influence on the election result is to be assumed, without there being a need to prove any specific manipulation. 25

4.2.5. Finally, the challenging party maintains further infringements of the law which are relevant with regard to Article 141 of the Constitution: 26

In order to prevent cases of double voting ("by postal voting or by personal voting"), section 5a paragraph 13 *BPräsWG* provides that the application for an absentee ballot must be recorded in the corresponding electoral roll. According to a report by a named video blogger and a named witness, the "blocking notice" had not been heeded in several cases and voting had been allowed (without surrender of the absentee ballot). Another witness reported that she had received two absentee ballots for the run-off election now being challenged. 27

Moreover, a number of voters had complained that the absentee ballots they had applied for never arrived. 28

In addition, a "(substitute) member" of a specified "flying electoral commission" operating in Vienna had reported irregularities in voting by patients. With several patients unable to articulate themselves, it had not been possible to determine whether they actually wished to take part in the vote; in one case, the named director of a nursing home had to assist a patient in casting the vote. In all cases, the commission head or the managing director of the nursing home had collected the ballots from the patients concerned after the members of the electoral commission had been made to leave the room. In a similar incident, a named witness reported that his demented mother living in a retirement home had been pressed to vote for Alexander Van der Bellen, presumably like other occupants, even though the name Alexander Van der Bellen did not mean anything to them given their condition. 29

Besides, a named Assistant Electoral Officer of an election commission operating in Vorarlberg had reported about partially identical handwritings on ballots, on 30

which the name of the preferred candidate had to be filled in personally. This fact, most likely due to the work of “polling assistants” for frail voters, had been recorded by the said Assistant Electoral Officer for 70 to 80 votes cast for Alexander Van der Bellen, but only for two votes cast for Norbert Hofer.

Moreover, according to media reports, the electoral authority in the municipality of Miesenbach had apparently used the directory of voters (“*Wählerevidenz*”) instead of the electoral roll (“*Wählerverzeichnis*”), so that adolescents under 16 years of age had been unlawfully entitled to vote (with the precise number of persons unlawfully entitled to vote still being unknown).

31

Again according to media reports, there was an excess of three ballots after the counting of votes in the municipality of Helfenberg, for no discernible reason. “The electoral authority then unanimously decided to destroy three invalid ballots, which is [...] unlawful”; the Federal Ministry of the Interior transmitted a statement of facts on this incident to the Public Prosecution Office to Fight Economic Crime and Corruption.

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Moreover, a named member of an electoral authority in Klagenfurt had reported to the Federal Ministry of the Interior that he had been put under pressure by the other members and had been excluded from parts of the counting procedure, respectively (being allocated only a part of the ballots for counting; protest by the Chief Officer and other Assistant Electoral Officers, when requesting to scrutinise the other ballots as well; removal of the ballots counted for Alexander Van der Bellen, even though he had noticed a blank ballot when flipping through the ballots). The Federal Ministry of the Interior had informed the Public Prosecution Office to Fight Economic Crime and Corruption of this incident.

33

In Rohrbach bei Mattersburg, a named election witness reported that “two absentee ballots had been brought from the ‘primary school’ polling station to the municipal office after the end of the vote [...] and 56 absentee ballots had been collected by the executive director of the municipality and mayor in the ‘municipal office’ polling station after the election result had already been determined (after 5:00 p.m.) and taken to the district electoral authority. These had not been handed in during the election”. Since, in the opinion of the election witness, these absentee ballots would have had to be discarded as void, he reported this incident to the district governor and filed a criminal complaint

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against the mayor of Rohrbach bei Mattersburg.

Finally, "in 2362 Biedermannsdorf / Mödling / Lower Austria / electoral ward 1 [...], 2 votes had been qualified as votes for Van der Bellen, which, had they been correctly assessed in legal terms, should have been qualified as invalid and which therefore should have led to an alteration of the result of the election". In one case, a "negative smiley" had been inserted on the ballot next to the column for candidate Alexander Van der Bellen instead of a cross; this, however does not imply a vote for the said candidate, but should be taken as an expression against the latter. In another case, crosses had been made for both candidates on the ballot, so that the voter's will was not discernible.

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4.3. In addition to the foregoing, the challenging party is suggesting that judicial review proceedings pursuant to Article 140 paragraph 1, subparagraph b, Constitution be instituted ex-officio by the Constitutional Court in regard of certain (parts of) provisions of the Federal Constitutional Act (*B-VG*) and of the *BPräsWG*. On that matter, the challenging party submits as follows:

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4.3.1. Section 21 paragraph 2 (first sentence) *BPräsWG*, which sets out a period of just one week to challenge an election, is unconstitutional. Given the complex voting procedure which involves several electoral authorities, it would be "unfeasible in practical terms" to highlight all infringements of the law which occur during an election within that deadline. The possibility to challenge elections in general, and the election of the Federal President, in particular, is an emanation of the rule-of-law principle, which is being infringed by the unreasonably short deadline for filing a challenge. Moreover, there is no objective justification in regard of Article 7 paragraph 1 Constitution for providing a mere one-week deadline, in deviation of section 68 Constitutional Court Act (*Verfassungsgerichtshofgesetz, VfGG*) which provides for a four-week period for filing a challenge for all other elections. This four-week period of challenge pursuant to section 68 *VfGG* applies, in particular, to elections to the National Council which, by all means, are comparable in terms of their complexity to the election of the Federal President; conversely, since the National Council is elected for a term of five years and the Federal President for six years, it would only be logical to allow for a longer period for challenging elections for the Federal President, compared to the elections for the National Council. Ultimately, it is argued that section 21 paragraph 2 *BPräsWG* does not clearly determine the one-week period of challenge, which violates the rule-of-

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law principle as well as Article 18 of the Constitution.

4.3.2. The challenging party further argues that the constitutional bases governing postal voting are incompatible with the fundamental principles of the Austrian Federal Constitution (see I.4.3.2.1.); equally, the ordinary laws – in particular those governing postal voting – would violate constitutional requirements (see I.4.3.2.2.). As the starting point of its line of reasoning, the challenging party states by way of introduction that, while the constitutional admissibility of postal voting has been resolved also for elections for the Federal President in regard of Article 60, paragraph 1, last sentence, Constitution, in conjunction with Article 26 paragraph 6, Constitution, and in light of the case law of the Constitutional Court, the legislator should have amended or complemented the existing statutory provisions, given the high potential for abuse with absentee ballots cast by post.

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4.3.2.1. As to the alleged infringement of the fundamental principles of the Federal Constitution by the constitutional provisions governing postal voting, the challenging party submits as follows:

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"[...] Violation of a fundamental constitutional principle by Article 60 paragraph 1 in conjunction with Article 26 paragraph 6 of the Constitution

a) Pursuant to the constitutional provision of Article 26 paragraph 6 (in conjunction with Article 60 paragraph 1) of the Constitution, a person is entitled to vote by postal ballot if the 'identity of the applicant is ... proven *prima facie*' (accordingly, on the level of ordinary laws, section 5a paragraph 4 *BPräsWG*). This provision comes as a surprise because – to avoid manipulation and to safeguard the principles of the personal right to vote – there has to be certainty as to the identity of the person authorised to vote (therefore see section 10a paragraph 1 *BPräsWG* for conventional voting in person), whereas it is sufficient to establish plausibility or probability when proving one's identity *prima facie*. It is recognised that the sufficiency of '*prima facie* proof' is a provision at constitutional level. The ascertained identity of the voter and the certainty that no persons not authorised to vote, respectively (e.g. non-citizens with similar names) are permitted to vote are pillars of the 'personal' right to vote and the 'equal' right to vote, which, in turn, are defining fundamentals of the democratic principle. Article 26 paragraph 6 in conjunction with Article 60 paragraph 1 of the Constitution, pursuant to which it is sufficient to 'prove the identity of the applicant *prima facie*', is therefore in contradiction to the democratic principle of the Federal Constitution. The Constitutional Court has established in *VfSlg 19.893/2014* that postal voting *per se* does not conflict with the democratic principle[;] the Court, however, did not review the specific structure of the postal voting right, which is not necessarily connected with postal voting. In this connection it should also be pointed out that former President of the

Constitutional Court Karl Korinek wrote in an op-ed in the newspaper 'Die Presse' dd. 11 November 2010: 'Issuing absentee ballots without a personal application or an application signed by the applicant himself/herself, including submitting official proof of identity, may well be regarded as unconstitutional.'

b) If, contrary to our view, 'proving' one's identity '*prima facie*' is sufficient for postal voting, it is hard to see why a voter must furnish 'unambiguous' proof of his/her identity when voting at a polling station (pursuant to section 10a paragraph 1 *BPräsWG* in conjunction with section 67 *NRWO*) and why in that case it is not sufficient for a person wishing to cast his/her vote to simply submit '*prima facie*' proof of identity. In other words, if Article 26 paragraph 6 in conjunction with Article 60 of the Constitution and section 5a paragraph 4 *BPräsWG* are not in contradiction to the democratic principle, then section 10a paragraph 1 *BPräsWG* in conjunction with section 67 *NRWO* in view of section 5a paragraph 5 *BPräsWG* is in contradiction to the principle of equality (Article 7 paragraph 1 of the Constitution), because it treats equal circumstances, i.e. the access to the right to vote, unequally, without any objective justification, by demanding 'unambiguous' proof of identity in one case and, in the other case, accepting '*prima facie*' proof of identity as sufficient.

c) Pursuant to Article 26 paragraph 6 in conjunction with Article 60 paragraph 1 of the Constitution, a voter wishing to vote by postal ballot must declare by signature in lieu of an oath that his/her vote has been cast personally and in secret. In *VfSlg 10.412/1985* [...] the Constitutional Court has correctly found that the voter's declaration saying that his/her vote has been cast under no observation is open to abuse: 'The fact that the voter must later confirm in writing that he/she has filled in the ballot paper personally and under no observation is insufficient from the point of view of safeguarding secret elections. In the event that the person authorised to vote is under more or less strong (psychological) pressure when filling in the ballot paper, it cannot be ruled out – in fact it is fair to assume – that such interference may and will also extend to the act of signing the declaration.' The challenging party does not fail to recognise that the Constitutional Court expressed this opinion prior to the creation of the applicable Article 26 paragraph 6 of the Constitution. Nevertheless, the detailed provisions of Article 26 paragraph 6 of the Constitution relating to the 'declaration in lieu of an oath' are not necessarily connected with the permissibility of postal voting, which the Constitutional Court has accepted *per se* (*VfSlg 19.893/2014*). It is, however, conceivable to design the right to vote in such a manner that postal voting becomes compatible with the requirements of voting personally and by secret ballot, such as by casting one's ballot (in secret and personally) before a notary public who would have to confirm this process. If, however, Article 26 paragraph 6 of the Constitution settles for a declaration made by the person authorised to vote (possibly made under duress or any other kind of influence) to the effect that he/she has cast his/her vote personally and in secret, said Article, in view of the principle of the right to vote personally and by secret ballot, which is part of the fundamental democratic constitutional principle, is in violation of a fundamental constitutional principle.

d) If, however, Article 26 paragraph 6 of the Constitution is to be interpreted in such a manner that it provides for the declaration in lieu of an oath as a minimum requirement only, which would have to be supplemented by the ordinary legislator through additional safeguards of the right to vote personally and by secret ballot, then the provisions of the *BPräsWG* would be unconstitutional because they also only provide for a declaration in lieu of an oath and thus do not meet the constitutional mandate.

e) Even if Article 26 paragraph 6 (in conjunction with Article 60 paragraph 1) of the Constitution did not violate any guiding principles of the Federal Constitution, it would have to be interpreted narrowly in view of its conflictual relationship with the voting principles of a secret ballot and the right to vote personally; more details are to be provided later." (Quote without the highlightings contained in the original)

4.3.2.2. As to the alleged infringement of constitutional requirements by the ordinary law governing postal voting, the challenging party submits as follows:

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"[...] Unconstitutionality of the Law Governing the Election of the Federal President (*BPräsWG*)

a) Conventional voting before electoral authorities is open to manipulation to a minor extent only. This is guaranteed first by the composition of the electoral authorities (Article 26a of the Constitution), which include representatives of the larger political parties taking part in the elections. In a conventional ballot voters appear in person before an electoral authority, which must verify their identity and entry in the electoral roll (section 10a paragraph 1 *BPräsWG*). The Assistant Electoral Officers delegated by the parties taking part in the elections, who also have copies of these electoral rolls (cf. section 5 paragraph 2 *BPräsWG*), may use them to check the authorisation of voters and the total number of votes cast. The voter then is presented with the ballot paper before the electoral authority (section 10a paragraph 1 *BPräsWG*), goes into the polling booth to cast his/her vote in private, and then hands over his/her ballot paper envelope to the Chief Electoral Officer, who puts it in the ballot box (section 10a paragraph 4 *BPräsWG*), which was checked by the electoral authority to be empty before voting started. It is unconceivable that a person authorised to vote accepts the ballot paper and then gives it to a representative of a political party he/she trusts (or on whom he/she depends) to complete it for him/her in the polling booth. Immediately after the end of voting, all ballot paper envelopes contained in the ballot box are counted by the electoral authority under the eyes of all present Assistant Electoral Officers delegated by the parties taking part in the elections. This makes it virtually impossible for anyone to switch ballot papers or add additional ones. As the number of votes cast can be determined on the basis of the voters' lists, any ballot papers added would be immediately noticed. In addition, the counting of votes starts immediately after the end of voting, which also makes manipulation impossible, as the ballot box and the votes contained therein do not remain unobserved for any length of time. That is the conventional voting process. The safety standards of conventional voting must

be applied to postal voting in conformity with the Constitution, as otherwise the present structure of the postal voting rules would be unconstitutional. A comparison of the present ordinary-law structure of the absentee ballot and postal voting processes in the elections for the Federal President shows that the specific applicable structure of postal voting does not meet these standards.

b) Constitutional problems arise in particular on the following occasions:

- application for absentee ballots,
- transmission of absentee ballots to voters,
- completion of absentee ballots 'in secret and in person',
- collection and storage of absentee ballots cast by post until they are counted, and
- subsequent counting of absentee ballots.

These problems are explained in the following.

c) Pursuant to Article 5a paragraph 4 *BPräsWG*, it is sufficient for an applicant to prove his/her identity *prima facie* when applying for an absentee ballot orally or in writing. The fact that this rule is in violation of a fundamental constitutional principle has already been set out above. Even if one were not to share this opinion, section 5a paragraph 4 *BPräsWG* would still not entirely be covered by Article 26 paragraph 6 of the Constitution. Article 26 paragraph 6 of the Constitution gives preferential treatment to the filing of an application (by accepting *prima facie* proof) only for 'postal voting' but not for absentee ballots cast before another electoral authority (pursuant to the case law of the Constitutional Court, election rules must be interpreted strictly according to the letter of the law). However, section 5a paragraph 4 *BPräsWG* also allows *prima facie* proof of identity when issuing absentee ballots for the purpose of casting an absentee ballot before another electoral authority (section 10a paragraph 2 *BPräsWG*) and is insofar not covered by the constitutional provision of Article 26 paragraph 6 of the Constitution. Therefore, section 5a paragraph 4 *BPräsWG* is, at least in that regard, in contradiction to the principle of personal voting pursuant to Article 60 paragraph 1 of the Constitution. [...]

To illustrate the problems associated with issuing absentee ballots only on the basis of *prima facie* proof of identity, it is pointed out as follows: Pursuant to section 5a paragraph 4 *BPräsWG*, a person applying for an absentee ballot in writing only has to prove his/her identity *prima facie* by 'stating the passport number' or by 'submitting a copy of official photo identification' or by 'submitting ... another document'. The municipality is, however, authorised to have the existence of this document verified, which does not alter the fact that one can still not be sure that the person claiming to be the applicant is actually identical with the person specified in the document. This means that someone having access to a person's documents can apply for an absentee ballot for this person and 'intercept' it (even if this is a punishable offence). A staff member of a retirement or dementia care home, who naturally has access to copies of the residents' documents, could, after weighing the probability of a resident's reluctance (e.g. as a result of advanced dementia) to exercise his/her right to

vote either directly or by postal voting, file an application for an absentee ballot on behalf of this resident, then take the ballot mailed to the address of the home (re. postal delivery see section 5a paragraphs 7 and 8 *BPräsWG*) after it has been delivered to the mailroom of the home and finally cast this absentee ballot instead of the demented resident. Such behaviour would be a punishable offence but would hardly be noticed, neither when the absentee ballot is applied for nor when the vote is cast. After all who, in an anonymous urban environment, is (in both cases) capable of checking who signed the application or the declaration in lieu of an oath? All the more as an absentee ballot does not have to be sent by registered letter to be delivered to the addressee only with return receipt (*RSa*) but can be sent by 'registered letter' only (section 5a paragraph 8 subparagraph 4 *BPräsWG*) (for more details, see below). It is remarkable to note that the *BPräsWG* evidently takes into consideration that absentee ballots are issued to unauthorised persons who applied for them on somebody else's behalf. Pursuant to section 5a paragraph 13 *BPräsWG*, every person authorised to vote has the right, until the 29th day after the election day, to make enquiries with the municipality as to 'whether an absentee ballot has been issued for him/her'.

d) Article 26 paragraph 6 of the Constitution only allows postal voting in exceptional cases for persons authorised to vote 'who are likely to be unable to cast their vote before the competent electoral authority on the election day, for example due to being absent, for health reasons or due to a stay abroad'. It goes without saying that in case of a stay abroad, in-person voting before an Austrian electoral authority is not possible. However, this does not apply equally when a voter is in Austria on election day, albeit absent from his/her place of residence; in that case it is often possible to vote in person by absentee ballot before an electoral authority other than the one of the voter's place of residence, which option is to be given preference to postal voting in the context of the right to vote personally and by secret ballot. In view of these voting principles and the necessary restrictive interpretation of postal voting, postal voting in the case of a voter's physical presence in Austria only qualifies as an option if it is still impossible for the voter to appear before any other electoral authority in Austria. As the *BPräsWG*, however, fails to make a distinction, as would be required by the Constitution, but allows for postal voting in general whenever a voter is in Austria on election day but not present at his/her place of residence, it is unconstitutional.

e) Eligibility for postal voting, pursuant to Article 26 paragraph 6 in conjunction with Article 60 paragraph 1 of the Constitution, demands that the applicant 'indicate the reason' of his/her inability to vote before the competent authority. This can, however, only mean – when using the necessary restrictive interpretation in view of the principle of personal and secret elections – that such reason actually must exist and has to be verified by the authority issuing the absentee ballot. If it turns out that the 'reason' given is only an excuse, an absentee ballot may not be issued. This is in contradiction to section 5a *BPräsWG*, which provides for the indication of any/a reason for the voter's inability to appear before the competent electoral authority merely as a formal requirement to be given which need not be verified by the authority. This understanding of section 5a *BPräsWG* is also in line with customary institutional practice. Therefore, section 5a paragraph 4 *BPräsWG* is unconstitutional also for

this reason, because it does not oblige an authority issuing absentee ballots to verify that the reason indicated is actually correct.

f) If, pursuant to section 5a paragraph 3 *BPräsWG*, the criteria for being issued with an absentee ballot 'for reasons set out in paragraph 2' cease to apply to a person entitled to vote, such person has to inform the municipality thereof. In conformity with the Constitution, the same should hold true for the reasons specified in section 5a paragraph 1 *BPräsWG*: If those criteria cease to apply after an application was filed and maybe the absentee ballot issued, but prior to the elections, then postal voting is not permissible and the voter would be required to cast his/her vote 'before the electoral authority' in the context of the right to vote personally and by secret ballot. As section 5a paragraph 3 *BPräsWG* does not prescribe this, it is deemed to be unconstitutional.

g) Pursuant to section 5a paragraph 8 subparagraph 4 *BPräsWG*, the absentee ballot, 'if sent by post, is to be sent by registered letter', i.e. is to be delivered to the applicant (= person authorised to vote or, more precisely, the person authorised to vote subject to '*prima facie proof of identity*'). This provision makes it clear that the transmission of the absentee ballot by post does not have to be made by official service of delivery in accordance with the rules of the Service of Documents Act (*Zustellgesetz*) (therefore incorrect in *Stein/Vogl/Wenda, Nationalratswahlordnung*⁴ [2013] comments 20 and 22 re. section 39 *NRWO* and comment 25 re. section 5a *BPräsWG*), otherwise the legislator would have used the term 'service (of delivery)' instead of 'sent by post' (cf. systematically also section 5a [paragraph] 8 subparagraph 5 *BPräsWG*, which provides that for the cases specified therein individual rules of the *ZustellG* are to be applied by analogy); moreover, the *ZustellG* does not use the terms 'registered' 'letter/s' (but, for example, personal service of 'documents' to addressee). The term 'registered letter' rather originates from postal laws and is used by the legislator to describe the sending of a letter in accordance with postal rules governing 'registered letters' and not service of an official document. This is also confirmed by a comparison of legal systems with the numerous rules of the Austrian system demanding a 'registered letter' [e.g. for the termination of a lease pursuant to section 6 Allotment Garden Act (*Kleingartengesetz*), also see section 27e Consumer Protection Act (*KonsumentenschutzG*), section 49 paragraph 1 Homeworking Act (*HeimarbeitsG*), section 82 paragraph 3 Electricity Sector Act (*EIWOG*)].

Under postal law, a 'registered letter', however, only confirms that a letter has been posted (in this case: by the municipality) and documentation is provided that the item has been handed over (to whomever). Additional services going beyond the scope of a 'registered letter', which term is used in the *BPräsWG*, to be regulated and compensated are, for example, 'personal service to addressee' (at an additional fee of EUR 2.10 service of the item will be only be effected personally to the addressee or an authorised recipient [!], which by the way proves *e contrario* that this is not relevant in the case of a conventional registered letter), 'do not deliver to authorised recipient' (!) or 'with return receipt' (only in this case the successful delivery of the item is documented on a return receipt by the recipient's signature).

First, in view of the essential significance of the right to vote personally as a constitutional principle, it appears to be unconstitutional that the law does not provide for the official service of documents in accordance with the rules of the *ZustellG* (and hence also the criminal liability of the institution pursuant to section 302 of the Criminal Code (*StGB*), as appropriate for the significance of the right to vote) but only for the comparatively casual form of a private service. In view of the significance of the right to vote as an expression of the democratic fundamental constitutional principle and the right to vote personally, service of delivery by registered letter to be delivered to the addressee only with return receipt (RSa delivery) would, in principle, be warranted in accordance with the Constitution.

If the legislator deems delivery under private law sufficient, it should at least provide for service of the document to the addressee only – in accordance with the non-transferrable right to vote (*VfSlg 10.412/1985*). By failing to limit delivery to registered mail to be delivered to 'the addressee personally, not to an authorised recipient, with return receipt', the legislator accepts that an absentee ballot may be delivered to another person than the person authorised to vote, which is also in violation of the principle of the right to vote 'personally' (Article 60 paragraph 1 of the Constitution).

All in all, the legislator has thus, without compelling reasons, opened substantial room for risks of manipulation and abuse when obtaining absentee ballots and thus also violates the principle of purity of elections.

h) Section 5a paragraph 4 and paragraph 8 subparagraph 6 *BPräsWG* provide for the option to have an absentee ballot collected by 'a person authorised by the applicant'. As the possession of an absentee ballot de facto gives a person the opportunity to cast a vote in another person's name – even though illegally and as a punishable offence but in a manner that is hardly verifiable – this rule is also in violation of the right to vote personally (Article 60 paragraph 1 of the Constitution). Under constitutional law, as explained above, the only options should be personal collection of an absentee ballot from the issuing authority or official service of delivery of an absentee ballot by registered letter to be delivered to the addressee only with return receipt (RSa).

i) Pursuant to section 5a paragraph 4 *BPräsWG* the 'municipality' is responsible for issuing absentee ballots. The law does not specify what municipal authority is responsible therefor and whether these tasks are to be carried out by a municipality within its autonomous sphere of competence or as delegated tasks (however, cf. Article 26 paragraph 7 of the Constitution). Therefore, there are also constitutional reservations against section 5a *BPräsWG* to the extent that it fails to provide for a specific regulation of the authorities' competence as warranted by Article 18 paragraph 1 and Article 83 paragraph 2 of the Constitution.

j) The right to vote by absentee ballot has to be exercised personally and by secret ballot. The problems associated with the 'declaration in lieu of an oath' (Article 26 paragraph 6 in conjunction with Article 60 paragraph 1 of the

Constitution, section 10 paragraph 3 *BPräsWG*) have been explained above [...]. In addition, it should be pointed out that the *BPräsWG* evidently also takes into consideration that the declaration in lieu of an oath (stating that the vote has been cast personally and under no observation) is not always made by the person authorised to vote. One of the grounds for nullity specified in section 10 paragraph 5 subparagraph 1 *leg.cit.*, apart from no such declaration being made at all, is the availability of 'proof' that the declaration in lieu of an oath 'has not been made by the person authorised to vote'. If the vote is cast, and the declaration is made, by an unauthorised person without any 'proof' thereof (i.e. without being evident), such vote will be included in the count. Accordingly, pursuant to section 14a paragraph 1 *BPräsWG* the officer only verifies whether the declarations 'have been made'. It is not possible to verify whether the declaration has actually been made by the person authorised to vote (*Stern*, *juridikum* 2009, 72 [73]).

k) Pursuant to section 10 paragraph 3 *BPräsWG*, an absentee ballot may also be submitted by a 'bearer'. This option granted by the law, which is not covered by the permissibility of 'postal voting' under the Constitution, also opens up risks of manipulation and is in violation of the principle of the right to vote personally (Article 60 paragraph 1 of the Constitution). The Constitution does not provide for sending an absentee ballot by mail ('letter') but only for personal delivery to the electoral authority.

l) If a person uses an absentee ballot to vote at any polling station, section 10a paragraph 2 *BPräsWG* becomes applicable. Hence the voter must 'present' the envelope to the Chief Electoral Officer pursuant to section 5a paragraph 6 *leg.cit.*, i.e. the absentee ballot. Subsequently, the Chief Electoral Officer presents the person authorised to vote with the official ballot paper contained in the envelope, together with a blue envelope (the white envelope from the absentee ballot must be 'destroyed' by the Chief Electoral Officer). For lack of a provision to that effect, the absentee ballot is not to be destroyed but to be taken to the polling station as proof. Returning the (empty) absentee ballot to the person authorised to vote would be illegal in accordance with the interpretation of the purpose of the law, as the voter could use this absentee ballot to cast his/her vote (albeit illegally) once more before another electoral authority because section 10a paragraph 2 last sentence *BPräsWG* specifically provides that a ballot paper which is no longer available is to be replaced by the Chief Electoral Officer. The fact that the Chief Electoral Officer may not return the absentee ballot is, however, not explicitly specified in section 10a paragraph 2 *BPräsWG*, which is quite misleading when read superficially. In the elections for the Federal President of 2016 there were actually some cases in which the absentee ballot remained with a voter or was returned to him/her after casting his/her vote, which would have made double (even though illegal) voting *de facto* possible. By failing to explicitly provide that an absentee ballot must be retained, section 10a paragraph 2 *BPräsWG* is in violation of the constitutional obligation regarding the precision of electoral rules, meaning they have to be so precise as to leave no room for any other interpretation than the literal one.

m) Any votes cast by postal ballot or by delivering the absentee ballot to an electoral authority are gradually received by the competent electoral authorities (even before election day). It is a fundamental problem that any postal ballots which must be received no later than 5:00 p.m. on the election day (section 10 paragraph 3 *BPräsWG*) are evaluated on the following day starting at 9:00 a.m. (section 14a *BPräsWG*). This gives rise to a longer period of time without observation during which postal votes can be manipulated. Section 10 paragraph 6 *BPräsWG* provides that absentee ballots 'must be officially kept under seal' until they are counted, however, this abstract requirement is not a sufficient guarantee to prevent manipulation. Under the Constitution an immediate count of the votes would be called for or a regulation which would rule out with certainty that votes may be manipulated, for example, in the night after election day. Hence, the rule according to which postal votes are only counted on the next day is unconstitutional as well. The problem is even aggravated by the fact that on the evening of the election the preliminary final results (excluding postal votes) are determined. Any persons willing to tamper with the votes, in particular in a close run, are officially 'served up the information on a plate' to what extent they would have to manipulate the postal votes when counting them in the night after election day or on the following day so as to achieve the desired result. The separate count of postal votes on the day following the election after the preliminary Austrian-wide results have been announced is therefore inconsistent with the requirements of organising elections with the lowest possible risk of manipulation and hence the constitutional rule of 'purity of elections'.

n) In connection with the latter it should be pointed out as follows: Pursuant to section 5a paragraph 11 *BPräsWG*, the municipal electoral authorities must ensure that post marked as absentee ballots that has been deposited with the locally competent postal agencies is collected before the election day. This provision opens up the opportunity to obtain an overview of the number of absentee ballots issued but not used to cast a vote, at the end of election day (when these absentee ballots could still be collected from the municipal electoral authorities) and after having been informed of the preliminary final results but prior to the counting of postal votes. Therefore this provision also makes manipulation easier because – even though this is unlawful and an abuse of authority – votes could still be "slipped in". Therefore, this provision is also in violation of the constitutional requirements of ordinary-law voting regulations, which are to be as little prone to manipulation as possible." (quote without the highlightings contained in the original)

The challenging party goes on to allege the unconstitutionality of the provisions regarding postal voting by persons under guardianship. It is essentially argued, in summary, that the application for an absentee ballot (section 5a paragraph 4 *BPräsWG*) and the declaration in lieu of an oath (section 10 paragraph 3 *BPräsWG*) are legal acts preceding the postal vote as such which could either be deemed as acts annexed to exercising the non-transferable right to vote – which means that in accordance with applicable laws, if a person is currently placed

under guardianship, they could only be performed in a legally effective manner by the person under guardianship – or as legal transactions, which would be incumbent on the legal guardian. Depending on the legal view taken, the performance of said legal acts by a person not authorised to do so renders a vote null and void. For lack of statutory provisions creating legal certainty, different practices are used in this connection. The legislator's failure to establish precise legal provisions creates "unconstitutionality, which makes the postal voting regulations of the *BPräsWG* unconstitutional in their entirety [...]".

4.3.3. Against this backdrop, the challenging party requests

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"the Constitutional Court, on the occasion of this challenge pursuant to Article 140 paragraph 1 subparagraph 1(b) of the Constitution, to institute proceedings [*ex officio*] to review the constitutionality

1. of Article 60 paragraph 1 last sentence in conjunction with Article 26 paragraph 6 second and third sentences of the Constitution
2. as well as of sections 5a, 10, 14a and 21 paragraph 2 of the Law Governing the Election of the Federal President

and to repeal these provisions or any parts thereof as unconstitutional, inter alia, on grounds of the violation of the democratic principle."

4.4. In conclusion, the challenging party submits that the incidents of unlawfulness invoked as well as the alleged unconstitutionality of the provisions regarding postal voting relate to the entire election procedure challenged, which is why this procedure is to be repealed in its entirety. As a legal precaution, the court is requested, *in eventu* "to repeal those parts of the election procedure in the case of which specific infringements were identified".

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5. The Federal Electoral Authority submitted the election files and filed a statement of defence, in which the pleadings of the challenging party are countered and the dismissal of the electoral challenge is requested. In this connection, it essentially argued as follows:

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5.1. By way of introduction it is stated that the statement of challenge contains alleged unlawful incidents that do not fall under the direct enforcement competence of the Federal Electoral Authority but under that of another electoral authority. The allegations occasionally made to the effect that the

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Federal Ministry of the Interior and the Federal Chief Electoral Officer, resp., exerted pressure so as to receive a final result of the postal vote as quickly as possible is not in accordance with the facts, because the focus was on the enforcement of electoral law provisions in conformity with the law.

According to the documentation in the files, which do not show any of the alleged irregularities, the description of numerous incidents before the district electoral authorities specified in the statement of challenge is not at all clear and can only be the subject matter of the taking of evidence by the Constitutional Court – regardless of any investigations by the prosecuting authorities. With regard to the special significance of the minutes for the election process and the requirement of a "complaint" by the members of the electoral authority, reference is made to the longstanding case law of the Constitutional Court and the probative value of the minutes as well as the significance of the monitoring tasks assumed by the Assistant Electoral Officers of the electoral authority in the establishment of the electoral result.

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Some of the passages of the statement of challenge, it is argued, are unsubstantiated. This concerns, for example, those pleadings according to which in certain electoral districts there is a "striking difference" between ballot-box voting, on the one hand, and postal voting, on the other hand, which creates doubts as to the correctness of the electoral result; this is mere speculation on the part of the challenging party which, also in accordance with the case law of the Constitutional Court, does not meet the statutory requirements of an electoral challenge.

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5.2. Regarding the alleged violation of the election principles and the principle of neutrality, as well as the unconstitutionality of the statutory bases of postal voting, it is stated that a response to any questions regarding the constitutionality of individual provisions of the relevant election codes and an assessment of any issues relating to media law do not fall under the sphere of competence of the Federal Electoral Authority. The constitutionality of postal voting, it is stated, was confirmed earlier by the Constitutional Court in *VfSlg. 19.893/2014*.

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With regard to the unconstitutionality of provisions regarding postal voting by persons under guardianship, as put forward in the statement of challenge, the Federal Electoral Authority submits that the casting of a vote is a non-

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transferable right and that this also holds true of the application for an absentee ballot as well as the declaration in lieu of an oath, which may be derived from the requirement to apply the strictly literal rule of interpretation of election-law provisions as well as the most recent case law of the Constitutional Court. Demanding a confirmation of the application by the guardian would constitute an unconstitutional restriction of the voting right of a person under guardianship.

The newspaper article presented in the statement of challenge as evidence refers to a date prior to the adoption of the Act on the Amendment of the Election Law 2011 (*Wahlrechtsänderungsgesetz*), Federal Law Gazette *BGBI. I 43/2011*, providing "new and detailed rules for substantial processes regarding voting by persons with disabilities as mentioned in the statement of challenge" (cf. e.g. section 5a paragraph 8 subparagraphs 1 and 2 *BPräsWG*). Pursuant to section 66 paragraph 1 *NRWO*, it is mandatory that a person who wants to be accompanied when voting by a person of his/her choosing be in a position to identify this person to the Chief Electoral Officer. There is no room for interpretation on the basis of which it may be deemed permissible to allow another person, such as a guardian, to sign instead of the person to whom the absentee ballot was made out. On the contrary, such a person is not eligible for postal voting but would have to go to a polling station or vote before a special electoral authority ("flying electoral commission") that will visit the person concerned in the hospital.

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5.3. As to the unlawfulness of postal voting it is emphasised that all minutes of the 113 district electoral authorities confirm a proper counting of the votes, specifically, for example, the start of the evaluation of the absentee ballots cast by post at 9:00 a.m. on the Monday following election day. In the opinion of the Federal Electoral Authority, the evaluation of the absentee ballots cast by post can be broken down into the following steps:

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"1. Recording of the data on the absentee ballot pursuant to section 10 paragraph 6 of the Law Governing the Election of the Federal President 1971:

Immediately after the district electoral authority receives an absentee ballot cast by post (which may, for example, be three weeks before election day), the tear-open flap is opened by an officer commissioned by the district electoral authority. Subsequently, the data specified in section 10 paragraph 6 of the Law Governing the Election of the Federal President 1971 is recorded, in most cases electronically. The absentee ballot is then kept under seal at the district electoral authority until 9:00 a.m. on the day following election day.

From the point of view of the Federal Electoral Authority, there is nothing to be said against the – legally irrelevant – practice of 'pre-sorting' absentee ballots upon collection for examining the existence of those grounds for nullity which can be ascertained without cutting them open. Grounds for nullity include, without being limited to, the missing signature for the declaration in lieu of an oath; pre-sorting, in practice, could also merely refer to the first (tentative) process of making stacks or putting the ballots in containers, in any case subject to the final examination and assessment by the electoral authority. Under no circumstances must an absentee ballot be cut open at the time of collection.

2. Establishing the grounds for nullity pursuant to section 10 paragraph 5 subparagraphs 1, 8, 9, 10 and 11 of the Law Governing the Election of the Federal President 1971 by the district electoral authority:

On Monday after the election day, 9:00 a.m., the district electoral authority first examines the absentee ballots received by way of postal voting, which are still unopened at that time, for any grounds of nullity pursuant to the legal provisions indicated above. A pre-sorting of absentee ballots that may have been, but was not necessarily, performed during collection could speed up the subsequent procedure of evaluating the ballots. The decision as to whether an absentee ballot is void or is to be included in the results must always be made by the district electoral authority as a collegiate body (example: During the examination of the ballots an absentee ballot that was wrongly classified as a ballot without a signature during pre-sorting is found to actually contain a declaration in lieu of an oath). Those absentee ballots which cannot be included in the ascertainment of the result are recorded in tables, broken down by ground for nullity. The necessary forms are provided by the Federal Ministry of the Interior.

3. Cutting open the absentee ballots:

After establishing the grounds for nullity mentioned above, the absentee ballots are cut open by the District Chief Electoral Officer in the presence of the members of the electoral authority (section 14a paragraph 1 of the Law Governing the Election of the Federal President 1971). The Federal Ministry of the Interior recommends opening the ballots by machine.

4. Establishing the grounds for nullity pursuant to section 1[0] paragraph 5 subparagraphs 2 to 7 of the Law Governing the Election of the Federal President 1971:

When the members of the district electoral authority take out the absentee ballots, it is determined whether any one of those grounds for nullity which may only be determined after an absentee ballot has been cut open, is applicable, including without limitation the use of the wrong ballot paper envelope (e.g. a blue instead of a beige one).

5. Counting:

Prior to 'conventionally' counting the [...] envelopes taken out of the absentee ballots that have been cut open, such envelopes are shuffled in a big container. Counting as such does not differ from the process to be carried out in a local electoral authority, however, as far as the volume is concerned, counting is only rarely comparable with the process in a local electoral authority, as the number of postal ballots to be counted is, as a rule, significantly higher." (quote without the highlightings contained in the original)

The process of "simply 'pre-sorting' sealed ballot paper envelopes" is deemed to be in compliance with the law provided that the process described is strictly adhered to. 52

Deviations from the process described have only been recorded in some district election files (e.g. district electoral authority St. Veit an der Glan: signatures of Assistant Electoral Officers only on the first page of the minutes, last page only signed by the District Chief Electoral Officer and her deputy; district electoral authority Feldkirch: no original signatures but names printed by machine with the addition "m.p."; district electoral authority Wien-Alsergrund: specific remarks made by an Assistant Electoral Officer regarding certain absentee ballots). 53

In the minutes of the district electoral authority Wien-Umgebung, the signatures of all the assistants confirm that the meeting started at 9:00 a.m. and ended at 1:35 p.m. on the day following the election. From the supplementary sheet to these minutes, however, it becomes clear that a discussion and subsequent vote regarding missing ballot papers took place and that an unlawfully nominated assistant participated in this vote. She was, at the same time, both a member of a ward electoral authority and a municipal electoral authority, which is irreconcilable with section 10 paragraph 5 *NRWO*. 54

Opening absentee ballots used in postal voting without the presence of the electoral authority constitutes a violation of legal provisions; however, the challenging party does not allege any manipulation that would lead to a change in the election results or to the inability of the responsible bodies to (objectively) ensure the reliable ascertainment of the results. In addition, it is argued, there is no indication of any manipulation. The beige ballot paper envelopes used in the run-off election are not "commodities that may be customarily ordered"; the ballot papers can hardly be reproduced without a skilled print shop (thickness, 55

folding). In addition, the suspicion that ballots were "destroyed" by simply removing the ballot paper envelopes was not confirmed when carrying out a basic examination of the records as to the absentee ballots to be excluded.

5.4. It is a known fact, it is argued, that "in rare cases, municipal officers used the wrong envelopes when mailing the absentee ballots", which was in part rectified by the competent municipality mailing another ballot paper for the run-off election. As regards the "wrong colour of the envelopes", it cannot be excluded that the voter himself/herself may have confused the ballot paper envelopes by mistake.

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With regard to the inclusion of an absentee ballot containing a ballot paper envelope qualifying for a ground for nullity under section 10 paragraph 5 subparagraph 4 *BPräsWG*, the minutes of the district electoral authority Baden document a decision to include the ballot in the ascertainment of the results.

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"Even before the elections, the district electoral authority Baden was informed by the municipality Traiskirchen that approximately 120 blue ballot paper envelopes had been sent out with the absentee ballots issued instead of the beige envelopes as required by law. Apparently with a view to this fact, the district electoral authority, in its meeting of 23 May 2016, decided to include 78 blue ballot paper envelopes and, in addition, three white envelopes in the ascertainment of the postal vote. The minutes also make clear that the Deputy District Chief Electoral Officer explicitly informed the members of the district electoral authority as to the unlawfulness of this majority decision." (quote without the highlightings contained in the original)

5.5. As to the "unlawfulness of advance information" the Federal Electoral Authority submits as follows:

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"Austrian legislation does not provide for any regulations or sanctions against the premature publication of data on election outcomes. Not even the announcement of official results by a municipality would be impermissible, albeit in the opinion of the Federal Electoral Authority not desirable in terms of democratic policy. Such a prohibition is only implemented in legislation governing elections to the European Parliament (Article 10 paragraph 2 of the Act concerning the election of the representatives of the European Parliament by direct universal suffrage of 20 September 1976, most recently amended by Council Decision of 25 June 2002 and 23 September 2002).

For lack of statutes, the Federal Electoral Authority has long applied a procedure that is determined anew for every election in the meeting of the Federal Electoral Authority and was most recently acknowledged by the members of the Federal Electoral Authority after detailed presentation, without any objections,

in its meeting of 23 March 2016. It is customary that information on the results is passed on to the media by the Federal Ministry of the Interior from around 1:00 p.m., provided that the responsible media representatives have previously assured the Federal Ministry of the Interior, by means of a written media statement, that they will not publish any data before 5:00 p.m. A sample media statement has been attached [...].

The Austrian Press Agency (APA) has announced to impose a penalty in the event of disclosure of any data that is published by it subject to a blocking period, and that by no means originates exclusively from the Federal Ministry of the Interior [...]. In addition, a well-trained team at the Ministry closely monitors the public media and most recently also the social networks throughout election day to examine the circumstances described in the statement of challenge. When monitoring the media in the most recent election, it turned out that the standards set by the Federal Ministry of the Interior were strictly observed and that any established premature disclosures were always made by mass media or social networks such as Twitter and Facebook, which did not have access to the data of the Ministry.

This approach, which has been used by the Federal Electoral Authority for many years, intends to prevent that the media take different measures so as to obtain data from a potentially less reliable source. Data can, for example, also be disclosed by election witnesses who according to section 61 paragraph 2 *NRWO* are not subject to any obligations of confidentiality.

The Federal Electoral Authority does not support the posting of results in social media, but regards it to be *de facto* unpreventable, given the existing framework conditions. This practice could only be effectively curbed by introducing a uniform closing time for all polling stations in Austria. Such a legal measure would, however, lead to a reduction in the citizen-friendly number of local electoral authorities all over Austria."

5.6. The "publication of voting behaviour" by posting photographs of completed ballot papers on the internet or in social media "in large numbers" is not supported, but it is not explicitly prohibited. "[P]ro futuro" the issue of avoiding such incidents should be addressed for all elections (secret elections). Voters must be unobserved in the polling booth; it seems unrealistic to check the availability of "devices that may be used to take photos" before a voter casts his/her vote.

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5.7. The Federal Electoral Authority further submits that it is impossible to vote twice in an Austrian-wide election if all the legal provisions are observed by the enforcing bodies. Voting twice is just possible in the event that "provisions are not complied with by authorities, be it intentionally or negligently". Specifically, this would be the case if a municipality fails to add a blocking notice in the

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electoral roll next to the name of the voter using an absentee ballot to cast his/her vote, or if such notice is overlooked when voting. Double voting constitutes a punishable offence pursuant to section 266 paragraph 1 *StGB*; however, this did specifically not occur in the three cases presented in the statement of challenge.

5.8. With regard to the "controversial decisions relating to votes in ballot-box voting", no unlawfulness was established in the evaluation of two ballot papers at the ward electoral authority 1 of the municipality Biedermannsdorf (cf. section 12 paragraph 2 *BPräsWG*). 61

6. Robert Luschnik, the legal representative authorised to accept service on behalf of the candidate Alexander Van der Bellen, (hereinafter referred to as the "interested party") submitted written observations, in which he opposes the pleadings made by the challenging party and "requests [the court] to dismiss the [challenging party's] claim with costs". 62

6.1. The introduction contains general legal arguments which are then presented in greater detail in the written observations (see items I.6.2. to 6.5.). Moreover, the interested party primarily refers to the wording of Article 141 paragraph 1 last but one sentence of the Constitution, according to which an electoral challenge is to be allowed if the alleged unlawfulness of an election has been proven and has been of influence on the election result: 63

There is no evidence of any actual unlawfulness within the meaning of the law, particularly in view of the fact that the minutes of the individual district electoral authorities confirm that all relevant electoral-law procedural rules have been adhered to. As public documents, the minutes constitute full evidence of their substance until the contrary is proven by the challenging party. All actors involved in the disputed electoral process have signed the minutes. 64

As regards the influence of the unlawfulness of the election procedure on the election result addressed in Article 141 paragraph 1 last but one sentence of the Constitution, the interested party essentially alleges, in summary, that this electoral challenge is to be allowed only if the alleged unlawfulness can be proven and has been of actual and not just theoretical influence on the election result. In support of this legal view taken, the party submits as follows: 65

"Not least due to the circumstance that the Constitutional Court has so far

always been able to decide in cases of electoral challenges following an exclusively written procedure on the basis of the electoral files – without taking evidence itself – the Constitutional Court has developed the established practice of allowing an electoral challenge if an infringement could have had an influence on the election result, without any evidence for actual manipulation having to be furnished.

This is understandable as it is hardly conceivable that evidence for the actual manipulation of the election result cannot be furnished on the basis of the election files alone. If, however, the Constitutional Court bases its decision not just on the election files but also on the taking of evidence and on interviews, a different standard has to be applied. In this case, it would be contrary to established practice and not understandable should the Constitutional Court base its decision on an alleged unlawfulness of the election procedure on the basis of interviewing witnesses (as in the case at hand), without examining the issue of whether the election result was actually manipulated.

In other words: If, by way of taking evidence, the Constitutional Court examines whether there is any unlawfulness, the Court must also examine whether there is any evidence, or at least indication, of actual manipulation. In this connection, reference is made to *VfSlg. 888/1927*, according to which it is sufficient for an electoral challenge that the proven unlawfulness could have been of influence on the election result. 'The assessment of this issue is, however, ultimately within the discretion of the Constitutional Court'. Which is why the Constitutional Court – at least when holding a public hearing – must also examine whether there is any indication of manipulation, in particular in connection with absentee ballots."

Any unlawfulness could only have had an impact on the election result if such (proven) unlawfulness had made it possible (in a manner unnoticed by the electoral authorities) to exchange 15,432 ballot paper envelopes or ballot papers. This would require the use of non-official ballot papers, as any manipulation through the use of official ballot papers would have been detectable. The non-use duplicates in the challenged run-off election, it is argued, can, however, be verified on the basis of specific characteristic features of the ballot paper envelopes and official ballot papers used. A manipulation of the electoral result can therefore be excluded, and the challenging party has only made unsubstantiated allegations in that regard. Besides, the statement of challenge contains "incorrect or at least massively misleading" information as to how many absentee ballots have been affected by the individual alleged infringements (see item I.4.2.1.: 28,438 instead of 30,295, 54,337 instead of 58,374 and 112,063 instead of 120,067 absentee ballots concerned).

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6.2. Subsequently the interested party objects to those pleadings put forward in

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the statement of challenge according to which a comparison of the result of absentee voting and the total result shows discrepancies in certain electoral districts (see item I.4.2.1.). In this connection, it is stated, by way of summary, that there are no statistical discrepancies in comparison with the results recorded in other electoral districts and that – subject to any infringements of the law – a deviation from the total result for all of Austria by 15,432 votes in favour of Norbert Hofer is statistically "highly improbable". The outcome of the election was in accordance with specific election forecasts as concerns absentee ballots; the research institute 'SORA', it is argued, has explicitly ruled out any indication of systematic irregularities in its analysis of the challenged run-off election.

6.3. With regard to the constitutional concerns presented by the challenging party in connection with section 21 paragraph 2 first sentence *BPräsWG* (see item I.4.3.1.), the interested party states that the Constitutional Court has never raised any constitutional reservations against the time period, and in its ruling *VfSlg. 17.269/2004* even indirectly confirmed the constitutional permissibility of a one-week period allowed for filing a challenge to the elections to the European Parliament. The allegation that was made by the challenging party to the effect that the specific end of the period was unclear is not justified, as deadlines expressed in weeks always expire at the end of the day by the same name as the day on which the event triggering the period occurred.

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In addition, the interested party did not share the reservations of the challenging party with regard to the unconstitutionality of the other legal bases of postal voting.

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6.4. As to the allegations made in the statement of challenge regarding the unlawful incidents during the challenged run-off election in specific electoral districts (see item I.4.2.1.), the interested party first states in a general manner, summarising the most essential issues, that, given the terms of sections 18, 63 paragraph 2, 65 and 84 *NRWO* in conjunction with section 2 *BPräsWG* as well as section 10 paragraphs 6 and 7 *BPräsWG*, there is a relatively large group of those electoral processes that may be carried out by the Chief Electoral Officer (of his/her own accord or by virtue of a resolution taken by the electoral authority granting him/her the authority to do so) or by support staff. Furthermore, several provisions of the *BPräsWG* are difficult to interpret even for lawyers (such as section 10 paragraph 6 *leg.cit.* regarding the specific arrangements for

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the official safekeeping of absentee ballots under seal) and such provisions are "disregarded' or 'overlooked' across the whole country", respectively (such as the rule in section 10a paragraph 4 last sentence *leg.cit.* providing that ballot paper envelopes are not to be put in the ballot box by the voters themselves but the Chief Electoral Officer); however, the data disclosed in connection with the 2016 elections for the Federal President does not give any "indication of potential manipulation or falsification of the will of the voters (to an extent relevant to the case at hand)".

The interested party further submits, in summary, as follows:

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6.4.1. It is stated, by way of introduction, that the mere "pre-sorting" of absentee ballots into void ballots and ballots to be included prior to Monday, 23 May 2016, is permissible. Many of the infringements alleged by the challenging party do not qualify as such simply because the electoral processes objected to are covered by law. This concerns, for example, the electoral districts Hermagor, Graz-Umgebung and Kitzbühel, where the requirements for the independent performance of official acts by the respective Chief Electoral Officer have been met pursuant to section 18 paragraph 1 *NRWO*. In the electoral districts Villach, Innsbruck-Land and Schwaz, the respective Chief Electoral Officers were authorised to perform the electoral procedures challenged on the basis of the corresponding resolutions of the electoral authority pursuant to section 18 paragraph 3 *leg.cit.* (for the electoral districts Graz-Umgebung and Villach-Land the existence of relevant resolutions must be examined when taking evidence). In connection with the electoral districts Freistadt and Bregenz, it is stated that "a resolution was adopted pursuant to section 18 paragraph 3 *NRWO* and that the failure of the members of the district electoral authority to participate has to be seen in light of section 18 paragraph 1 *NRWO*", respectively.

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The unlawful incidents regarding the electoral districts Liezen and Kufstein, as alleged in the statement of challenge, are not applicable, in particular because the absentee ballots were still unopened at the beginning of the count on 23 May 2016, 9:00 a.m.

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In connection with the electoral districts Leibnitz and Hollabrunn, the electoral procedures objected to by the challenging party did not have an impact on the election result and are therefore irrelevant.

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For the time being, no pleadings can be made relating to the remaining electoral districts (Südoststeiermark, Wien-Umgebung, Landeck and Wolfsberg) criticised by the challenging party. 75

6.4.2. To the extent that the statement of challenge contains any pleadings deemed suitable, if applicable, to establish any reservations as to the unequivocal reflection of the voters' will, the allegations submitted by the challenging party are unsubstantiated and "supported to a very limited extent only" by the evidence presented. 76

With regard to eleven of the absentee ballots unanimously excluded by the district electoral authority in the electoral district Gänserndorf, the challenging party has not shown with sufficient certainty to what extent this is to be regarded as a violation of the law. The fact that absentee ballots were not opened and shuffled by the District Chief Electoral Officer is of no relevance as, according to the enclosures presented with regard to this challenged item, members of the district electoral authority were involved and there was no indication of any (attempted) manipulation. Moreover, the allegations that discarded absentee ballots had already been packed in boxes on 22 May 2016 and that the Assistant Electoral Officers and electoral witnesses had no opportunity to check this process are supported to a limited extent only by the evidence presented. As shown by the documents submitted by the challenging party, the witnesses questioned on this issue made no observations in that regard. Moreover, no request to check this process – with regard to which the challenging party itself also fails to argue that it was objected to – was apparently made. Ultimately, it is argued, the information provided by a named witness contradicts the pleadings of the challenging party. When the meeting of the district electoral authority started on Monday, 23 May 2016, at 9:00 a.m., the discarded absentee ballots had been visibly and centrally placed on a table, then the grounds for exclusion were talked about (in some cases also consulted on), it was possible to check the absentee ballots and the "absentee ballots to be counted were shuffled several times". 77

The challenging party's allegations that in the electoral district Völkermarkt it was not possible to scrutinize the absentee ballots discarded as void and that only a "list of attendance" was signed are not supported by the evidence presented. The written statement given by the witness called by the challenging party was not signed and only contains vague statements. 78

As regards the electoral district Reutte, the challenging party makes a complaint about the storage of the discarded absentee ballots and alleges that it was not possible to inspect those ballots; however, it fails to specify where the ballots were stored and whether the Assistant Electoral Officers could have made such an inspection. According to information furnished by a named witness, the Chief Electoral Officer announced the number of discarded absentee ballots in the meeting of the district electoral authority and the members of the district electoral authority had the opportunity to inspect them at any time.

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6.4.3. It is further argued that the (mere) pre-sorting of absentee ballots in 59 electoral districts, as objected to by the challenging party, does not constitute an infringement. Essentially, the interested party summarises his allegations arguing that section 10 paragraphs 6 and 7 *BPräsWG* does not contain any regulations regarding certain aspects of handling absentee ballots without an influence on the election result, including, without limitation, the issue of the (mere) "pre-sorting" of absentee ballots, which is why those electoral procedures are not unlawful. They are rather purely "administrative" tasks within the meaning of the ruling of the Constitutional Court dd. 18 June 2015, W I 2/2015.

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The facts alleged by the challenging party in connection with the electoral district Wels-Land are not "in the slightest" supported by any of the documents submitted as evidence.

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As regards the unlawful incidents in the electoral district "Wien 9" alleged by the challenging party, "the enclosures submitted as evidence [...] are inherently contradictory [...], as the admission of five controversial absentee ballots/ballot paper envelopes is mentioned in a declaration in lieu of an oath but not in the 'data sheet' even though the other incident specified in the declaration in lieu of an oath is being mentioned therein". The incident in question, however, concerns six votes at the most and is therefore not relevant as such.

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6.4.4. The statements made by the challenging party regarding the alleged infringements in connection with ballot paper envelopes which were not in compliance with legal standards are contradictory, it is argued. The challenging party "complains about a violation of the law in 15 electoral districts by invoking the exclusion of a total of 292 absentee ballots containing non-beige ballot paper envelopes of some other colour as a violation of the respective voters' right to vote [...], as well as, at the same time, the validation of those 210 ballot papers

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contained in non-beige envelopes". Besides, this does not qualify as a relevant unlawfulness due to the number of votes allegedly affected.

6.4.5. In connection with the unlawfulness asserted by the challenging party due to the publication of advance information on certain election results prior to the final result (see item I.4.2.2.), the interested party submits, by summary, that the publication objected to is neither part of the electoral process within the meaning of Article 141 of the Constitution nor prohibited by the law. 84

The "publication of voting behaviour" by posting large numbers of photographs in the (internet) media as criticised by the challenging party (see item I.4.2.3.) cannot establish an unlawfulness as such publications, which were incidentally also made by the challenging party itself, do not impair free and secret elections. 85

In connection with the allegations made by the challenging party as to the allegedly biased reporting of various media prior to the run-off election (see item I.4.2.4.), the interested party quotes extracts from *VfSlg. 13.839/1994*, according to which a violation, if any, of the (previous) Broadcasting Act (*Rundfunkgesetz*) by bodies of the *ORF* in the context of a referendum may not be held against the federal government or other government bodies for lack of legal options to prevent infringements; in the opinion of the interested party, the same applies to reporting by private media. 86

In connection with the legal violations referred to by the challenging party as "further infringements of the law in the run-off election" (see item I.4.2.5.), the interested party essentially states that the sum total of these infringements, subject to proof, "only concerns an extremely low number of votes not suited to have an impact on the election result". 87

6.5. In conclusion, the interested party gives reasons in support of his legal opinion that the challenged run-off election is not to be repealed in its entirety in case that the challenge is allowed: 88

Any proven infringements of the law having an influence on the election result, it is argued, only affect a few district electoral authorities and exclusively the ascertainment of the result of the votes cast by postal ballot. The challenged run-off election is therefore to be repealed with a view to section 70 *VfGG*, if applicable, within such scope only. 89

Such a partial repeal of the election is an option, it is argued, as "all voters voting by postal ballot on 22 May 2016 in the electoral districts with regard to which the [challenging party] has claimed infringements of the law can be fully and completely identified" on the basis of section 10 paragraph 6 *BPräsWG*, which provides for the legal obligation of the district electoral authorities to collect certain data relating to absentee ballots delivered by mail, on the one hand, and the ballot paper envelopes available at the electoral authorities, on the other hand. This also holds true for those voters who exercised their right to vote by absentee ballot in 'other' wards, as their data must be collected as well. Therefore, it is possible to order a separate rerun of the postal vote for each electoral district ensuring (for example by way of personal notification or delivery of another absentee ballot, including explanations as to how to proceed) that all voters having exercised their right to vote by absentee ballot in the second round of elections will be entitled to vote again." The unequivocal reflection of the voters' will could be restored in this manner.

This is not in conflict with the ruling of the Constitutional Court of 13 June 2016, W I 22/2015, declaring that a separate rerun of the postal vote is not deemed possible for a district council election, as the relevant facts of that case were different.

7. The Constitutional Court held a public oral hearing.

II. The Law

1. The relevant provisions of the Law Governing the Election of the Federal President from 1971 (*Bundespräsidentenwahlgesetz, BPräsWG*), Federal Law Gazette *BGBl. 57/1971* as amended by Federal Law Gazette *BGBl. I 158/2015* read as follows:

"Section 2. In accordance with this Federal Law, the election of the Federal President is to be administered and carried out by the ward electoral authorities, the municipal electoral authorities, the district electoral authorities, the provincial electoral authorities and the Federal Electoral Authority currently in office in accordance with the Act on Elections to the National Council 1992 (*Nationalrats-Wahlordnung, NRW*), Federal Law Gazette *BGBl. 471*. Moreover, the pertinent provisions of the *NRWO*, including the provisions on international election monitoring (including, without limitation, section 20a *NRWO*) apply *mutatis mutandis* to these electoral authorities.

[...]

Section 5. (1) Persons entitled to vote are to be entered in electoral rolls which are to be renewed prior to every election of the Federal President.

(2) The entry of the persons entitled to vote in the electoral roll, the correction and complaint procedure, participation in the election and the place where the right to vote may be exercised are governed by section 22 paragraph 2, last sentence, and sections 23 to 37 *NRWO* with the proviso that copies of the electoral roll may also be requested by legal representatives authorised to accept service intending to submit election proposals (section 7).

Section 5a. (1) Persons entitled to vote who are likely to be unable to cast their vote before the competent electoral authority on the election day, for example due to being absent, for health reasons or due to a stay abroad, have the right to be issued with an absentee ballot.

(2) The right to be issued with an absentee ballot for exercising their right to vote is also given to those voters who, on the election day, are unable to come to their competent polling stations for lack of ambulatory ability or fitness for transport or because they are bedridden due to sickness, age or any other reason, or because they are detained in a remand prison, a correctional facility, in forensic commitment or in police custody, and who want to exercise their right to vote in the presence of a special electoral authority (section 73 paragraph 1 *NRWO*), unless it is possible for them to exercise their right to vote pursuant to section 72 or section 74 *NRWO*.

(3) Should the criteria for being issued with an absentee ballot for reasons set out in paragraph 2 subsequently cease to apply to a person entitled to vote, such person shall inform the municipality in which he/she was staying, in a timely manner before the election day, that he/she renounces his/her right to be visited by a special electoral authority pursuant to section 73 paragraph 1 *NRWO*.

(4) The application for the issuance of an absentee ballot is to be submitted in written or oral form, starting from the day on which the election is announced, to the municipality by which the person entitled to vote was entered in the electoral roll, stating the reason as specified in paragraph 1. Applications by telephone are not permitted. The application is to be received by the competent authority no later than on the fourth day before the election day. Oral applications may be filed no later than 12:00 noon on the second day before the election day. The latter deadline also applies to applications filed in writing if it is possible to personally hand over the absentee ballot to a person authorised by the applicant. Abroad, the issuance and delivery of an absentee ballot may also be applied for by way of an Austrian official representation. In the case of an application filed orally, unless the applicant is known to the authority, the identity of the applicant is to be proven *prima facie* by means of a document. In the case of a written application, unless the applicant is known to the authority or has affixed to the application, in the case of electronic submission, a qualified

electronic signature, *prima facie* proof of identity may also be furnished in other ways, in particular by stating the passport number or by submitting a copy of official photo identification or another document. The municipality is authorised to have the passport number verified by a passport authority, and photo identification or other documents by the authority competent for issuing such documents. Provided that it has the technical facilities to do so, the municipality is also authorised to verify the passport number itself on the basis of the central directory pursuant to section 22b of the Passport Act 1992 (*Passgesetz*), Federal Law Gazette *BGBI. No. 839/1992*. In the cases specified in paragraph 2, the application has to contain an express request for a visit by a special electoral authority pursuant to section 73 paragraph 1 *NRWO*, as well as the exact location where the applicant expects to be visited by the special electoral authority. In the case of persons in public custody, the application has to include an official confirmation of such custody.

(5) Immediately after the announcement of the elections for Federal President, persons entitled to vote who have their main place of residence abroad and who have been entered in the directory of eligible voters (section 2a of the Act on Directories of Eligible Voters 1973 [*Wählerevidenzgesetz*]), provided that their residential address has also been entered in the directory of eligible voters, are to be informed, by post, by the municipality which has entered them in such directory, of the possibility to exercise their right to vote by means of postal ballot. Furthermore, they are to be informed of the possible ways to file an application and, where applicable, also about filing applications via the Internet. This information may be sent by e-mail if an e-mail address is known to the municipality. Persons who have applied for the *ex-officio* issuance of an absentee ballot according to section 2a paragraph 6 or section 9 paragraph 4 of the Act on Directories of Eligible Voters 1973 are to be sent absentee ballots as soon as the corresponding pre-printed forms and the official ballot papers are available to the municipality.

(6) The absentee ballot and the absentee ballot for the run-off election both are to be produced as sealable envelopes. The absentee ballot is to be printed as specified in Schedule 4, and the absentee ballot for the run-off election is to be printed as specified in Schedule 5. It is to be ensured, by means of appropriate technical measures, that the personal data concerning the person entitled to vote, in particular that person's signature, is covered by a closable flap before the absentee ballot is forwarded to the district electoral authority and that after sealing the absentee ballot it is possible, by means of appropriate perforation, to make visible to the district electoral authority the personal data of the voter and the voter's declaration in lieu of an oath without opening the absentee ballot. In accordance with the technical properties of the absentee ballot, the flap is to feature printed text containing information on how to use the absentee ballot when casting a vote by postal ballot and on how to forward the absentee ballot. The municipality may affix a bar code or a QR code. Absentee ballots for persons entitled to vote who have their main place of residence abroad are to be marked accordingly in the respective section. Absentee ballots issued by means of automatic data processing may, instead of the mayor's signature, bear an official signature pursuant to sections 19 and 20 of the Federal Act on Provisions Facilitating Electronic Communications with Public Bodies (E-Government Act –

E-GovG) (*Bundesgesetz über Regelungen zur Erleichterung des elektronischen Verkehrs mit öffentlichen Stellen [E-Government-Gesetz, E-GovG]*), Federal Law Gazette *BGBl. I 10/2004*; section 19 paragraph 3, second sentence, *E-GovG* does not apply. The absentee ballot forms are to be provided to the authorities in charge of issuing the absentee ballots in sufficient numbers based on a needs assessment to be carried out on a regular basis.

(7) If an application for the issuance of an absentee ballot is accepted, an official ballot paper pursuant to section 11 paragraph 2 and a white sealable ballot paper envelope are to be delivered together with the absentee ballot. If the Federal Electoral Authority has published the names of more than two candidates (section 9) and the application is received from a person entitled to vote living abroad or contains a corresponding request, an absentee ballot for the run-off election, including an official ballot paper pursuant to section 11 paragraph 3 and a beige sealable ballot paper envelope are to be delivered as well. The absentee ballot paper pursuant to section 11 paragraph 2 and the white ballot paper envelope are to be put inside the absentee ballot and, where applicable, the absentee ballot paper pursuant to section 11 paragraph 3 and the beige ballot paper envelope are to be put inside the absentee ballot for the run-off election. All documents are to be delivered to the applicant. The applicant has to keep the absentee ballot safe until casting the vote. If the absentee ballot is sent by post, the envelope containing the absentee ballot is to be marked with the note 'Absentee ballot for the election of the Federal President XXXX'.

(8) The following applies to the delivery or transmission of absentee ballots applied for:

1. If the absentee ballot is handed over personally, the applicant has to sign a confirmation of receipt. If the applicant is unable to do so, a note is to be recorded on file.
2. For patients in hospitals and nursing homes (section 72 *NRWO*), if the absentee ballot is sent by post, it is to be sent by registered letter addressed exclusively to the recipient personally. In such case, the letter is to be marked with the note 'do not deliver to authorised recipient'.
3. If absentee ballots are delivered by courier to the persons referred to in subparagraph 2, the confirmation of receipt must be personally signed by the patient. If the applicant is unable to do so, a note is to be recorded on file.
4. In the case of applicants not referred to in subparagraph 2, the absentee ballot, if sent by post, is to be sent by registered letter unless the absentee ballot was applied for orally, the electronically filed application carried a qualified electronic signature, or the absentee ballot was issued ex officio on the basis of an application according to section 2a paragraph 6 or section 9 paragraph 4 of the Act on Directories of Eligible Voters 1973.
5. If absentee ballots are transmitted to persons not referred to in subparagraph 2 by courier or by way of an Austrian official representation, section 16 paragraphs 1 and 2 of the Service of Documents Act (*ZustellG*) is to be applied by analogy, with the proviso that an absentee ballot may also be delivered to persons entitled to vote who have not yet reached the age of 18. The absentee ballot may be delivered without any proof being required if it was applied for orally or the electronically filed application carried a qualified electronic signature.

6. Absentee ballots applied for in writing which are personally collected by the applicant may be handed over by the municipality only in return for a confirmation of receipt. If the applicant is unable to provide such confirmation, a note is to be recorded on file. If an absentee ballot applied for in writing is handed over to a person authorised by the applicant, that person has to confirm receipt of the absentee ballot.

7. A courier who delivers an absentee ballot which is used for postal voting is not entitled to immediately collect the absentee ballot.

(9) In any case, confirmations of the receipt of absentee ballots delivered by courier or by way of an Austrian official representation are to be transmitted to the municipalities that issued the absentee ballots. Confirmations of receipt submitted to Austrian official representations may be forwarded electronically. Applications filed in writing, confirmations of receipt, notes on file and a list of applications received electronically are to be submitted to the municipal electoral authority after the end of the period specified in paragraph 1. The municipal electoral authority has to add the documents submitted to it to the election file of the municipality.

(10) The municipality must not hand out duplicates for lost absentee ballots. Absentee ballots that have become unusable but have not yet been sealed and for which the declaration in lieu of an oath has not yet been signed may be returned to the municipality. In that case, the municipality may issue a duplicate after having received the absentee ballot. The absentee ballot that has become unusable is to be marked with a corresponding note and submitted to the municipal electoral authority in such a case. The municipal electoral authority has to add the absentee ballot to the election file of the municipality.

(11) The municipal electoral authorities shall ensure that post marked as absentee ballots (paragraph 7, last sentence) that has been deposited with the locally competent postal agencies is collected at the time when the respective postal agency is last closed before the election day and is kept ready to be handed over to the applicant on the election day. At that time, post marked as absentee ballots (paragraph 7, last sentence) and deposited with the postal agency but not collected is to be set aside and kept ready to be handed over to a person delegated by the municipal electoral authority. The municipal electoral authorities shall inform the Federal Ministry of the Interior of any post marked as absentee ballots (paragraph 7, last sentence) stored by them. The Federal Ministry of the Interior has to take appropriate measures, e.g. establish a telephone hotline, so that applicants may be informed of the place where post marked as absentee ballots (paragraph 7, last sentence) is kept. Absentee ballots deposited with Austrian official representations that are not collected are to be destroyed after the election day. The municipality that issued such an absentee ballot is to be informed thereof electronically.

(12) A person entitled to vote is to be informed by the municipality as soon as possible if his/her application for the issuance of an absentee ballot was not allowed.

(13) The issuance of an absentee ballot is to be marked in the electoral roll by entering the words 'absentee ballot' prominently next to the name of the voter concerned under the heading 'remark', and the issuance of an absentee ballot for the run-off election, where applicable, is to be marked 'absentee ballot 2'. Until the twenty-ninth day after the respective election day, the municipalities shall inform, upon oral or written request, any person entitled to vote who is registered in the electoral roll whether an absentee ballot was issued for that person. For that purpose, the municipalities, after having forwarded the electoral rolls to the municipal electoral authority, have to keep ready copies of the electoral rolls until the aforementioned date unless they have other records of the absentee ballots issued, e.g. an IT application. When making a request, the person entitled to vote is to furnish *prima facie* proof of his/her identity.

(14) In the event that an absentee ballot is issued, in accordance with paragraph 2, to a person entitled to vote who is staying in a location other than the one where he/she was entered in the electoral roll, the municipality issuing the absentee ballot has to inform the municipality in which the person entitled to vote is staying of the issuance of the absentee ballot as well as of the fact that such person has to be visited by a special electoral authority.

(15) After the end of the time period set out in section 39 paragraph 1, the district electoral authority has to immediately report the number of absentee ballots issued to the provincial electoral authority (immediate notification). The provincial electoral authority also has to immediately, or at the latest on the last day before the election day, report the number of absentee ballots issued within its sphere of competence to the Federal Electoral Authority. When reporting the number of absentee ballots issued, the number of absentee ballots issued to persons entitled to vote living abroad and the number of absentee ballots issued for the run-off election are to be stated separately.

[...]

Section 9. (1) On the thirty-first day before the election day, the Federal Electoral Authority has to finalise the election proposals conforming to the law and publish them, without street names and numbers, in alphabetical order of the family names or last names, on the official notice board of the Federal Ministry of the Interior and on the Internet; in the case of identical family names or last names, the first names of the candidates are to be considered for listing them in alphabetical order; if the first names are also identical, they are to be listed according to the time at which the election proposal was filed. If several election proposals include one and the same candidate standing for election, the name of such candidate is to be published only once, listing, however the legal representatives authorised to accept service of the relevant election proposals.

(2) The announcement is to be made in all municipalities in conformity with local customs and in any case also by a public notice.

(3) If an election proposal is not published, the financial contribution (section 7

paragraph 9) is to be refunded.

Section 10. (1) The voting procedure is governed by the provisions of sections 52 to 55, 57 to 59, 61 to 67, 69 to 72, and section 73 paragraphs 1 to 3, first sentence, and paragraph 4, as well as section 74 *NRWO*, but section 61 *NRWO* applies with the proviso that electoral witnesses may be named by each legal representative authorised to accept service of an election proposal published by the authorities (section 9) or by his/her authorised representative.

(2) Voters who have been issued with absentee ballots according to section 5a may exercise their right to vote at every polling station or by way of sending the sealed absentee ballot to the competent district electoral authority (postal voting).

(3) For that purpose, the voter has to put the official ballot paper completed by him/her into the ballot paper envelope, seal the envelope and put it into the absentee ballot. After that, the voter has to declare in lieu of an oath by his/her personal signature that he/she has completed the ballot paper personally, under no observation or undue influence. Following that, the voter has to seal the absentee ballot. The absentee ballot is to be submitted to the competent district electoral authority in due time so that the district electoral authority receives the absentee ballot no later than on the election day, 5:00 p.m., or is to be handed in at a polling station during the opening hours or at a district electoral authority no later than 5:00 p.m. on the election day. Absentee ballots may be handed in by a bearer. Absentee ballots used to cast a vote abroad that are received by an Austrian official representation or an Austrian unit by the sixth day before the election day, by a representation outside the European Economic Area or outside Switzerland by the ninth day before the election day, are to be forwarded to the competent district electoral authority by the representation or Austrian unit. The Austrian official representation or Austrian unit may forward absentee ballots received after the sixth day before the election day, in representations outside the European Economic Area or outside Switzerland after the ninth day before the election day, to the competent district electoral authority if it appears to be ensured that the absentee ballot may nevertheless be received by the competent district electoral authority in due time, or the person entitled to vote is informed that receipt in due time might not be guaranteed. The costs of transmitting the absentee ballot to the district electoral authority by post are to be borne by the Republic of Austria.

(4) Votes may be cast by postal ballot immediately after receipt of the absentee ballot, in the case of a run-off election, however, no earlier than on the ninth day after the election day for the first ballot.

(5) Votes cast by postal ballot will be null and void if

1. the declaration in lieu of an oath on the absentee ballot is missing or was verifiably not made by the person entitled to vote,
2. the absentee ballot does not contain a ballot paper envelope,
3. the absentee ballot only contains a ballot paper envelope or several ballot paper envelopes other than the white ballot paper envelope,

4. the absentee ballot for the run-off election only contains a ballot paper envelope or several ballot paper envelopes other than the beige ballot paper envelope,
5. the absentee ballot contains two or more white ballot paper envelopes,
6. the absentee ballot for the run-off election contains two or more beige ballot paper envelopes,
7. there is text written on the ballot paper envelope,
8. the verification of integrity (section 90 paragraph 1 *NRWO*) has revealed that the absentee ballot is damaged in such a way that abuse by removing or inserting the ballot paper envelope inside it cannot be ruled out,
9. the data or the signature of the voter can no longer be made visible because the fields under the flap of the absentee ballot have been glued over, or
10. the absentee ballot is not received by the competent district electoral authority by 5:00 p.m. on the election day at the latest or handed in at a polling station by that time, or
11. the absentee ballot for the run-off election is received by the competent district electoral authority prior to the ninth day after the election day for the first ballot or if it is evident that the absentee ballot was used to cast a vote prior to such date.

(6) Upon receipt of absentee ballots used for postal voting, the district electoral authority has to record the data under the flap, at least the data in the fields 'consecutive number of electoral roll', 'municipality' and 'Austrian living abroad', after they have been made visible. Recording of such data using the bar code or QR code, if any, on the absentee ballot is permitted. The absentee ballots then must be officially kept under seal until they are counted (section 14a paragraph 1).

(7) On the day of the election, the district electoral authority has to ensure that absentee ballots are accepted from 8:00 a.m. to 5:00 p.m. Where applicable, the district electoral authority has to ensure that absentee ballots delivered by post are accepted on the day before the election. These absentee ballots also are to be recorded as described in paragraph 6.

Section 10a. (1) When casting a vote, each voter first has to prove his/her identity (section 67 and section 70 paragraph 1 *NRWO*). If a voter features on the electoral roll, the Chief Electoral Officer has to present him/her with an empty ballot paper envelope and the official ballot paper.

(2) In the case of voters voting by absentee ballot, the Chief Electoral Officer has to open the envelope presented by the voter (section 5a paragraph 6) and present him/her with the official ballot paper contained therein, together with a blue envelope instead of the white envelope taken from the absentee ballot. The Chief Electoral Officer has to destroy the white envelope. The Chief Electoral Officer is to expressly point out to voters with absentee ballots that in casting their vote they are to use the ballot papers handed over at the time the absentee ballot was issued. If the voter concerned is no longer in possession of this ballot paper, he/she is to be issued with a new official ballot paper.

(3) In a run-off election, for voters voting by absentee ballot, not only the beige ballot paper envelope is to be exchanged, but the ballot paper pursuant to section 11 paragraph 3 is to be exchanged for a ballot paper pursuant to section 11 paragraph 2 as well.

(4) The Chief Electoral Officer has to ask each voter to enter the polling booth. There, the voter has to complete the official ballot paper and put it in the ballot paper envelope. The voter then has to leave the polling booth and present the ballot paper envelope to the Chief Electoral Officer. The Chief Electoral Officer has to put the unopened ballot paper envelope into the ballot box.

(5) When a voter makes a mistake when completing the official ballot paper, he/she has to be issued with a new ballot paper upon request. The voter concerned has to make the official ballot paper initially presented to him/her unusable by tearing it up before the electoral authority and take it with him/her for the sake of maintaining the secrecy of the vote.

(6) Whenever an additional official ballot paper is issued, this is to be noted in the voting record.

Section 11. (1) For the election of the Federal President, official ballot papers are used.

(2) The official ballot paper has to contain the first name and the family name or last name of the candidates standing for election according to the officially published election proposals in the order determined according to section 9 paragraph 1 as well as boxes with a circle each and, in addition, the information to be gathered from the specimen in Schedule 2. If the Federal Electoral Authority has published the name of female candidates, the official ballot paper is to be adjusted so as to bear the feminine form of the title 'Federal President'. Official ballot papers may only be produced by order of the Federal Electoral Authority.

(3) The official ballot paper for casting a vote by postal ballot in the run-off election has to contain a box for entering the family name or last name of the candidate as well as, where applicable, additional distinctive characteristics, the earliest possible time for casting the vote and, in addition, the information to be gathered from the specimen in Schedule 6 including, without limitation, information for voters abroad as to where to obtain information whether a run-off election will take place and which candidates have qualified for it. If the Federal Electoral Authority has published the names of female candidates, the text on the ballot paper provided for in Schedule 6 is to be adjusted accordingly.

(4) If the Federal Electoral Authority determines, on the thirty-first day before the election day, that only one candidate has applied for the office of Federal President, the official ballot paper has to contain the questions 'Should NN take office as Federal President?' or 'Should NN remain in office as Federal President for another term of office?' and below these questions the words 'yes' and 'no',

each with a circle, in addition to the information to be gathered from the specimen in Schedule 3.

(5) The size of the official ballot papers is to be set according to the number of candidates standing for election, and has to be at least DIN A5 format. In the case of ballot papers pursuant to paragraph 2, equally sized rectangles and block letters are to be used for all candidates. All block letters are to be printed in consistent black and the dividing lines between the rectangles as well as the circles are to be of the same thickness.

(6) The Federal Electoral Authority has to transmit the official ballot papers to the ward electoral authorities in Vienna via the provincial electoral authority, and to the municipal and ward electoral authorities outside of Vienna via the district authorities and municipal authorities, and in chartered towns via the town authorities, on the basis of the final number of persons entitled to vote registered with the respective electoral authorities plus another 15 % of this number, and in the run-off election 25 %, as a reserve. An additional surplus of 5 % is to be presented to the district administration authorities in case more ballot papers are needed by any electoral authority on the election day. The ballot papers are to be handed over in return for a confirmation of receipt issued in duplicate; one copy is for the delivering party, the second one for the accepting party.

(7) Any person who commissions, produces, distributes or disseminates official ballot papers or ballot papers identical with or similar to the official ballot papers without authorisation is committing an administrative offense and, unless this constitutes an offense subject to more severe punishment, is liable to pay a fine of up to EUR 218 imposed by the district administration authority or, in default of payment, to serve a prison sentence of up to two weeks. Official ballot papers produced by an unauthorised person or such ballot papers which are the same as or similar to the official ones may be declared forfeited, irrespective of whose property they are.

(8) Any unauthorised person who marks, in any way, official ballot papers intended to be issued for the election is to be punished in accordance with paragraph 7 as well.

[...]

Section 14. (1) If ballot papers pursuant to section 11 paragraphs 2 or 3 are used, when counting the votes,

- a) the total number of valid and invalid votes cast,
- b) the total number of invalid votes cast,
- c) the total number of valid votes cast, and
- d) the total number of valid votes cast for the the individual candidates according to the officially published election proposals (section 9) (candidate totals) are to be determined.

(2) If ballot papers pursuant to section 11 paragraph 4 are used, when counting the votes,

- a) the total number of valid and invalid votes cast,
 - b) the total number of invalid votes cast,
 - c) the total number of valid votes cast,
 - d) the total number of valid 'yes' votes cast, and
 - e) the total number of valid 'no' votes cast,
- are to be determined.

(3) Apart from that, the determination of the local election results as well as the election results in the provincial constituency and the regional constituencies are governed by the respective provisions of sections 84 to 89 paragraph 1, section 90 paragraphs 6 and 7, section 93 paragraph 1, first sentence, as well as paragraphs 2 to 4, section 95 paragraph 1, section 96 paragraph 6 with the additional provision that the voting results must be recorded in voting minutes, as well as sections 99, 103 and 104 *NRWO mutatis mutandis* with the proviso that the votes cast by absentee ballot must be counted within the sphere of competence of the electoral authorities in which they were cast.

Section 14a. (1) On the day after the election, 9:00 a.m., the District Chief Electoral Officer, under the monitoring of the Assistant Electoral Officers present, shall examine the absentee ballots received by way of postal voting by the election day, 5:00 p.m., and any absentee ballots accepted by the local electoral authorities and forwarded to the district electoral authority according to section 70 paragraph 3 *NRWO*, regardless of the electoral district in which they were issued, for the integrity of the seal and for the visibility of the data and the signature of the voter. After that, the District Chief Electoral Officer shall examine whether the declarations in lieu of an oath (section 10 paragraph 3) have been made on the absentee ballots. Absentee ballots that do not meet these requirements must not be included in the ascertainment of the result. Following that, the District Chief Electoral Officer shall open the absentee ballots, take out the ballot paper envelopes contained therein, which are to be included, and put them in a container provided for that purpose. Absentee ballots with regard to which a ground for nullity as referred to in section 10 paragraph 5 subparagraphs 2 to 7 has been identified must not be included in the ascertainment of the result. Absentee ballots not to be included are to be added to the election file and kept under seal. The reasons for not including the absentee ballots are to be recorded in the minutes. After the ballot paper envelopes to be included have been thoroughly shuffled, the district electoral authority has to open them, take out the official ballot papers, verify their validity, mark the invalid official ballot papers with consecutive numbers and make the determinations pursuant to section 14 paragraphs 1 or 2 regarding the votes cast by postal ballot.

(2) Following that, the district electoral authority has to, for the sphere of competence of the electoral district, add the election results of the votes cast by postal ballot to the election results pursuant to section 14 paragraphs 1 or 2, report them to the competent provincial electoral authority without delay (immediate notification) and enter them in the minutes. The district electoral

authority has to report the results of the votes cast by postal ballot separately. In doing so, the district electoral authority has to indicate the number of absentee ballots cast by postal ballot from other electoral districts, broken down by electoral district.

(3) As soon as all election files from the municipal electoral authorities or, in Vienna, from the ward electoral authorities, have been received by the district electoral authorities, they are to be arranged alphabetically by the district electoral authorities, outside of Vienna according to municipalities and in Vienna according to wards, and the local election results are then to be checked for inconsistencies of the numerical results, which are to be corrected. Thereafter, the district electoral authority has to add up the final local election results from within the electoral district and enter them in the minutes.

(4) The minutes referred to in paragraphs 1, 2 and 3 constitute the election file of the district electoral authority. The election files of the municipal electoral authorities, in Vienna of the ward electoral authorities, as well as the documents used to record voters voting by absentee ballot according to section 60 paragraph 4 are to be enclosed as annexes to this election file which is to be submitted in a closed state, if possible in a sealed envelope, to the competent provincial electoral authority without delay.

(5) On the fifteenth day after the election day, and in the case of a run-off election on the fifteenth day after such run-off election, the district electoral authority has to determine the number of late absentee ballots received by then and report it to the Federal Electoral Authority by way of the provincial electoral authorities. Furthermore, the district electoral authority has to ensure that the unopened absentee ballots are destroyed at the time the election result has been determined and can no longer be challenged.

[...]

Section 21. (1) The Federal Electoral Authority is to announce the result of the election (section 17, where applicable section 20) on the official notice board of the Federal Ministry of the Interior and on the Internet without delay.

(2) Within a week from the day of announcement, the election decision of the Federal Electoral Authority (paragraph 1) may be challenged before the Constitutional Court by the legal representative authorised to accept service of an election proposal conforming to the law (section 9) on grounds of any alleged unlawfulness of the election procedure. The challenge must include a reasoned application to declare the election procedure or a specific part thereof null and void. The Constitutional Court is to decide on the challenge within four weeks, at the latest, from the challenge being filed. The provisions of section 68 paragraph 2, section 69 and section 70 paragraphs 1 and 4 of the Constitutional Court Act 1953 (*Verfassungsgerichtshofgesetz 1953*) apply *mutatis mutandis* to the challenge procedure."

2. The relevant provisions of the Federal Law on National Council Elections (Nationalrats-Wahlordnung 1992, NRWO), Federal Law Gazette BGBl. 471/1992 as amended by Federal Law Gazette BGBl. I 158/2015, read as follows:

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"Chapter 2
Electoral authorities
General remarks

Section 6. (1) Elections are to be administered and carried out by electoral authorities. New electoral authorities are set up for each election.

(2) The electoral authorities consist of a chairperson who functions as a Chief Electoral Officer or his/her deputy and a number of Assistant Electoral Officers. A Substitute Assistant Electoral Officer is to be appointed for each Assistant Electoral Officer in case he/she is unable to perform his/her office.

(3) Only persons who have the right to vote in the National Council elections may become members of the electoral authorities. Those who do not fulfil this requirement are excluded from the electoral authorities. The deputies not acting as chairperson as well as the Substitute Assistant Electoral Officers, who are neither counted towards the quorum nor included in the voting, are to be put on an equal footing with the remaining members of the electoral authorities in all other respects.

(4) The office of a member of an electoral authority is a public honorary post which must be accepted by every person entitled to vote who has his/her main place of residence in the municipality where the respective electoral authority is located.

(5) Representatives of the parties taking part in the elections are entitled, according to section 15 paragraph 4, to be present at meetings of the electoral authorities.

Sphere of competence of the electoral authorities and Chief Electoral Officers

Section 7. (1) The electoral authorities are responsible for carrying out and administering the elections. The Chief Electoral Officers shall transact the business they are entrusted with according to this Federal Law. They also are to prepare the meetings of the electoral authorities and implement the resolutions adopted by the electoral authorities.

(2) The office which is headed by the Chief Electoral Officer or whose head has appointed the Chief Electoral Officer is to allocate the necessary support staff and resources to the electoral authorities. The costs arising in this connection are to be borne by the regional authority in charge of bearing the costs of the office concerned.

[...]

Quorum, valid resolutions of the electoral authorities

Section 17. (1) The electoral authorities, with the exception of the ward electoral authorities, have a quorum when the chairperson, or his/her deputy, and at least half of the Assistant Electoral Officers appointed for the respective electoral authority pursuant to section 15 are present. The ward electoral authorities have a quorum if the chairperson, or his/her deputy, and at least two Assistant Electoral Officers are present.

(2) A majority of votes is required to adopt valid resolutions. The chairperson does not take part in the voting. However, when there is a tie, the proposal supported by the chairperson is to be adopted as a resolution.

(3) Substitute Assistant Electoral Officers are only counted towards the quorum and included in the voting, when the Assistant Electoral Officers for whom they are substituting are unable to perform their office.

Independent performance of official acts by the Chief Electoral Officer

Section 18. (1) When, especially on the election day, irrespective of having been duly convened, a meeting of an electoral authority does not have a quorum or an electoral authority loses its quorum during an official act and the urgency of such official act does not allow for postponement, the official act is to be performed independently by the Chief Electoral Officer. In such case, the Chief Electoral Officer has the possibility to consult trusted persons, taking into consideration the party proportions.

(2) The same applies to all official acts of an electoral authority which cannot be assembled at all since none of the parties has brought forward proposals for the appointment of Assistant Electoral Officers (Substitute Assistant Electoral Officers) according to section 14.

(3) Except in the cases outlined in paragraphs 1 and 2 as well as section 15 paragraph 2, section 42 paragraph 1 and section 113, the Chief Electoral Officer may perform unpostponable official acts for the performance of which he/she was expressly authorised by the electoral authority.

[...]

Chapter 3 Registration of persons entitled to vote Electoral rolls

Section 23. (1) The persons entitled to vote (section 21 paragraph 1) are to be entered in electoral rolls. These electoral rolls are to be prepared using the

specimen in Schedule 2.

(2) Preparing these electoral rolls is the duty of the municipalities within the sphere of competence assigned to them by the Federation.

(3) The electoral rolls are to be prepared by the municipalities on the basis of the directory of eligible voters, taking into consideration section 21 paragraph 1.

(4) In municipalities not divided into wards, the electoral rolls are to be prepared in alphabetical order of the names of the persons entitled to vote in elections and referenda, and in municipalities divided into wards they are to be broken down by electoral ward and, where necessary, by place, street and house number.

[...]

Decision on applications for correction

Section 30. (1) Applications for correction are to be decided on, within six days after the period for public inspection has ended, by the municipal electoral authorities outside of Vienna, and by the district electoral authorities in Vienna. Section 7 of the General Administrative Proceedings Act 1991 (*Allgemeines Verwaltungsverfahrensgesetz*) applies.

(2) The municipality has to inform the applicant and the person affected by the decision of such decision in writing without delay.

[...]

Place of voting

Section 37. (1) In principle, all persons entitled to vote shall exercise their right to vote at the place (municipality, electoral ward) where they have been entered in the electoral roll.

(2) Persons holding an absentee ballot may also exercise their right to vote outside such place.

[...]

PART IV Voting procedure

[...]

Establishment of identity

Section 67. (1) Every voter shall appear before the electoral authority, give his/her name and residential address and present a document or another official certificate furnishing unambiguous proof of his/her identity.

(2) In particular, the following documents or official certificates may be used to establish identity: ID cards, passports and driver's licenses, any official photo identification in general.

(3) Voters who do not possess any of the documents or certificates described in paragraph 2 nevertheless are to be allowed to vote if they are personally known to the majority of the members of the electoral authority and no objection according to section 71 paragraph 1 is made. This circumstance must be expressly noted in the minutes on the election procedure.

Casting votes

Section 68. (1) The voter is to first prove his/her identity (section 67 and section 70 paragraph 1). If a voter has been entered in the electoral roll, the Chief Electoral Officer is to present him/her with the empty ballot paper envelope and the official ballot paper. In the case of voters voting by absentee ballot, the Chief Electoral Officer shall open the envelope presented by the voter concerned (section 39 paragraph 4) and present him/her with the official ballot paper contained therein, together with the sealable ballot paper envelope. Voters voting by absentee ballot in their own regional constituency are to be presented, by the Chief Electoral Officer, with the empty ballot paper envelope instead of the sealable ballot paper envelope taken from the absentee ballot. The sealable ballot paper envelope must be destroyed by the Chief Electoral Officer. The Chief Electoral Officer has to expressly inform each voter with an absentee ballot that, when casting the vote, he/she has to use the ballot papers handed over to him/her when the absentee ballot was issued. Voters voting by absentee ballot who are no longer in possession of such ballot paper, are to be issued with an official ballot paper from the respective regional constituency (section 75) if their absentee ballot bears the designation of the regional constituency in which the place of voting is located, or with an empty official ballot paper if the voter voting by absentee ballot comes from a different regional constituency (section 76). The Chief Electoral Officer is to fill in the number of the respective provincial constituency and the letter designating the respective regional constituency as marked on the absentee ballot on the empty official ballot paper before handing it over to the voter concerned. Voters voting by absentee ballot from another regional constituency who are no longer in possession of a sealable ballot paper envelope are to be presented with a new sealable envelope from their provincial constituency.

(2) – (5) [...]

Entries by the electoral authorities in the voting record and the electoral roll

Section 69. (1) An Assistant Electoral Officer shall enter the name of each voter casting a vote into the voting record, together with a consecutive number, to which the consecutive number from the electoral roll has to be added, or record it accordingly in the electronic voting record. At the same time, the respective name shall be crossed out of the electoral roll by a second Assistant Electoral Officer.

(2) The consecutive number from the voting record shall be entered in the electoral roll under the heading "vote cast" in the corresponding place (male, female voter) by the second Assistant Electoral Officer.

Procedure for voters voting by absentee ballot

Section 70. (1) Voters who have been issued with an absentee ballot are to present it together with a document or official certificate listed in section 67 paragraph 2 proving that they are identical with the person named on the absentee ballot. The names of all voters voting by absentee ballot, unless they are voters voting by absentee ballot pursuant to paragraph 2, are to be entered at the end of the electoral roll, numbered consecutively, and recorded in the minutes on the election procedure. The absentee ballot is to be taken from the voter concerned, marked with the consecutive number from the electoral roll and attached to the minutes. If a polling station has been set up especially for voters voting by absentee ballot, the consecutive number of the voting record is to be indicated on the absentee ballot. At such a polling station, the ballot paper envelopes must not be exchanged (section 68 paragraph 1, fourth and fifth sentences).

(2) When a voter who has been issued with an absentee ballot appears before the electoral authority competent according to his/her initial entry in the electoral roll in order to exercise his/her right to vote, such voter is to cast his/her vote, using the ballot paper issued together with the absentee ballot and in accordance with the remaining provisions of this Federal Law, after having handed the absentee ballot over to the electoral authority.

(3) At every polling station, absentee ballots that have been used to cast a vote by postal ballot are to be accepted during the opening hours for the purpose of forwarding them to the superordinate district electoral authority (section 85 paragraph 3 point k). The same holds for electoral wards set up pursuant to section 72 paragraph 1 and electoral authorities set up pursuant to section 73 paragraph 1.

[...]

Chapter 4
Special facilities for exercising the right to vote
Exercise of the right to vote by patients in hospitals and nursing homes

Section 72. (1) In order to facilitate the casting of votes by patients in public or private hospitals and nursing homes, the municipal electoral authorities, and in Vienna the Vienna City Administration, may set up one or more special electoral wards covering the area of such institutions. In these cases, the regulations set out in sections 52 to 54 apply *mutatis mutandis*. The acceptance of votes cast by absentee ballot by other persons present in hospitals and nursing homes is permitted.

(2) If electoral wards are set up according to paragraph 1, patients who are able to walk are to cast their votes at the polling stations of the ward electoral authorities competent pursuant to paragraph 1. The same applies to patients who are able to walk and who cast their vote by absentee ballot.

(3) In order to collect the votes of bedridden patients, the ward electoral authority competent according to paragraph 1, together with its aides and electoral witnesses, may also enter the rooms of the patients concerned. In such cases, appropriate facilities are to be set up (such as, for example, a folding screen or a similar device) to ensure that the patients are able to fill in the ballot paper and put it in the envelope given to them by the Chief Electoral Officer without being observed by any other person in the room.

(4) Furthermore, when the right to vote is exercised pursuant to paragraphs 2 and 3, the provisions of this Federal Law including, without limitation, sections 39 and 40 as well as sections 68 and 70 governing the participation in the elections and the exercise of the right to vote by absentee ballot, must be observed.

Exercise of the right to vote by bedridden patients and voters who are otherwise restricted in their freedom of movement using absentee ballots

Section 73. (1) In order to make it easier for persons entitled to vote who have been issued with an absentee ballot upon application according to section 38 paragraph 2 to exercise their right to vote, the municipal electoral authorities, and in Vienna the Vienna City Administration, shall set up, no later than on the twenty-first day before the election day, special electoral authorities which will visit these voters during voting hours. The presence of electoral witnesses and a maximum of two accredited persons referred to in section 20a paragraph 3 is permitted. The provisions of sections 52 and 54 apply *mutatis mutandis*.

(2) When the right to vote is exercised before special electoral authorities, the provisions of section 72 paragraphs 3 and 4 apply *mutatis mutandis*. The acceptance of absentee votes cast by other persons present during the casting of votes by voters voting by absentee ballot who are bedridden or otherwise restricted in their freedom of movement is permitted.

(3) The verification of the ballot papers by the special electoral authorities includes only the determination to be made pursuant to section 84 paragraph 2. The ballot paper envelopes of the voters voting by absentee ballot according to section 38 paragraph 2 from other regional constituencies are to be counted separately and handed over separately to the electoral authorities acting according to paragraph 4. Concerning the minutes taken by the special electoral authorities, section 85 paragraph 2 points a) to i), paragraph 3 points a) to d) and g), as well as paragraph 4 apply *mutatis mutandis*.

(4) Observing the need to maintain the secrecy of the vote, the municipal electoral authorities and in Vienna the Vienna City Administration shall select the electoral authority in charge of determining the election result of the special electoral authorities. This electoral authority then shall include the ballot paper envelopes taken from bedridden patients or voters who are otherwise restricted in their freedom of movement from the respective regional constituency, which have been taken over without opening them, when determining their own election result, ensuring that they cannot be distinguished from other envelopes; the ballot paper envelopes from bedridden patients and voters who are otherwise restricted in their freedom of movement from other regional constituencies are to be treated according to section 84 paragraph 3 and section 85 paragraph 3 point h). The election files including the minutes taken by the special electoral authorities are to be provided to the electoral authorities determining the election result without delay and form part of the latter's election file.

[...]

Minutes

Section 85. (1) The electoral authority then has to record the election procedure and the local election result in the minutes.

(2) These minutes are to include at least the following information:

- a) the name of the place of voting (municipality, political district, electoral ward, polling station, regional constituency, provincial constituency) and the election day;
- b) the names of the members of the electoral authority both present and absent as well as the names of the trusted representatives according to section 15 paragraph 4;
- c) the names of the election witnesses present;
- d) the names of the accredited persons (section 20a paragraph 3) who are or were present;
- e) the time of starting and closing of the voting procedure;
- f) the number of official ballot papers received and handed out to voters;
- g) the names of the voters voting by absentee ballot, particularly highlighting those from other regional constituencies;
- h) the decisions of the electoral authority concerning the admission or non-admission of voters to the casting of a vote (section 71);
- i) other decisions of the electoral authority made during the voting procedure

(for example to interrupt the voting procedure);

j) the determinations made by the electoral authority according to section 84 paragraphs 3 and 4, and in the case of invalid votes, the reason for their invalidity;

k) the number of absentee ballots that have been used to cast a vote by postal ballot accepted pursuant to section 70 paragraph 3, broken down by electoral district.

(3) The following documents are to be attached to the minutes:

a) the electoral roll;

b) the voting record;

c) the absentee ballots taken from the voters pursuant to section 70 paragraphs 1 or 2;

d) the confirmation of receipt confirming the number of official ballot papers received;

e) the invalid ballot papers, which are to be enclosed in separate envelopes labelled accordingly;

f) the valid ballot papers, which are to be grouped according to the list number of the parties and within this order according to whether or not a preferential vote was given and to be enclosed in separate envelopes labelled accordingly;

g) the official ballot papers not issued, which also are to be enclosed in separate envelopes labelled accordingly;

h) the preferential vote records filled in according to section 84 paragraph 6;

i) the ballot paper envelopes handed in by voters voting by absentee ballot from other regional constituencies in a specially marked and sealed envelope (section 84 paragraph 3, second sentence), unless they have already been forwarded separately according to section 89 paragraph 2;

j) where applicable, documents referred to in section 39 paragraphs 6 and 7 as well as absentee ballots not collected according to section 39 paragraph 8;

k) the absentee ballots used for postal voting which were accepted according to section 70 paragraph 3 and counted, enclosed in envelopes.

(4) The minutes are then to be signed by the members of the electoral authority. If they are not signed by all members, the reason therefor is to be given.

(5) Upon request, the Chief Electoral Officer shall hand over to any election observers present (section 20a paragraph 3) a compilation of the voting results of the local electoral authority signed by him/her.

(6) This brings the voting procedure to an end.

(7) The minutes, together with their enclosures, constitute the election file of the electoral authority.

(8) In the case of polling stations set up exclusively for voters voting by absentee ballot, all required activities and determinations concerning blue ballot paper envelopes, in particular the verification of the ballot papers, do not apply.

(9) The absentee ballots accepted according to section 70 paragraph 3, which

have been used to cast a vote by postal ballot, are to be forwarded to the municipal electoral authority, and in chartered towns to the district electoral authority, without delay if it is not ensured that they can be forwarded together with the minutes on the election day."

3. Section 292 of the Act of 1 August 1895 on Judicial Procedure in Civil Matters (Code of Civil Procedure [*Zivilprozessordnung – ZPO*]), Imperial Law Gazette *RGBl. 113/1895* as amended by Federal Law Gazette *BGBI. I 164/2005*, reads as follows:

"Evidentiary value of documents
Section 292.

(1) Documents which, within the scope of this Act, have been prepared, in accordance with the requirements as to form, on paper or electronically, by a public authority within the scope of its official responsibilities, or by a person vested with public trust within the area of responsibility assigned to such person (public documents) establish full evidence of what the authority officially orders or declares therein, or of what the authority or the authenticating party attests therein. The same applies to documents which have been prepared, outside the scope of this Act but within the scope of their official responsibilities, by such public bodies that are subordinate to an authority which has its seat within the territory to which this Act applies.

(2) Evidence proving that the recorded transaction or the recorded fact is incorrect or has been improperly recorded is permitted."

III. Considerations

1. On the admissibility of the challenge

1.1. According to Article 141 paragraph 1 point a) of the Constitution, the Constitutional Court shall pronounce on challenges to the election of the Federal President (cf. *VfSlg. 10.951/1986, 13.068/1992, 13.071/1992, 15.168/1998, 15.169/1998, 17.192/2004*).

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1.2. According to section 21 paragraph 2 of the *BPräsWG*, challenges to the election decision of the Federal Electoral Authority (section 21 paragraph 1 *leg.cit.*) on grounds of any alleged unlawfulness of the election procedure are to be filed with the Constitutional Court within one week from the day of announcement. The challenge must include a reasoned application to declare the election procedure or a specific part thereof null and void. The provisions of section 68 paragraph 2, section 69 and section 70 paragraphs 1 and 4 of the

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Constitutional Court Act apply mutatis mutandis to the challenge procedure. Pursuant to section 21 paragraph 2 *BPräsWG*, the election decision of the Federal Electoral Authority may only be "challenged [before the Constitutional Court] by the legal representative authorised to accept service of an election proposal conforming to the law (section 9)".

1.3. The challenging party is the legal representative authorised to accept service in the name of Norbert Hofer, who is listed in the election proposal made on 17 March 2016. This election proposal was published by the Federal Electoral Authority on 24 March 2016, together with five other election proposals. 98

1.4. Thus, as the legal representative authorised to accept service of an election proposal conforming to the law (section 9 *BPräsWG*), the challenging party is authorised, according to section 21 paragraph 2 *BPräsWG*, to file an electoral challenge. 99

1.5. On 1 June 2016 the Federal Electoral Authority announced the result of the election of the Federal President pursuant to section 21 paragraph 1 *BPräsWG* and, pursuant to section 17 *BPräsWG*, declared Alexander Van der Bellen to have been elected Federal President. Therefore, the challenge dated 7 June 2016 was, in any case, filed in due time. 100

1.6. As, in addition, all other procedural requirements have been met, the electoral challenge is allowed. 101

2. On the merits

2.1. The Constitutional Court has to examine an election procedure exclusively within the bounds of the infringements alleged by the challenging party in the statement of challenge. By contrast, the Constitutional Court is prohibited from examining the lawfulness of the remaining aspects of the election procedure *ex officio* (cf. *VfSlg.* 17.589/2005, 19.245/2010; *VfGH* 24/02/2016, *WI* 18/2015 etc.; 13.6.2016, *WI* 22/2015). 102

2.2. The challenging party expresses concerns over the constitutionality of the legal provisions underlying the election on the one hand, and claims the unlawfulness of certain procedures carried out when implementing such provisions on the other. These concerns refer primarily to the votes cast by 103

absentee ballot – in particular by way of postal voting. According to the regulations set out in the *BPräsWG*, the relevant law is as follows:

2.2.1. In accordance with section 5a paragraph 1 *BPräsWG*, persons entitled to vote who are likely to be unable to cast their vote before the competent electoral authority on the election day, for example due to being absent, for health reasons or due to a stay abroad, have the right to be issued with an absentee ballot. According to section 5a paragraph 2 *leg.cit.*, the right to be issued with an absentee ballot is also given to those voters who, on the election day, are unable to come to their competent polling stations for instance for lack of ambulatory ability or fitness for transport or because they are bedridden or detained in a prison and who want to exercise their right to vote in the presence of a special electoral authority pursuant to section 73 paragraph 1 *NRWO* ("flying electoral commission"), unless it is possible for them to exercise their right to vote in a special electoral ward (sections 72 or 74 *NRWO*). Should the criteria for being issued with an absentee ballot for reasons set out in section 5a paragraph 2 *BPräsWG* subsequently cease to apply to a person entitled to vote, such person shall, in accordance with section 5a paragraph 3 *leg.cit.*, inform the municipality in which he/she was staying, in a timely manner before the election day, that he/she renounces his/her right to be visited by a special electoral authority set up in accordance with section 73 paragraph 1 *NRWO*.

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According to section 5a paragraph 4 *BPräsWG*, the application for the issuance of an absentee ballot is to be submitted in written or oral form, starting from the day on which the election is announced, to the municipality by which the person entitled to vote was entered in the electoral roll, stating the reason as specified in section 5a paragraph 1 *leg.cit.* Applications by telephone are not permitted. In the case of an application filed orally, unless the applicant is known to the authority, the identity of the applicant is to be proven *prima facie* by means of a document. In the case of a written application, unless the applicant is known to the authority or has affixed to the application, in the case of electronic submission, a qualified electronic signature, *prima facie* proof of the identity may also be furnished in other ways, in particular by stating the passport number or by submitting a copy of official photo identification or another document. The municipality is authorised to have the passport number verified by a passport authority, and photo identification or other documents by the authority competent for issuing such documents.

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Section 5a paragraph 6 of the *BPräsWG* governs the details of the design and physical qualities of absentee ballots: Accordingly, the absentee ballot is to be produced as a sealable envelope. It is to be ensured, by means of appropriate technical measures, that the personal data concerning the person entitled to vote, in particular that person's signature, is covered by a sealable flap before the absentee ballot is forwarded to the district electoral authority and that after sealing the absentee ballot it is possible, by means of appropriate perforation, to make visible to the district electoral authority the personal data of the voter and the voter's declaration in lieu of an oath without opening the absentee ballot. The municipality may affix a bar code or a QR code.

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If an application for the issuance of an absentee ballot is accepted, according to section 5a paragraph 7 *BPräsWG*, an official ballot paper pursuant to section 11 paragraph 2 *leg.cit.* and a white sealable ballot paper envelope are to be delivered to the person entitled to vote together with the absentee ballot. If the Federal Electoral Authority has published the names of more than two candidates (section 9 *leg.cit.*) and the application was made by a person entitled to vote living abroad or contains a corresponding request, an absentee ballot for the run-off election including an official ballot paper pursuant to section 11 paragraph 3 *leg.cit.* and a beige sealable ballot paper envelope are to be delivered as well.

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2.2.2. The delivery or transmission of absentee ballots applied for is governed by section 5a paragraph 8 *BPräsWG*. According to this provision, a confirmation of receipt must be signed if the absentee ballot is handed over personally (section 5a paragraph 8 subparagraph 1 *leg.cit.*) and, in the case of patients in hospitals and nursing homes (section 72 *NRWO*), the absentee ballot must be sent by post, by means of a registered letter addressed exclusively to the recipient personally (section 5a paragraph 8 subparagraph 2 *BPräsWG*). Section 5a paragraph 8 subparagraph 4 sets out that, in the case of applicants not referred to in section 5a paragraph 8 subparagraph 2 *leg.cit.*, the absentee ballot, if sent by mail, is to be sent by registered letter unless the absentee ballot was applied for orally, the electronically filed application carried a qualified electronic signature, or the absentee ballot was issued *ex officio* on the basis of an application according to section 2a paragraph 6 or section 9 paragraph 4 of the Act on Directories of Eligible Voters 1973 (*ex officio* delivery of absentee ballots to persons entitled to vote living abroad or persons who are unable to come to their competent polling station on the election day for lack of sufficient

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ambulatory ability or fitness for transport or because they are bedridden). Section 5a paragraph 10 of the *BPräsWG* stipulates that, in principle, the municipality must not hand out duplicates for lost absentee ballots.

Section 5a paragraph 12 of the *BPräsWG* provides that a person entitled to vote is to be informed by the municipality as soon as possible if his/her application for the issuance of an absentee ballot was not allowed. According to section 5a paragraph 13 *leg.cit.* the issuance of an absentee ballot is to be marked in the electoral roll by entering the words "absentee ballot" prominently next to the name of the voter concerned under the heading "remark", and the issuance of an absentee ballot for the run-off election, where applicable, is to be marked "absentee ballot 2". Until the twenty-ninth day after the respective election day, the municipalities are to inform, upon oral or written request, any person entitled to vote who is registered in the electoral roll whether an absentee ballot was issued for that person.

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2.2.3. According to section 10 paragraph 2 *BPräsWG*, voters who have been issued with absentee ballots according to section 5a *leg.cit.* may exercise their right to vote at every polling station or by way of sending the sealed absentee ballot to the competent district electoral authority (postal voting). Moreover, in specified cases (cf. section 5a paragraph 2 *leg.cit.*) the votes may be cast before a special electoral authority pursuant to section 73 paragraph 1 *NRWO*.

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2.2.4. The detailed provisions governing the election procedure to be followed when voters holding an absentee ballot cast their vote in person at a polling station are contained in section 70 *NRWO* in conjunction with section 10 paragraph 1 *BPräsWG* and section 10a *BPräsWG*:

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According to section 70 paragraph 1 *NRWO*, voters who have been issued with an absentee ballot shall present it together with a document or official certificate listed in section 67 paragraph 2 *leg.cit.* (e.g. ID cards, passports and driver's licenses) proving that they are identical with the person named on the absentee ballot. The names of all voters voting by absentee ballot, unless they are voters voting by absentee ballot pursuant to section 67 paragraph 2 *leg.cit.* (voters appearing before the competent electoral authority according to their initial entry in the electoral roll), are to be entered at the end of the electoral roll, numbered consecutively, and recorded in the minutes on the election procedure.

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Section 10a paragraph 2 of the *BPräsWG* provides as follows: In the case of voters voting by absentee ballot, the Chief Electoral Officer shall open the envelope presented by the voter (section 5a paragraph 6 *leg.cit.*) and present him/her with the official ballot paper contained therein, together with a blue envelope instead of the white envelope taken from the absentee ballot. The Chief Electoral Officer shall destroy the white envelope. The Chief Electoral Officer shall expressly point out to voters with absentee ballots that in casting their vote they shall use the ballot papers handed over at the time the absentee ballot was issued. If the voter concerned is no longer in possession of this ballot paper, he/she is to be issued with a new official ballot paper.

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In a run-off election, for voters voting by absentee ballot, not only the beige ballot paper envelope is to be exchanged but the ballot paper pursuant to section 11 paragraph 3 *BPräsWG* is to be exchanged for a ballot paper pursuant to section 11 paragraph 2 *leg. cit.* as well (section 10a paragraph 3 *leg.cit.*).

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According to section 70 paragraph 1 *NRWO*, the absentee ballot is to be taken from the voter concerned, marked with the consecutive number from the electoral roll and attached to the minutes.

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2.2.5. Section 10 paragraph 3 of the *BPräsWG* governs how to exercise the right to vote by way of postal voting: For that purpose, the voter shall put the official ballot paper completed by him/her into the ballot paper envelope, seal the envelope and put it into the absentee ballot. After that, the voter shall declare in lieu of an oath by his/her personal signature that he/she has completed the ballot paper personally, under no observation or undue influence. Following that, the voter shall seal the absentee ballot. The absentee ballot is to be submitted to the competent district electoral authority in due time so that the district electoral authority receives the absentee ballot no later than on the election day, 5:00 p.m., or is to be handed in at a polling station during the opening hours or at a district electoral authority no later than 5:00 p.m. on the election day. Regarding the handing in of postal ballots abroad, special provisions apply. According to section 10 paragraph 4 *leg.cit.* votes may be cast by postal ballot immediately after receipt of the absentee ballot, in the case of a run-off election, however, no earlier than on the ninth day after the election day for the first ballot.

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Upon receipt of absentee ballots used for postal voting, the district electoral

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authority, pursuant to section 10 paragraph 6 *BPräsWG*, shall record the data under the flap, at least the data in the fields "consecutive number of electoral roll", "municipality" and "Austrian living abroad", after they have been made visible. Recording of such data using the "bar code" or "QR code", if any, on the absentee ballot is permitted. The absentee ballots then must be officially kept under seal until they are counted (section 14a paragraph 1 *leg.cit.*; i.e. until the day following the election, 9:00 a.m.). According to section 10 paragraph 7 *leg.cit.*, the absentee ballots accepted by the district electoral authority on the election day are to be recorded and kept safe in the same manner.

2.2.6. According to section 14a paragraph 1 *BPräsWG*, on the day after the election, 9:00 a.m., the District Chief Electoral Officer, under the monitoring of the Assistant Electoral Officers present, shall examine the absentee ballots received by way of postal voting by the election day, 5:00 p.m., and any absentee ballots accepted by the local electoral authorities and forwarded to the district electoral authority according to section 70 paragraph 3 *NRWO*, regardless of the electoral district in which they were issued, for the integrity of the seal and for the visibility of the data and the signature of the voter. After that, the District Chief Electoral Officer shall examine whether the declarations in lieu of an oath (section 10 paragraph 3 *BPräsWG*) have been made on the absentee ballots. Absentee ballots that do not meet these requirements must not be included in the ascertainment of the result. Following that, the District Chief Electoral Officer shall open the absentee ballots, take out the ballot paper envelopes contained therein, which are to be included, and put them in a container provided for that purpose. Absentee ballots with regard to which a ground for nullity as referred to in section 10 paragraph 5 subparagraphs 2 to 7 *BPräsWG* has been identified must not be included in the ascertainment of the results either; this may be the case, for instance, if the absentee ballot does not contain a ballot paper envelope (section 10 paragraph 5 subparagraph 2 *leg.cit.*) or the absentee ballot for the run-off election only contains a ballot paper envelope or several ballot paper envelopes other than the beige ballot paper envelope (section 10 paragraph 5 subparagraph 4 *leg.cit.*). Absentee ballots not to be included are to be added to the election file and kept under seal. The reasons for "not including" the absentee ballots are to be recorded in the minutes.

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After the ballot paper envelopes to be included have been thoroughly shuffled, the district electoral authority shall open them, take out the official ballot papers, verify their validity, mark the invalid official ballot papers with

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consecutive numbers and make the determinations pursuant to section 14 paragraphs 1 or 2 of the *BPräsWG* regarding the votes cast by postal ballot – for instance the number of valid and invalid votes cast.

Section 14a paragraphs 1, 2 and 3 of the *BPräsWG* provide for minutes to be kept which are to constitute the election file of the district electoral authority (section 14a paragraph 4 *leg.cit.*) and serve the purpose of documenting the review of the votes cast by postal ballot and the determination of the results ascertained (cf. also section 85 *NRWO* and section 14 paragraph 3 *BPräsWG*). 120

Section 14 paragraphs 1 and 2 of the *BPräsWG* contain detailed provisions on how to determine the results of the counting. It follows from section 14 paragraph 3 *leg.cit.* that the votes cast by absentee ballot must be counted within the sphere of competence of the electoral authorities in which they were cast. 121

2.3. Regarding the concerns expressed with a view to the statutory provisions: 122

2.3.1. The challenging party starts by claiming the unconstitutionality of the one-week period allowed for electoral challenges pursuant to section 21 paragraph 2, first sentence, of the *BPräsWG*. This provision, it is argued, contravenes the rule-of-law principle as the time period is unreasonably short and therefore fails to guarantee sufficient and efficient legal protection. Moreover, it is in violation of Article 7 paragraph 1 of the Constitution because there is no objective justification for the fact that Article 141 of the Constitution in conjunction with section 68 paragraph 1 *VfGG* provides for a four-week period allowed for challenging other elections (such as, for instance, the National Council elections). And finally, according to the challenging party, Article 18 of the Constitution is violated as well because section 21 paragraph 2 of the *BPräsWG* fails to sufficiently determine the point in time at which the one-week period for filing a challenge ends. 123

2.3.1.1. Pursuant to section 21 paragraph 2, first sentence, of the *BPräsWG*, the election decision of the Federal Electoral Authority may be challenged before the Constitutional Court by the legal representative authorised to accept service of an election proposal conforming to the law on grounds of any alleged unlawfulness of the election procedure "[w]ithin a week from the day of announcement"; the Constitutional Court shall decide on the challenge within 124

four weeks, at the latest, from the challenge being filed (in this respect the provision corresponds to section 80 of the Electoral Rules for European Elections (*Europawahlordnung – EuWO*) governing challenges to the elections of the members of the European Parliament; cf., *inter alia*, *VfSlg.* 17.269/2004 and 19.893/2014).

2.3.1.2. The Constitutional Court regards the time limit of one week acceptable under constitutional law and in its previous jurisprudence did not see any reason to review section 21 paragraph 2, first sentence, *BPräsWG* (cf. rulings *VfSlg.* 8877/1980, 14.253/1995 as well as *VfGH* 28/02/1994, *W I-12/93* etc., in all of which challenges were rejected as inadmissible on grounds of failure to meet the one-week time period for filing a challenge without giving rise to concerns as to the constitutionality of such provision).

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Regarding the constitutionality of short deadlines in election procedures, the Constitutional Court is primarily guided by the thought that the information required to substantiate a challenge is made accessible to the parties taking part in the elections, by way of the Assistant Electoral Officers or trusted representatives to be delegated to the electoral authorities by them, in due time, i.e. before the announcement of the election result which triggers the start of the time period pursuant to Article 141 of the Constitution in conjunction with section 21 *BPräsWG* (cf. *VfSlg.* 15.033/1997; *VfGH* 13/06/2016, *W I 22/2015*).

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Both the one-week period for filing a challenge and the four-week period allowed to the Constitutional Court to take a decision were already provided for in the original version of the *BPräsWG*, Federal Law Gazette *BGBI.* 42/1951. In the legislative materials it was stated that it "is necessary to explain this procedure in greater detail in section 21 paragraph 2 because sections 67 et seq. of the Constitutional Court Act 1930 (*VerfGG*) only governs how to challenge elections to general representative bodies. For this reason, only individual passages of the pertinent provisions of the *VerfGG* may be declared applicable *mutatis mutandis*" (cf. *RV 290 BlgNR 6. GP, 11*). These different regulations regarding the procedure for challenging the election of the Federal President on the one hand and challenging the elections to general representative bodies as set out in the *VfGG* on the other hand reflects the difference in design of these state functions already provided for at constitutional level (cf., for instance, the continuity of the legislative period of the National Council laid down in Article 27 paragraph 1 of the Constitution in contrast to the discontinuity of the term of

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office of the Federal President resulting from Article 60 paragraph 5 of the Constitution). Consequently, the election of the Federal President cannot simply be compared to other elections. In light of the discretion that may be exercised by the ordinary legislator with a view to legal policy, there are no reservations against differing regulations of the respective time periods allowed for filing a challenge.

According to section 35 paragraph 1 *VfGG* – unless otherwise provided for in the *VfGG* – the Code of Civil Procedure (*ZPO*) applies *mutatis mutandis* to proceedings before the Constitutional Court. Section 125 paragraph 2 *ZPO* expressly stipulates that a period expressed in weeks will expire at the end of the day of the last week of such period which has the same name as the day on which the period began to run (cf. also the essentially identically worded provisions of section 32 paragraph 2 General Administrative Procedure Act [*AVG*], section 902 Civil Code [*ABGB*] and section 108 Federal Fiscal Code [*BAO*]). Insofar as the pleadings of the challenging party are to be understood to mean that section 35 paragraph 1 *VfGG* is not to apply because it is not included in the references to the *VfGG* contained in section 21 paragraph 2, last sentence, of the *BPräsWG*, it has to be pointed out that section 68 paragraph 2, section 69 and section 70 paragraphs 1 and 4 *VfGG*, all of which have been expressly declared to apply *mutatis mutandis* in section 21 paragraph 2, last sentence, *BPräsWG*, are specific procedural provisions regarding challenges to elections. It cannot be concluded that the general provisions governing proceedings before the Constitutional Court do not apply. Hence, the Constitutional Court has no reservations regarding section 21 paragraph 2 of the *BPräsWG* with a view to Article 18 of the Constitution.

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2.3.2. The challenging party then alleges that individual provisions of Article 26 paragraph 6 of the Constitution contravene the fundamental principle of democracy, essentially arguing that these regulations according to which the identity of the applicant "[is] to be proven *prima facie*" and the person entitled to vote "[shall] declare by signature in lieu of an oath that the vote has been cast personally and in secret" are incompatible with the principles of personal, equal and secret suffrage.

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2.3.2.1. In its ruling *VfSlg. 10.412/1985*, the Constitutional Court set aside as unconstitutional provisions on postal voting contained in electoral rules for local elections in light of the right to vote personally and by secret ballot. In contrast

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to the constitutional law prevailing back then, there is now, in the case at hand, a special constitutional basis for relevant ordinary laws on voting by postal ballot, namely Article 26 paragraph 6 in conjunction with Article 60 paragraph 1 of the Constitution as amended by Federal Law Gazette *BGBI. I 27/2007*. According to these provisions, persons entitled to vote who are likely to be unable to cast their vote before the electoral authority on the election day may exercise their right to vote by postal voting upon substantiated application, in which case the voter has to prove his/her identity *prima facie* and declare by his/her signature in lieu of an oath to have cast the vote personally and in secret – i.e. unobserved by third parties and thus in a manner not recognisable to the public (cf. *RV 94 BlgNR 23. GP, 3; VfSlg. 19.893/2014*).

As results from this wording, the constitutional legislator did not provide for postal voting (remote voting) as a form of voting that is equivalent to casting votes before an electoral authority (conventional voting or "ballot-box voting"), but rather as an exception subject to certain restrictions (such as, for instance, the necessity to apply for an absentee ballot) (cf. *Eberhard, Die österreichische Wahlrechtsreform 2007, in: Gamper [Ed.], Entwicklungen des Wahlrechts am europäischen Fallbeispiel, 2010, 119 [131]; Poier, Briefwahl – Stärkung der Allgemeinheit der Wahl? Erste Erfahrungen aus der Anwendung der Briefwahl in Österreich, FS Manfred Prisching, 2010, 987 [992]*).

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2.3.2.2. The Constitutional Court has no reservations as to the compatibility of the system of postal voting provided for by constitutional law with the fundamental principles laid down in the Constitution. In its case law established since the entry into force of the Amendment of the Constitution, Federal Law Gazette *BGBI. I 27/2007*, the Constitutional Court has dealt with challenges to elections on grounds of alleged infringements of the law in connection with postal voting several times already without this leading to any concerns as to the constitutionality of postal voting *per se* (cf. *VfSlg. 19.245/2010, 19.246/2010, 19.893/2014; VfGH 18/06/2015, W I 2/2015; 23/11/2015, W I 3/2015; 23/11/2015, W I 4/2015; 13/06/2016, W I 22/2015*). For instance, in *VfSlg. 19.893/2014* regarding Article 26 paragraph 6 of the Constitution and Article 23a paragraph 4 of the Constitution – whose wording is identical to that of Article 60 paragraph 1, last sentence, of the Constitution – the Constitutional Court expressly stated that these provisions "would be unconstitutional only on condition that enacting them would have caused a total revision of the Constitution within the meaning of Article 44 paragraph 3 of the Federal

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Constitution, which as such would have required a referendum prior to its authentication by the Federal President (cf. *VfSlg. 2455/1952*). A total revision of the Federal Constitution is an amendment affecting any of the guiding principles of the Federal Constitution – such as the principle of democracy (Article 1 Constitution; cf. *VfSlg. 2455/1952*; and prior to that already *VfSlg. 1708/1948*). In the case at hand, there was no such total revision of the Federal Constitution”.

2.3.2.3. The concerns voiced by the challenging party regarding the constitutional provisions governing the casting of votes by postal ballot are thus unfounded.

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2.3.3. Finally, the challenging party objects to individual provisions of the *BPräsWG*, in *concreto* sections 5a, 10, 10a and 14a *leg.cit.* In its introduction to its line of reasoning, the challenging party basically points out the fact that "in the case of conventional elections before the electoral authority" high security standards shall be observed (e.g. verification of the identity of the person entitled to vote and his/her registration in the electoral roll, acceptance of the ballot sheet before the eyes of the electoral authority, availability of a polling booth for voting in private, putting the ballot paper in the ballot box and counting of the votes taken from the ballot box in the presence of the electoral authority and all attending Assistant Electoral Officers of the parties taking part in the election directly after the end of the election procedure) to ensure that the elections are prone to manipulation to a minor extent only; in order for postal voting to be in conformity with the Constitution, it is argued, the same security standards are to be met. As "the relevant applicable [ordinary-law] postal voting regulations do not meet these standards", these regulations are unconstitutional.

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2.3.3.1. In its following evaluation of the alleged unconstitutionality of individual provisions of the *BPräsWG*, the Constitutional Court proceeds from the following fundamental understanding of the system of postal voting (regarding the law applicable to absentee ballots transmitted by post cf. the statements made under item III.2.2.):

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In principle, votes are to be cast before the electoral authority which – based on the initial registration of the person entitled to vote in the electoral roll – is competent (cf. section 3 paragraph 2 and section 5 paragraph 2 *BPräsWG* in conjunction with section 37 paragraph 1 *NRWO*). But even before the

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Amendment of the Constitution, Federal Law Gazette *BGBI. I 27/2007*, entered into force, it had been possible to cast a vote by absentee ballot before another electoral authority (cf. section 38 *NRWO 1971* as amended by Federal Law Gazette *BGBI. 471/1992* as well as prior to that already section 3a Electoral Rules 1920 (*Wahlordnung*), State Law Gazette *StGBI. 316/1920*) or abroad (cf. the provision of section 62a *NRWO* as amended by Federal Law Gazette *BGBI. 148/1990*, first enacted as a constitutional provision, and later the almost identically worded ordinary-law provision of section 60 *NRWO* as amended by Federal Law Gazette *BGBI. 471/1992* and the constitutional basis of Article 26 paragraph 6 of the Constitution as amended by Federal Law Gazette *BGBI. 470/1992*). By Federal Law Gazette *BGBI. I 27/2007* the option to cast a vote by postal ballot, which until then had been reserved exclusively to persons entitled to vote who were likely to stay abroad on the election day, was expanded to include all Austrian citizens. According to the legislative materials, the reason for expanding the scope of application of this form of voting was to ensure that "no group of voters will be excluded from casting their votes due to their absence on the election day" (cf. *RV 88 BlgNR 23. GP, 2*), which – given the changes in society – definitely goes hand in hand with greater participation of persons entitled to vote in the democratic formation of will.

The regulations on postal voting using absentee ballots are based on the previously existing system of absentee ballots. For this reason, there is only one type of absentee ballot for all variants of voting which will probably not take place before the competent electoral authority, and such absentee ballot may be used either to cast a vote before another electoral authority (i.e. not the competent one) or by postal voting (abroad or in Austria) (cf. *Grabenwarter/Krauskopf, Entwicklungsstufen der Distanzwahl im Spannungsfeld des freien, geheimen und persönlichen Wahlrechts, in: Gamper [Ed.], Entwicklungen des Wahlrechts am europäischen Fallbeispiel, 2010, 145 [170]*).

With a view to the potential conflicts between postal voting and the general electoral principles, in particular the right to vote personally and by secret ballot (cf. *VfSlg. 10.412/1985* on the inadmissibility of the introduction of postal voting by ordinary law on grounds of infringement of the constitutional principles of secret and personal voting), the authorisation contained in Article 26 paragraph 6 of the Constitution is a necessary constitutional prerequisite for the introduction of postal voting by ordinary law. In light of the principle of personal suffrage, which not only precludes voting by proxy but also requires the physical

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presence of the voter before the electoral commission (cf. *VfSlg. 10.412/1985*), remote voting as made possible by constitutional law, which particularly allows the "non-personal casting of votes" in the form of postal voting (cf. *Holzinger/Unger*, Article 26 Constitution, in: *Korinek/Holoubek et.al.* [Ed.], *Österreichisches Bundesverfassungsrecht*, 9th ed., 2009, note 54), constitutes an exception. With a view to the principle of secret ballot, the framework conditions for controlling whether the secrecy of voting is ensured changed – also as compared to the previous regulations on postal voting abroad – when the Constitution permitted postal voting, granting voters a higher level of self-responsibility (cf. *Eberhard*, loc.cit., 134 et seq.).

Within this constitutionally provided framework, the ordinary legislator may determine further details of the election procedure (cf. Article 26 paragraph 8 of the Constitution). The legislator is given some leeway in this respect as it has to create a system that, in its entirety, sufficiently takes into account the electoral principles laid down in the Constitution in their respective manifestations. At the same time, the legislator must not render impossible, through complex and impracticable (security) provisions, the implementation of the fundamental decision taken by the constitutional legislator to permit remote voting.

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2.3.3.2. In the following, the ordinary-law provisions of the *BPräsWG* considered incompatible with the electoral principles by the challenging party must, therefore, be seen in the light of the (exceptional) form of remote voting created by the introduction of postal voting in Article 26 paragraph 6 of the Constitution and the ensuing modifications of the electoral principles as regards postal voting; these modified principles form the constitutional standard of review.

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All in all, no evidence has come to light that the system of postal voting as regulated by ordinary law restricts the constitutionally guaranteed principles of secret and personal voting to a greater extent than inevitably resulting from the constitutional concept of postal voting provided for in Article 26 paragraph 6 of the Constitution.

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2.3.3.3. According to the challenging party, the *BPräsWG* is unconstitutional because Article 26 paragraph 6 of the Constitution allows postal voting "in exceptional cases" only for those persons entitled to vote who are likely to be unable to cast their vote before the electoral authority on the election day, for example due to being absent, for health reasons or due to a stay abroad. In light

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of the electoral principles and the required restrictive interpretation of the provisions on postal voting, voters staying in Austria are only allowed to vote by post if, due to the type of their absence, they are not able to appear before any other electoral authority in Austria either. As the *BPräsWG* does not make any differentiation in that respect, but rather permits postal voting in general, i.e. in all cases of absence, it is, according to the challenging party, unconstitutional.

The Constitutional Court is unable to follow this line of argument: As already explained (see item III.2.3.3.1.), the constitutional legislator, when regulating postal voting in Article 26 paragraph 6 of the Constitution, used as a basis the previously existing system of absentee ballots, found in the ordinary law implementing regulations, which had also been designed as an exception from voting before the competent electoral authority. According to that system, voters who "are likely to be absent, on the election day, from the place (municipality, electoral ward) in which they have been registered in the electoral roll and therefore cannot exercise their right to vote", were entitled to be issued with an absentee ballot (cf. section 5a *BPräsWG* as amended by Federal Law Gazette *BGBl. I 159/1998* as well as section 38 *NRWO* as amended by Federal Law Gazette *BGBl. 471/1992*). Since it is not required, at the time of application for an absentee ballot pursuant to section 5a paragraph 4 *BPräsWG*, to differentiate whether the absentee ballot will be used to cast a vote before another electoral authority or by post, absence as a reason for postal voting as mentioned in Article 26 paragraph 6 of the Constitution cannot be attributed any meaning other than the one it already had before, and still has, regarding the casting of votes before another electoral authority – namely the likely absence from the place of the "competent" electoral authority (see also the legislative materials regarding Article 26 paragraph 6 Constitution as amended by Federal Law Gazette *BGBl. I 27/2007, RV 94 BlgNR 23. GP, 3*; cf. also the wording of section 5a paragraph 1 *BPräsWG*). Therefore, it can by no means be derived from the wording of the Constitution that postal voting is only permitted if visiting a polling station is possible under no circumstances – i.e., for instance, only if the absence means an insurmountable distance from (any) polling station. Under constitutional law, it is not required to differentiate, when issuing absentee ballots, whether they are meant to be used for postal voting or for voting before another authority (or before a special electoral authority pursuant to section 5a paragraph 2 *leg.cit.*).

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2.3.3.4. The challenging party expresses concerns over the constitutionality of

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section 5a paragraph 4 *BPräsWG* according to which the issuance of an absentee ballot is to be applied for "stating the reason as specified in paragraph 1" arguing that this is a merely procedural requirement which the authority does not have to verify, even though this would be necessary in the light of the principle of personal and secret ballots. For the same reason, section 5a paragraph 3 *leg.cit.* – according to which, should the criteria for being issued with an absentee ballot for reasons set out in section 5a paragraph 2 *leg.cit.* subsequently cease to apply to a person entitled to vote, such person shall inform the municipality in which he/she was staying, in a timely manner before the election day, that he/she renounces his/her right to be visited by a special electoral authority pursuant to section 73 paragraph 1 *NRWO* – is also claimed to be in breach of the Constitution because reference is made only to reasons pursuant to section 5a paragraph 2 *BPräsWG* no longer applying and not also to reasons pursuant to section 5a paragraph 1 *leg.cit.*

As can be seen from section 5a paragraph 1 of the *BPräsWG* (as well as Article 26 paragraph 6 of the Constitution regarding the casting of votes by postal ballot), it is only a question of whether the voter's inability to come to the competent polling station is "likely" at the time of application and the reasons mentioned for such inability cover a broad range and, on top of that, are only listed by way of example. Against this backdrop, the standard to be applied by the municipality to which the application for the issuance of an absentee ballot pursuant to section 5a paragraph 4 *leg.cit.* is made, when verifying if these reasons for an exception actually exist, is less strict (cf. *Eberhard*, loc.cit., 131; *Poier*, loc.cit., 992 et seq.). Moreover, it has to be pointed out that the person entitled to vote, pursuant to section 5a paragraph 12 *leg.cit.*, is to be informed by the municipality as soon as possible if his/her application for the issuance of an absentee ballot was not allowed.

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The Constitutional Court does not recognise any constitutional obligation of the ordinary legislator to provide for the possibility of withdrawing absentee ballots applied for and already issued, should the reasons stated cease to exist or should it become known that they do not exist. In view of the fact that absentee ballots may already be applied for starting from the day on which the election is announced (cf. section 5a paragraph 4 *BPräsWG*) and persons entitled to vote may cast their vote immediately after receipt of the absentee ballot, in the case of a run-off election, however, no earlier than on the ninth day after the election day for the first ballot (cf. section 10 paragraph 4 *leg.cit.*), there are no

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constitutional reservations if the legislator refers to the point in time when the application is made as the critical criterion for the applicant's predictive decision as to the existence of the reasons preventing him/her from ballot-box voting. The verifiability of the actual existence of these reasons is frustrated by the mere fact that it is inherent in the system of postal voting provided for in Article 26 paragraph 6 of the Constitution and also in the objective of extending the voting possibilities pursued thereby (cf. item III.2.3.3.1.) that persons who are likely to be absent on the election day will cast their vote already prior to the election day (cf. *VfSlg. 19.893/2014* on "early voting"), whereas the non-existence of the "likely" inability may only be finally determined on the election day – and thus at a point in time at which the vote was already cast by postal ballot.

With a view to the concerns raised by the challenging party against section 5a paragraph 3 of the *BPräsWG* regarding the different treatment of the reasons mentioned in paragraph 1 *leg.cit.* (right to be issued with an absentee ballot due to being absent, for health reasons or due to a stay abroad) and those mentioned in paragraph 2 *leg.cit.* (right to be issued with an absentee ballot for lack of ambulatory ability or fitness for transport or because they are bedridden or detained in prisons or the like) it has to be replied that paragraph 2 *leg.cit.* provides for the possibility of issuing absentee ballots for voting before a special electoral authority that will visit the person concerned during the election times ("flying electoral commission" pursuant to section 5a paragraph 2 *BPräsWG* in conjunction with section 73 paragraph 1 *NRWO*), provided that the reasons mentioned in said provision are met. As can be seen clearly from this regulation, the purpose of the obligation laid down in section 5a paragraph 3 *BPräsWG* to notify the authority if the criteria pursuant to paragraph 2 *leg.cit.* cease to exist, is to renounce the right to be visited by the special electoral authority (and the organisational, personnel and financial expenses incurred in this connection). These provisions constitute an exception to paragraph 1 *leg.cit.* and therefore cannot be compared to it.

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2.3.3.5. Regarding section 5a paragraph 4 *BPräsWG*, which, *inter alia*, also stipulates that the application for the issuance of an absentee ballot is to be submitted to the "municipality" by which the person entitled to vote was entered in the electoral roll, the challenging party claims that this was in violation of Article 18 paragraph 1 and Article 83 paragraph 2 of the Constitution because it is not exactly specified which municipal body is in charge and whether this task has to be performed within such body's autonomous sphere of

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competence or within its assigned sphere of competence.

That statement is not true as express reference is made to the municipality by which the person entitled to vote was entered in the electoral roll: Since, pursuant to Article 26 paragraph 7 of the Constitution and section 5 paragraph 2 *BPräsWG* in conjunction with section 23 paragraph 2 *NRWO*, keeping electoral rolls is the responsibility of the municipality within its sphere of competence assigned by the federal level and thus, pursuant to Article 119 paragraph 2 of the Constitution, of the mayor, there is no doubt that the same – in contrast, for instance, to the decision on applications for corrections of the electoral rolls which, pursuant to section 30 paragraph 1 *NRWO*, are the responsibility of the municipal electoral authority (and in Vienna of the district electoral authority) – also holds for applications for the issuance of absentee ballots pursuant to section 5a paragraph 4 *BPräsWG*. Moreover, it is expressly stated in section 5a paragraph 6 *leg.cit.* and Annexes 4 and 5 to the *BPräsWG* that the absentee ballot must bear the signature of the mayor.

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2.3.3.6. Regarding another rule laid down in section 5a paragraph 4 of the *BPräsWG*, according to which in the case of applications for the issuance of an absentee ballot the identity of the applicant "is to be proven *prima facie* by means of a document", the challenging party – in addition to alleging that the fundamental principle of democracy is violated (see item III.2.3.2.) – claims that this provision is not covered by Article 26 paragraph 6 of the Constitution because the "acceptance of *prima facie* evidence" only applies in cases of postal voting and not when casting votes by absentee ballot before another electoral authority. As according to section 5a paragraph 4 *BPräsWG* "*prima facie* proof" is also sufficient when issuing absentee ballots for the purpose of voting before another electoral authority, this is, according to the challenging party, unconstitutional.

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As already explained under item III.2.3.3.1., ordinary laws had already provided for the possibility of casting votes by absentee ballot before a different electoral authority prior to the establishment of postal voting by constitutional law (Federal Law Gazette *BGBI. I 27/2007*); according to the case law of the Constitutional Court there are no reservations as to exercising the right to vote using absentee ballots (cf. *VfSlg. 5362/1966*). As casting votes before another electoral authority using an absentee ballot is a conventional voting procedure, the only difference being that the vote is not cast before the competent electoral

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authority but before a different one, the electoral principles of Article 26 paragraph 1 of the Constitution apply in full. Therefore, voters using absentee ballots to cast their vote before another electoral authority (as well as voters casting their vote before the competent electoral authority without an absentee ballot) must, pursuant to section 10a paragraph 1 *BPräsWG* in conjunction with sections 67 and 70 paragraph 1 *NRWO* – in principle (cf. section 67 paragraph 3 *NRWO*) – present their absentee ballot together with a document or an official certificate (ID card, passport and driver's license, any official photo identification) proving that they are identical with the person named on the absentee ballot.

Even though in Article 26 paragraph 6 the wording "acceptance of *prima facie* proof" refers exclusively to postal voting, against the backdrop of the identity checks by the electoral authority required by law when votes are cast by absentee ballot at a different polling station, there are no constitutional reservations concerning the fact that at first, when issuing the absentee ballot, merely "*prima facie* proof" of the identity of the applicant is required.

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Insofar as the statements of the challenging party regarding the risk of abuse inherent in the furnishing of mere "*prima facie* proof" of the identity are meant to be understood as a claim that section 5a paragraph 4 of the *BPräsWG* is unconstitutional as well, reference has to be made, on the one hand, to the statements regarding item III.2.3.3.1. with a view to the consequences of a constitutionally permitted system of remote voting and, on the other hand, to the fact that the law provides for sufficient precautions to guarantee the right to vote personally and in secret (cf. regarding the claim that there was a special risk of abuse in nursing homes, for instance section 5a paragraph 8 subparagraph 2 *BPräsWG* according to which the absentee ballot, if it is sent by post, is to be addressed to the recipient personally and handed over exclusively to such recipient), especially considering that the personal and secret casting of the vote not only must be confirmed by a declaration in lieu of an oath (cf. Article 26 paragraph Constitution and section 10 paragraph 3 *BPräsWG*), but is also secured by criminal-law provisions protecting the constitutional electoral principles (cf. sections 261 et seq. Criminal Code [*StGB*]) and the provisions under constitutional and criminal law protecting the privacy of letters (Article 10 Basic Law on the General Rights of Nationals [*StGG*], Article 8 ECHR, section 118 *StGB*) (cf. *VfSlg.* 19.893/2014).

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2.3.3.7. Moreover, the challenging party expresses his concerns over the

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possibility of delivering the absentee ballot to an authorised person as provided for in section 5a paragraphs 4 and 8 subparagraph 6 of the *BPräsWG*, claiming that this provision (given the – albeit illegal – possibility to cast a vote in another person's name inherent in the mere possession of an absentee ballot) contravenes the principle of the right to personal voting. Moreover, it is argued, the option to have the absentee ballot handed in by a bearer as provided for in section 10 paragraph 3 *leg.cit.* constitutes an infringement of the principle of the right to personal voting given the risk of manipulation opened up by such process.

This statement of the challenging party is not justified either: As already held by the Constitutional Court regarding comparable regulations under provincial law, a provision according to which it is mandatory that the absentee ballot be applied for by the respective person entitled to vote himself/herself, serves the purpose of ruling out the risk of manipulation and abuse in the electoral process. With a view to the fact that the constitutional legislator, when introducing postal voting, legitimised a higher level of self-responsibility of the voters (cf. item III.2.3.3.1.), there are, however, no constitutional reservations against the law not providing, on top of that, for an obligation to either personally hand in the absentee ballot to the electoral authority or to personally mail it but rather also allows other forms, such as delivery by courier, and makes the choice of transmission the responsibility of the respective absentee voter (cf. *VfGH 23/11/2015, WI 3/2015; 23.11.2015, WI 4/2015*).

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2.3.3.8. In the opinion of the challenging party, section 5a paragraph 8 subparagraph 4 *BPräsWG*, according to which the absentee ballot, if sent by post, is to be sent by registered letter, is also unconstitutional with a view to the fundamental significance of the right to vote personally because it fails to provide for the official service of delivery for absentee ballots pursuant to the provisions of the *Zustellgesetz* (herein after referred to as “*ZustellG*”). Beyond that, it is argued, – even if service under private law was covered by constitutional law – it would under no circumstances be compatible with the principle of personal suffrage to allow delivery by registered letter without return receipt to be personally signed by the recipient. According to the challenging party, the risks of manipulation and abuse created by the legislator by such failure also constitute an infringement of the principle of purity of elections.

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In principle, the forms of service regulated in the *ZustellG* apply, pursuant to section 1 *leg.cit.*, to the service of written documents within the scope of public administration. Public entities acting within the scope of private administration, however, must proceed in line with the general postal-law provisions like any other private individual (cf. the legislative materials on the original version of the *ZustellG*, Federal Law Gazette *BGBI. 200/1982, RV 162 BlgNR 15. GP, 9*). As the electoral authorities, when serving absentee ballots, are acting within the scope of public administration, i.e. in the enforcement of the laws, the *ZustellG* does, in principle, apply. However, as results from the case law of the Constitutional Court establishing that pursuant to Article I paragraph 3 subparagraph 4 of the Introductory Act to the Administrative Procedure Acts (*EGVG*) the administrative procedure acts do not apply in election matters (cf. *VfSlg. 13.420/1993, 19.733/2013; VfGH 2.7.2015, E 657/2015*) and the author of the legal norm is free "to choose, in individual procedural areas, independent organisation systems, which adequately take into consideration the requirements and special characteristics of different types of procedures – *in concreto*: procedures in election matters" (cf. *VfSlg. 13.420/1993*), the ordinary legislator is free, when enacting election laws, also within the scope of public administration, to provide for service of delivery in line with the provisions of general postal law. This is not in contradiction to the principles of personal and free voting since the possibility of errors and abuse when serving absentee ballots – which, however, could not even be fully ruled out if the *ZustellG* applied – is a necessary consequence of the constitutional legislator's decision for such system, creating a higher level of self-responsibility. Section 5a paragraph 8 of the *BPräsWG* – with the objective of preventing abuse with regard to applications, as laid down in the legislative materials to the Act on the Amendment of the Election Law 2011 (*Wahlrechtsänderungsgesetz*), Federal Law Gazette *BGBI. I 43/2011*, (cf. *IA 1527/A BlgNR 24. GP, 52*) – provides for various forms of service: For instance, according to subparagraph 2, absentee ballots are to be sent to patients in hospitals and nursing homes by registered letter bearing the note 'do not deliver to authorised recipients', while according to subparagraph 4 absentee ballots sent to other recipients are to be sent by registered letter (i.e. involving confirmation of receipt), unless the absentee ballot was applied for orally or the electronically filed application carried a qualified electronic signature (in such case, sending them without "registered letter", i.e. basically without confirmation of dispatch and receipt, is sufficient). By deciding for this differentiated system, the legislator has balanced the interests of secure transmission of absentee ballots exclusively to authorised persons and the

interest of an efficient, effective and cost-saving procedure, which is justified both with a view to the principles of personal and free voting and the general requirement of objectivity.

2.3.3.9. Section 5a paragraph 11 of the *BPräsWG* stipulates that the municipal electoral authorities are to ensure that post marked as absentee ballots (section 5a paragraph 7, last sentence, leg. cit.) that has been deposited with the locally competent postal agencies is to be collected at the time when the respective postal agency is last closed before the election day and kept ready to be handed over to the applicant on the election day. The challenging party states that this regulation provides an overview of the number of absentee ballots issued but not used to cast a vote and thus facilitates manipulation because – even though this is unlawful and an abuse of authority – votes could still be "slipped in" before the votes cast by postal ballot were counted.

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It is not the intention of this provision to rule out the possibility of manipulation and abuse in the election procedure, but rather its exclusive purpose is to give a "second chance" to applicants who were not able to pick up their deposited absentee ballots in time prior to the election day to nevertheless exercise their right to vote (cf. legislative materials to the Act on the Amendment of the Election Law 2011, Federal Law Gazette *BGBl. I 43/2011, IA 1527/A BlgNR 24. GP, 52 et seq.*). Apart from that, it suffices to refer the challenging party to the case law of the Constitutional Court according to which "the assumption alone that at the individual stages of this procedure acts in violation of (criminal) law are theoretically possible, [...] does not change the fact that the statutory provision is constitutionally unobjectionable, even more so as such illegal behaviour must not be presumed without reason. Should any illegal acts have actually occurred during the recording of absentee ballots in a specific election procedure, the Constitutional Court may be notified of such acts by means of an electoral challenge" (cf. *VfGH 18/06/2015, W I 2/2015*).

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2.3.3.10. As according to section 10 paragraph 5 subparagraph 1 of the *BPräsWG* votes cast by postal ballot are, *inter alia*, null and void if the declaration in lieu of an oath on the absentee ballot was "verifiably" not made by the person entitled to vote, the challenging party voices the concern that this provision violates the principle of personal voting, arguing that, *in argumentum e contrario*, a vote not verifiably cast, and a declaration in lieu of an oath not verifiably made, by an unauthorised person would have to be included.

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In addition to the explanations under item III.2.3.2., it has to be replied to these pleadings that a lesser level of control of whether a secret and personal voting process is ensured – as compared to the conventional casting of votes before the electoral authority – is immanent in the system of postal voting (remote voting) provided for by constitutional law. Thus, the considerations made by the challenging party that, for instance, votes cast by unauthorised persons in violation of criminal provisions could theoretically be included if that was not "verifiable", do not have the desired effect because such circumstances are the necessary consequence of the reduced control which has to be accepted when votes are cast by postal ballot.

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2.3.3.11. Regarding the pleadings of the challenging party according to which section 10a paragraph 1 *BPräsWG* in conjunction with section 67 *NRWO*, providing that every voter has to present a document or another official certificate furnishing "unambiguous" proof of his/her identity, is in violation of Article 7 of the Constitution because in the case of postal voting "*prima facie* proof" is sufficient, the Constitutional Court replies – with reference to the explanations under item III.2.3.3.6. – that casting votes by postal ballot is not comparable to the conventional casting of votes before an electoral authority. Moreover, it has to be pointed out that when applying for an absentee ballot, the identity has to be "proven" anyway in that "*prima facie* proof" must be furnished by presenting a "document" (in the case of oral applications) or "in particular by stating the passport number or by submitting a copy of official photo identification or another document" (in the case of written applications), (and these data may be verified by the municipality; cf. section 5a paragraph 4 *BPräsWG*) and in that the applicant, when casting his/her vote, in fact also confirms to be the person named on the absentee ballot by his/her declaration in lieu of an oath (cf. Article 26 paragraph 6 of the Constitution and section 10 paragraph 3 *BPräsWG*).

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2.3.3.12. Section 10a paragraph 2 of the *BPräsWG* provides, *inter alia*, that in the case of voters voting by absentee ballot, the Chief Electoral Officer shall open the envelope presented by the voter (cf. section 5a paragraph 6 according to which the "absentee ballot is to be produced as a sealable envelope") and present him/her with the official ballot paper contained therein, together with a blue envelope instead of the white (and in a run-off election: beige; cf. paragraph 3 *leg.cit.*) envelope taken from the absentee ballot. The Chief Electoral Officer shall destroy the white (beige) envelope. In this respect, the challenging party raises

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concerns with a view to Article 18 of the Constitution because – in contrast to the absentee paper envelope ("destroy") – it is not specified how to proceed with the absentee ballot. When construing this according to the purpose of the law, it is argued, returning the absentee ballot is definitely unlawful; this could, however, be misunderstood given the wording of the law.

In response to these pleadings, the challenging party is to be made aware of section 10 paragraph 1 of the *BPräsWG* in conjunction with section 70 paragraph 1, third sentence, of the *NRWO*, from which clearly results that the absentee ballot has to be taken from the voter and attached to the minutes after having been marked with the consecutive number of the electoral roll.

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2.3.3.13. Moreover, the challenging party regards the instruction contained in section 14a paragraph 1 of the *BPräsWG*, according to which the absentee ballots received by way of postal voting by the election day, 5:00 p.m., must not be evaluated earlier than on the day after the election, 9:00 a.m., as an infringement of the constitutional requirement of purity of elections given the ensuing extension of the time period during which the postal votes are unobserved and manipulation is possible.

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In response, it has to be stated that section 10 paragraph 6, last sentence, of the *BPräsWG* expressly provides for the absentee ballots to be officially kept under seal (section 14a paragraph 1 *leg.cit.*) until they are counted (cf. *VfSlg. 19.893/2014* on the identically worded provision of section 46 paragraph 4 *EuWO*). Moreover, reference is made to the case law of the Constitutional Court already cited under item III.2.3.3.9.

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2.3.3.14. Finally, the challenging party alleges the unconstitutionality of the postal voting regulation of the *BPräsWG* in its entirety because provisions regarding postal voting by persons under guardianship are missing. It is argued that, at any rate, the casting of a vote, being a non-transferable civil right and liberty, must be performed by the person under guardianship him/herself. However, different provisions might apply to the application for the issuance of absentee ballots and the declaration in lieu of an oath because the first case is a legal act before an authority and the second case is a contractual declaration; in both cases, acts performed by the person under guardianship are ineffective without the approval of the legal guardian. Alternatively, it is also conceivable that both actions constitute acts annexed to exercising the right to vote,

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therefore not falling within the sphere of competence of the legal guardian. Since the maker of the electoral laws has failed to regulate this issue, thereby creating a cause for misunderstandings, ambiguities, cases of preventable voidness of votes, etc. the challenging party takes the view that the *BPräsWG* is unconstitutional in that respect.

The right to vote is a non-transferable right that, by all means, precludes *voting* by proxy (cf. *VfSlg. 10.412/1985*). In contrast to the provision of section 24 *NRWO* 1971 as amended by Federal Law Gazette *BGBI. 136/1983*, repealed in *VfSlg. 11.489/1987*, according to which persons for whom a guardian pursuant to section 273 of the *ABGB* had been appointed were excluded from the right to vote, neither the *BPräsWG* nor the parts of the *NRWO* declared to be applicable contain such a provision (cf. Article 26 paragraph 5 of the Constitution on the admissibility of the exclusion from the right to vote provided for by ordinary law exclusively as a consequence of a final conviction by the courts). As applying for the absentee ballot and making the declaration in lieu of an oath are inseparable components of the overall electoral process, neither of these acts performed by a person under guardianship requires the approval of the legal guardian, but it is mandatory that the application for an absentee ballot pursuant to section 5a paragraph 4 of the *BPräsWG* (cf. *VfGH 23/11/2015, W I 3/2015*, regarding the similar provision of section 5 paragraph 4 of the Law of Vorarlberg on Municipal Elections [*Vbg. Gemeindewahlgesetz*]), the making of the declaration in lieu of an oath pursuant to section 10 paragraph 3 of the *BPräsWG*, and the casting of the vote are performed by the person entitled to vote himself/herself.

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2.4. Regarding the alleged errors in connection with the implementation of the provisions on postal voting in general:

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2.4.1. The challenging party, in summary, argues that numerous infringements occurred when implementing the provisions on handling absentee ballots used for postal voting (see item I.4.2.1. and item III.2.5.). In numerous electoral districts, the absentee ballots had already been "pre-sorted" into absentee ballots to be included and void absentee ballots before the date set forth in section 14a paragraph 1 of the *BPräsWG* by persons not authorised to do so and (in some cases) without giving the members of the district electoral authorities any opportunity of review. In addition, the absentee ballots had already been opened in several electoral districts. And in some electoral districts the ballot paper envelopes had already been removed from the absentee ballots and, in

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some cases, the votes had even been counted.

The Federal Electoral Authority objects that the alleged infringements are not reflected in the minutes taken by the district electoral authorities. The witnesses named in the statement of challenge, in their capacity as Assistant Electoral Officers, have failed to complain about the infringements now alleged and to have them recorded in the minutes. There are no reservations regarding the "pre-sorting" of absentee ballots in the course of the recording process and without opening them, as this process is subject to the subsequent review and evaluation by the electoral authority.

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The interested party furthermore states that the "pre-sorting" complained about is merely a preparatory measure which does not have to be carried out "under the eyes" of the members of the electoral authority but may be taken care of by the authorities' (support) staff. The interested party goes on to argue that the electoral authorities, in the performance of the tasks entrusted to them, are entitled to use aides where necessary and that it is to be assumed that the persons referred to in the statement of challenge as "unauthorised persons" are simply aides of the authority authorised by law to be present and to perform activities during the counting process.

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2.4.2. First of all, it has to be stated that the minutes recorded by the respective electoral authorities are of particular importance (*VfSlg. 14.556/1996*). In its case law on the documentation of the processes involved in the ascertainment of the votes in minutes which form part of the election file (cf. section 14a paragraph 4 *BPräsWG*), the Constitutional Court refers to the fact that it is primarily the task of the Assistant Electoral Officers (or the Substitute Assistant Electoral Officers) to press for any irregularities to be recorded in the minutes and, in case their request is denied, to refrain from signing the minutes, giving the respective reason (cf. section 85 paragraph 4 *NRWO* in conjunction with section 14 paragraph 3 *BPräsWG*). The Constitutional Court is guided by the thought that the role of Assistant Electoral Officer of the electoral authorities also includes the – mutual – control of the lawfulness of the election procedure and the detection of possible irregularities (*VfSlg. 4882/1964*) so that, wherever possible, they can be prevented from occurring or discontinued or corrected during the election process (cf. *VfSlg. 14.556/1996*).

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Pursuant to section 85 *NRWO* in conjunction with section 14 paragraph 3 *BPräsWG*, the electoral authority is to record the election procedure and the election result in the minutes. These minutes have to include certain minimum data (such as, for instance, the name of the place of voting and the election day, the names of the members of the electoral authority both present and absent as well as the names of the trusted representatives, the time the voting procedure starts and ends). In addition, section 14a paragraphs 1, 2 and 3 of the *BPräsWG* provide that, *inter alia*, the reasons for "not including" the absentee ballots and the election result are to be recorded in the minutes.

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As such minutes taken by the electoral authority are public documents within the meaning of section 292 *ZPO* – which, according to section 35 paragraph 1 *VfGG* applies *mutatis mutandis* – they establish full evidence of what the authority officially orders or declares therein, or of what the authority or the authenticating party attests therein (section 292 paragraph 1 *ZPO*). However, pursuant to section 292 paragraph 2 *ZPO*, evidence proving that the recorded transaction or the recorded fact is incorrect or has been improperly recorded is permitted. Such evidence may, for instance, be produced by interviewing witnesses pursuant to sections 320 et seq. *ZPO*. Only after evidence has been furnished that the recorded transaction or fact did not occur or did not occur as recorded or that the recording process was incorrect, will there be free evaluation of evidence by the judge within the relevant scope.

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For the case at hand, this means that the challenging party – given the fact that minutes which were also signed by the Assistant Electoral Officers are available – needs to demonstrate and substantiate (as early as in the statement of challenge) the specific circumstances that are to attest that the actual events deviate from the ones recorded in the minutes and how their occurrence is to be proven (cf., in this matter, *VfSlg. 11.255/1987, 14.556/1996*).

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The minutes of the electoral authorities of relevance to the case at hand are prepared on the basis of a specimen form provided by the Federal Ministry of the Interior which, in part, includes preworded text passages which are not designed to be adapted on a case by case basis. Even though this may have conveyed the impression that signing the minutes by the members of the electoral authority should merely serve the purpose of attesting those facts that were recorded in the fields to be filled in individually (i.e. in particular the respective election results), pursuant to section 292 *ZPO* the minutes of the

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electoral authorities nevertheless establish, in principle, full evidence of all facts and transactions recorded therein, i.e. – with a view to the minimum information required by law – at any rate also of the subject matter and course of events during the official act (cf. for instance item G of the minutes regarding the recorded starting time of the official act at 9:00 a.m.).

Based on the pleadings submitted by the challenging party, which – given the precise designation of electoral districts concerned, the presentation of declarations in lieu of an oath and data sheets as well as the naming of witnesses – are to be qualified as sufficiently substantiated in this respect, evidence for the incorrectness of the presentation of the course of events in the minutes of the electoral authorities has come to light in several electoral districts. Even though, in this connection, it has to be taken into consideration that the declarations in lieu of an oath, which among other things were used by the challenging party for the rebuttal of the evidentiary value of the minutes, were made by persons whose task, as Assistant Electoral Officers of the respective electoral authorities, would have been to have their concerns recorded in the minutes (not only did they fail to do so – apart from a few exceptions – but some even attested the content of the minutes by signing them), this does not change the fact that in several electoral districts precise indications for the incorrectness of the description of the occurrences in the minutes were identified on the basis of the statement of challenge, part of which were also confirmed when taking evidence – in particular by the statements of the witnesses interviewed at the oral hearing.

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2.4.3. Electoral rules, including, without limitation, section 14a of the *BPräsWG* governing the counting of votes cast by postal ballot, which according to the established case law of the Constitutional Court are procedural requirements to be interpreted strictly according to the letter of the law (cf. e.g. *VfSlg. 19.847/2014; VfGH 18/06/2015, W I 1/2015; VfGH 13/06/2016, W I 22/2015*), serve the overall purpose of documenting the voting procedure beyond doubt and eliminating ensuing ambiguities wherever possible as well as guaranteeing a traceable allocation of the votes to the individual parties standing for election and the verifiability of the election procedure, in particular if the elections are challenged (cf. *VfGH 18/06/2015, W I 1/2015; 13/06/2015, W I 22/2015*). In its previous case law, the Constitutional Court, in order to preclude the risks of manipulation and abuse, also applied a strict standard for compliance with those provisions intended to ensure that the election principles are complied with in

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the circumstances of postal voting as well (cf., in particular, *VfSlg. 19.246/2010, 19.278/2010; VfGH 23/11/2015, W I 3/2015; 23/11/2015, W I 4/2015*).

2.4.4. According to section 14a of the *BPräsWG* (cf. item III.2.2.6.) the ascertainment of the votes cast by postal ballot – starting from the examination of the absentee ballots as to the existence of grounds for nullity – is reserved to the district electoral authority.

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2.4.5. The *BPräsWG* provides for the pertinent provisions of the *NRWO* to apply *mutatis mutandis* to the electoral authorities (section 2 *BPräsWG*). According to section 10 paragraph 2 of the *NRWO*, the district electoral authority is composed of the district governor, in chartered towns of the mayor, and in Vienna of the head of the municipal district office, or a permanent representative to be appointed by him/her as the chairperson and District Chief Electoral officer as well as of nine Assistant Electoral Officers. Pursuant to section 10 paragraph 3 *leg.cit.*, the District Chief Electoral Officer has to appoint several deputies and determine the order in which they are to represent him/her should he/she be temporarily prevented from performing his/her duties. Pursuant to section 17 paragraph 1 *leg.cit.*, the district electoral authority has a quorum when the chairperson, or his/her deputy, and at least half of the Assistant Electoral Officers appointed pursuant to section 15 *leg.cit.* are present. A majority of votes is required to adopt valid resolutions; the chairperson does not take part in the voting. However, when there is a tie, the proposal supported by the chairperson is to be adopted as a resolution (section 17 paragraph 2 *leg.cit.*). Section 18 *leg.cit.* provides that official acts may be performed independently by the Chief Electoral Officer, *inter alia* when, especially on the election day, irrespective of having been duly convened, a meeting of an electoral authority does not have a quorum or an electoral authority loses its quorum during an official act and the urgency of such official act does not allow for postponement (section 18 paragraph 1 *leg.cit.*). In addition, according to section 18 paragraph 3 *leg.cit.* – except in the cases outlined in paragraphs 1 and 2 – the Chief Electoral Officer may perform unpostponable official acts for the performance of which he/she was expressly authorised by the electoral authority (cf. regarding the performance of official acts by the Chief Electoral Officer in cases comparable to those outlined in section 18 *leg.cit. VfSlg. 15.028/1997, 15.695/1999, 19.247/2010*).

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In this connection, the special importance attributed to the electoral authorities

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– provided for in Article 26a of the Constitution – acting as a collegiate body for implementing elections and – mutually – reviewing the lawfulness of the election procedure needs to be mentioned. In particular the rules on the (proportional) composition of the electoral authorities, whose Assistant Electoral Officers have a vote and are nominated by the political parties concerned by the elections, guarantee the objectivity of these authorities (cf. the report on the motives for the electoral rules for the constitutive national assembly, *62 Blg PrNV*, 22). Eventually, during activities directly connected with the counting of votes, their tasks are to ensure the transparency of the ascertainment of the election result, to guarantee mutual control and to prevent possible manipulation. With a view to the fact that the implementation of the election procedure is, in principle, reserved to the electoral authorities acting as a collegiate body (Article 26a Constitution), the authorisation of the Chief Electoral Officer – which the law allows within strict limits only – to independently carry out official acts is to be construed restrictively (see also item III.2.6.2.1.).

It results from section 17 paragraph 1 in conjunction with section 18 paragraph 1 *NRWO* that – in order for the election authorities to have a quorum – the election authorities must be duly convened; otherwise the lawful implementation of official acts reserved to the district electoral authority acting as a collegiate body would not be guaranteed. In order for the electoral authority to be duly convened, it is required that, with a view to section 6 paragraph 3 and section 17 paragraph 3 *leg.cit.*, the Assistant Electoral Officers and the Substitute Assistant Electoral Officers of the electoral authority are informed in due time of the place, time and subject matter of the official act to be carried out; the information alone that it is possible for the Assistant Electoral Officers and Substitute Assistant Electoral Officers to be present during the performance of the official acts reserved to the electoral authority as a collegiate body does not suffice for a meeting to be duly convened. Consequently, the Chief Electoral Officer is only entitled to independently perform official acts pursuant to section 18 paragraph 1 *leg.cit.* if the Assistant Electoral Officers and Substitute Assistant Electoral Officers have been properly invited. On condition that the meeting was duly convened, pursuant to section 18 paragraph 1 *leg.cit.* the Chief Electoral Officer may nevertheless only independently carry out an official act if its urgency does not allow for postponement. Under no circumstances does this include any official acts for the performance of which the law expressly determines a – later – point in time (cf. in particular section 14a paragraph 1 *BPräsWG* stipulating that the district electoral authority is to perform the official

act on the day after the election day, 9:00 am).

The possibility for the election authority to expressly authorise the Chief Electoral Officer in advance to implement unpostponable official acts in general according to section 18 paragraph 3 *NRWO* (cf. for instance the examples in *Stein/Vogl/Wenda, Nationalrats-Wahlordnung 1992 [NRWO]*⁴, 2013, section 18, remark 2) is ruled out for those official acts that directly serve the purpose of ensuring that the electoral principles are observed; at any rate this includes the official acts reserved to the district electoral authority pursuant to section 14a paragraph 1 of the *BPräsWG*. Entrusting these tasks to the Chief Electoral Officer in advance would violate the statutory provision reserving such tasks to the electoral authority acting as a collegiate body.

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2.4.6. As already repeatedly pronounced by the Constitutional Court, the members of the electoral authorities are entitled to enlist the assistance of support staff (cf. section 7 paragraph 2 *NRWO* in conjunction with section 2 *BPräsWG*) for the performance of the tasks they are entrusted with (cf. *VfSlg. 14.847/1997, 19.247/2010*). In connection with the involvement of aides in the election procedure (cf. *VfSlg. 11.020/1986, 16.035/2000*; cf. also *VfSlg. 19.247/2010*) and in particular when deciding on a challenge to the election results (cf. *VfSlg. 14.847/1997*) the Constitutional Court has held that the votes cast and the election file, respectively, are to be available only to the members (acting as a collegiate body) of the electoral authorities (under permanent mutual supervision), and even to them only to the extent necessary for fulfilling the responsibilities allocated to these officials by the election laws; any "aides enlisted may only work under the eyes of the collegiate body" (*VfSlg. 11.020/1986, 14.847/1997, 16.035/2000, 19.247/2010; VfGH 18/06/2015, W I 2/2015*; cf. also *VfSlg. 4882/1964*). If these requirements are met, it is therefore permitted that aides assist the district electoral authority (acting as a collegiate body) in performing the official acts pursuant to section 14a of the *BPräsWG*.

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Furthermore, in connection with the alleged participation of unauthorised persons in the electoral procedure, the Constitutional Court has already repeatedly referred to the obligation of safekeeping the election file in general (*VfSlg. 11.020/1986, 14.847/1997, 19.908/2014; also VfSlg. 3047/1956, 9011/1981*; cf. in this matter section 10 paragraph 6 and section 14a paragraph 4 *BPräsWG*). Entrusting unauthorised persons with the examination of the votes without monitoring them will eventually lead to the verification by the

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competent authorities no longer being – objectively – guaranteed (cf. regarding the requirement of restricting access to electoral documents to the electoral authority [as a collegiate body] *VfSlg. 14.847/1997*).

2.4.7. The activities reserved to the district electoral authority acting as a collegiate body pursuant to section 14a *BPräsWG* must be differentiated from those activities that take place prior to the process of ascertaining the election result and do not have any direct consequences on it. As these activities do not directly serve the purpose of ensuring compliance with the electoral principles but rather of preparing the meeting of the electoral authority, there are no reservations regarding the involvement of aides assigned to the electoral authority who act on the instructions and under the supervision of the Chief Electoral Officer (cf. section 7 paragraph 1 and 2 *NRWO* in conjunction with section 2 *BPräsWG*) (cf., for instance, section 10 paragraph 6 *BPräsWG*).

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As a consequence, there are no reservations against "pre-sorting" of the absentee ballots into ballots to be included and invalid ballots on the basis of "evident grounds for nullity", i.e. grounds that can be easily established without opening the absentee ballots (e.g. missing signature pursuant to section 14a paragraph 1, first sentence, *BPräsWG*), which was performed – as the outcome of the oral hearing has shown – when recording the absentee ballots pursuant to section 10 paragraph 6 *BPräsWG*; these are activities which take place prior to the ascertainment procedure and in no way affect the actual verification pursuant to section 14a paragraph 1 *BPräsWG* by the district electoral authorities as a collegiate body. Therefore, to the extent that it is possible for the district electoral authority acting as a collegiate body to verify the absentee ballots on the basis of data collected when recording them, meaning that they can verify whether the number of the "pre-sorted" absentee ballots corresponds to the number of absentee ballots recorded (the absentee ballots may also be allocated to the individual recorded voters by name) and whether the absentee ballots are damaged, it is not to be assumed that this action was unlawful.

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In order to guarantee the verification of the absentee ballots in accordance with section 14a paragraph 1 *BPräsWG* as to the integrity of the seal, the visibility of the data and the signature of the voter and whether the declaration in lieu of an oath has been made on the absentee ballot (section 10 paragraph 3 *leg.cit.*), it is required that all absentee ballots, namely those to be included and those to be considered null and void due to "evident grounds for nullity", all of which must

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still be sealed, are available, at any rate, on the premises where the counting takes place and which are accessible to the members, at the beginning of the official act entrusted to the district electoral authority as a collegiate body pursuant to section 14a paragraph 1 *BPräsWG*, and that the Chief Electoral Officer points out the possibility of verification and that all members have the opportunity to convince themselves of the existence of the grounds for nullity.

In any case, it is no longer possible for the district electoral authority to perform a (binding) verification of the absentee ballots if they have already been opened by other persons. This is to say that the opening of the absentee ballots must be reserved to the district electoral authority acting as a collegiate body. 190

2.5. Regarding the alleged errors in the implementation of the provisions on postal voting in particular: 191

With a view to the alleged infringements in the individual electoral districts, the proceedings before the Constitutional Court have revealed the following: 192

2.5.1. Innsbruck-Land 193

2.5.1.1. According to the pleadings of the challenging party, the votes cast by postal ballot were already counted on 22 May 2016. The counting was performed in the absence of the Assistant Electoral Officers, i.e. not by the district electoral authority. The members of the district electoral authority were informed of the result of the counting of the votes cast by postal ballot at the meeting on Monday, 23 May 2016, starting at 4:00 p.m. 194

In its statement of defence, the Federal Electoral Authority did not comment on the pleadings of the challenging party regarding the occurrences at the district electoral authority Innsbruck-Land. 195

The interested party, in its written observations, basically states that on Sunday 22 May 2016, the district electoral authority decided to have the votes cast by postal ballot counted by staff members of the district authority Innsbruck-Land in the presence of the Deputy District Chief Electoral Officer and to give the Assistant Electoral Officers the opportunity to be present during the counting. The Assistant Electoral Officer ***** made use of that opportunity and was present for two hours on Monday, 23 May 2016. Thus, according to the 196

challenging party, as the district electoral authority had passed a resolution pursuant to section 18 paragraph 3 *NRWO* and, consequently, this procedure was not unlawful.

2.5.1.2. At the public oral hearing, the Constitutional Court interviewed the District Chief Electoral Officer ***** and the Assistant Electoral Officers *****, *****, and ***** as witnesses. 197

2.5.1.3. On the basis of the content of the file and the witness statements, which are substantially consistent, the Constitutional Court has established the following facts of legal relevance to the application: 198

In the electoral district Innsbruck-Land 14,712 absentee ballots were received by the district electoral authority; 13,814 of these absentee ballots were included in the ascertainment of the result. 265 votes were declared invalid; out of the 13,549 valid votes, 5,208 votes went to Norbert Hofer and 8,341 to Alexander Van der Bellen. 199

The meeting of the district electoral authority on Monday, 23 May 2016 was convened by the District Chief Electoral Officer for 4:00 p.m. The relevant passage of the invitation of 17 May 2016 reads as follows (without the highlightings contained in the original): 200

"Furthermore, given the fact that postal voting is possible, the district electoral authority has to start examining and counting the absentee ballots transmitted to the district electoral authority on the day after the election day from 9:00 am.

In accordance with the provisions of section 7 paragraph 2 of the Electoral Rules for Elections to the National Council, it is planned that – given the volume to be expected – this task will be performed with the assistance of staff members of the district authority Innsbruck. Therefore, the plan is to start on Monday, 23 May 2016, 8:00 a.m., by explaining the procedure to the staff members before beginning with the evaluation of the postal ballots.

Since – based on experience from previous elections – it is expected that given the number of absentee ballots transmitted the counting process will be completed in the course of the afternoon, the closing meeting of the district electoral authority, in which the resolution on the final election result will be passed, is to be held on

Monday, 23 May 2016, 4:00 p.m.
on the official premises of the district authority Innsbruck,

6020 Innsbruck, Gilmstraße 2, 3rd floor
meeting room 304

You are once again kindly requested to arrange with the respective Substitute Assistant Electoral Officers in case you are unable to attend this meeting to ensure that sufficient members of the district electoral authority will be present for the meeting to have a quorum."

The absentee ballots were already opened before the meeting of the district electoral authority scheduled for Monday, 23 May 2016, 4:00 p.m., namely on the evening of the election day, Sunday, 22 May 2016, by the District Chief Electoral Officer and his Deputy. Moreover, on the evening of the election day, the same two persons removed some ballot paper envelopes from the absentee ballots and put them in a (lockable) container.

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The ballot paper envelopes were opened on Monday, 23 May 2016, from 9:00 am. During this process, the District Chief Electoral Officer, staff members allocated to the district electoral authority by the district authority Innsbruck-Land and (for a certain period) also an Assistant Electoral Officer were present.

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The meeting of the district electoral authority was opened on Monday, 23 May 2016, at 4:00 p.m., and sufficient members of the district electoral authority were present for the meeting to have a quorum. The meeting was closed at 4:30 p.m.

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2.5.1.4. Regarding the lawfulness of the evaluation process carried out by the district electoral authority Innsbruck-Land, the Constitutional Court has considered the following:

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In the electoral district Innsbruck-Land the absentee ballots – in violation of section 14a of the *BPräsWG* and of the principle of secret ballot pursuant to Article 60 paragraph 1 of the Constitution – were already opened by the District Chief Electoral Officer and his Deputy on the evening of the election date, i.e. before the meeting of the district electoral authority called for Monday, 23 May 2016, in the absence of the Assistant Electoral Officers.

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There is no need to determine whether – as explained by the District Chief Electoral Officer at the public oral hearing – a resolution – which, in any case, was neither documented nor official – was passed at the meeting of the district electoral authority on Sunday, 22 May 2016, 7:00 p.m., authorising the District

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Chief Electoral Officer to perform tasks of the district electoral authority on Monday, 23 May 2016 (from 9:00 a.m.). In fact, the opening and evaluation of absentee ballots and ballot paper envelopes is, in principle, excluded from being the subject matter of a resolution pursuant to section 18 paragraph 3 *NRWO* in conjunction with section 2 *BPräsWG* (cf. item III.2.4.5.).

For the above reasons, the ascertainment of the result of the postal vote in the electoral district Innsbruck-Land is in violation of section 14a of the *BPräsWG* and the principle of secret ballot pursuant to Article 60 paragraph 1 of the Constitution and is therefore unlawful. 207

This unlawfulness concerns, in any case, the 13,814 absentee ballots included in the ascertainment of the result in the electoral district Innsbruck-Land. 208

2.5.2. Südoststeiermark 209

2.5.2.1. According to the pleadings of the challenging party, in the electoral district Südoststeiermark, the entire process of verifying the absentee ballots and counting the votes was performed by staff members of the district authority Südoststeiermark. The Assistant Electoral Officers of the district electoral authority did not receive any invitation for a meeting of the district electoral authority on Monday, 23 May 2016, 9:00 a.m. to verify and count the votes cast by postal ballot and they were not informed of the time and place for the verification and counting of the votes cast by postal ballot. Rather, the Assistant Electoral Officers were invited to a meeting of the district electoral authority on 23 May 2016 at 3:00 p.m. At that meeting they were merely informed of the final result that was already available by then. 210

The challenging party goes on to state that on Monday, 23 May 2016, at 10:30 a.m., two Assistant Electoral Officers from the *FPÖ* went to the district electoral authority. At that moment, the evaluation of the postal ballots was "already well under way". The Deputy District Chief Electoral Officer ***** told them that the district electoral authority had given instructions to carry out the necessary preliminary work for counting the votes cast by postal ballot. Visible for the two Assistant Electoral Officers, the ballots, having already been counted, were placed in separate stacks in a room within their view. 211

The "official meeting" of the district electoral authority on 23 May 2016 started 212

at 3:00 p.m. At that moment in time, as stated by the challenging party, the absentee ballots had already been evaluated and the result of the counting of the votes cast by postal ballot was available and merely announced to the members of the district electoral authority.

The Federal Electoral Authority and the interested party have not submitted any pleadings regarding the electoral district Südoststeiermark. 213

2.5.2.2. At the public oral hearing, the Constitutional Court interviewed the District Chief Electoral Officer *****, the Deputy District Chief Electoral Officer *****, and the Assistant Electoral Officer ***** as witnesses. 214

2.5.2.3. On the basis of the content of the file and the witness statements, which are substantially consistent, the Constitutional Court has established the following facts of legal relevance to the application: 215

In the electoral district Südoststeiermark 8,150 absentee ballots were received by the district electoral authority; 7,598 of these absentee ballots were included in the ascertainment of the result. 204 votes were declared invalid; out of the 7,394 valid votes, 4,201 votes were cast for Norbert Hofer and 3,193 for Alexander Van der Bellen. 216

By letter of 10 May 2016, the District Chief Electoral Officer invited the members of the district electoral authority to a meeting of the district electoral authority on Monday, 23 May 2016, starting at 3:00 p.m. No other invitations to meetings on the election day or on the day after the election day were sent out. The agenda for this meeting includes item 4. "Determination of the result of the postal vote in the electoral district". On the evening of 22 May 2016, the Deputy District Chief Electoral Officer, together with a total of eight staff members of the district authority Südoststeiermark, started to open the absentee ballots and shortly thereafter counted the votes cast by postal ballot. The process was completed at 0:30 a.m. on 23 May 2016. No Assistant Electoral Officers were present during the process. 217

On Monday, 23 May 2016, from 3:00 p.m. to 3:30 p.m., the meeting of the district electoral authority convened for the day after the election day was held. This meeting was chaired by the District Chief Electoral Officer *****. *****, who had been appointed Deputy District Chief Electoral Officer on Sunday, 218

22 May 2016, attended the meeting, as did eight Assistant Electoral Officers and two trusted representatives. At this meeting, neither absentee ballots were opened nor were votes cast by postal ballot counted. Rather, the result of the counting of the votes cast by postal ballot ascertained in the night from 22 to 23 May 2016 was adopted as a resolution by the district electoral authority.

2.5.2.4. Regarding the lawfulness of the evaluation process carried out by the district electoral authority Südoststeiermark, the Constitutional Court has considered the following: 219

In the electoral district Südoststeiermark, the district electoral authority was not duly convened for evaluating the absentee ballots received. Contrary to the provision of section 14a *BPräsWG* and the principle of secret ballot pursuant to Article 60 paragraph 1 of the Constitution, those were opened in the absence of the Assistant Electoral Officers, and not during a meeting of the district electoral authority. The counting of votes cast by postal ballot was done in the same way. 220

For this reason alone, the ascertainment of the result of the postal vote in the electoral district Südoststeiermark is in violation of section 14a of the *BPräsWG* and the principle of secret ballot pursuant to Article 60 paragraph 1 of the Constitution and is therefore unlawful. 221

This unlawfulness occurred, in any case, with reference to the 7,598 absentee ballots included in the ascertainment of the result in the electoral district Südoststeiermark. 222

2.5.3. Villach 223

2.5.3.1. According to the pleadings of the challenging party, in the electoral district Villach the absentee ballots received were sorted into void ones and those to be included in the ascertainment of the result, opened and counted already on Sunday, 22 May 2016, in the absence of the members of the district electoral authority. At the time the counting by the district electoral authority should have started according to the law, i.e. Monday, 23 May 2016, 9:00 a.m., all votes cast by postal ballot had already been counted. This emerges from the declaration in lieu of an oath made by the Assistant Electoral Officer *****. The result of the counting was informally reported to her on 23 May 2016, 9:00 a.m., by ***** , a staff member of the electoral office of the city of Villach. The result 224

was confirmed in the meeting of the district electoral authority called for 23 May 2016, 4:30 p.m.

The premature counting by unauthorised persons was independently arranged by the District Chief Electoral Officer ***** without knowledge of the other members of the district electoral authority. There was neither a resolution to sort the absentee ballots in advance (into void ballots and those to be included in the ascertainment of the result), nor was there a resolution to prematurely count the ballots (outside the district electoral authority and without Assistant Electoral Officers and electoral witnesses). The Assistant Electoral Officers ***** and ***** were not present during the evaluation of the absentee ballots and the counting of the votes.

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Even though he had promised to do so, the District Chief Electoral Officer failed to comply with the request of the two Assistant Electoral Officers to have the aforementioned infringement recorded in the minutes. The description recorded under item G of the minutes, according to which the procedure prescribed in section 14a of the *BPräsWG* was adhered to, is therefore incorrect. When it emerged in the course of a meeting of the Carinthian Province electoral authority on 24 May 2016 that the complaint made by the Assistant Electoral Officers had not been recorded, the two members of the provincial electoral authority delegated by the *FPÖ* refused to sign the minutes of the Carinthian Province electoral authority of the meeting held to ascertain the final election results; the reason given for not signing was that the counting had, *inter alia* in Villach, already been done on Sunday.

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In its statement of defence, the Federal Electoral Authority did not comment on the pleadings of the challenging party regarding the occurrences at the district electoral authority Villach.

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The interested party, in its written observations, basically argues that it emerges from the minutes of the constitutive meeting of the district electoral authority in 2013 that the latter has entrusted the municipal department for elections with processing the absentee ballots on the day after the election from 9:00 a.m. and that the district electoral authority was invited to participate and monitor the process, respectively. The minutes were signed by all members of the district electoral authority present. From a legal point of view, it is argued, a resolution pursuant to section 18 paragraph 3 *NRWO* had been passed according to which

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the District Chief Electoral Officer could perform unpostponable official acts for the performance of which he/she was expressly authorised by the electoral authority.

2.5.3.2. At the public oral hearing, the Constitutional Court interviewed the District Chief Electoral Officer *****, the Assistant Electoral Officers *****, *****, *****, ***** and ***** as well as the head of department of the registry office Villach ***** as witnesses. 229

2.5.3.3. On the basis of the content of the file and the witness statements, which are substantially consistent, the Constitutional Court has established the following facts of legal relevance to the application: 230

In the electoral district Villach, 3,620 absentee ballots were received by the district electoral authority; 3,498 of these absentee ballots were included in the ascertainment of the result. 55 votes were declared invalid; out of the 3,443 valid votes, 1,305 votes went to Norbert Hofer and 2,138 to Alexander Van der Bellen. 231

By letter of 17 May 2016, the District Chief Electoral Officer invited the members of the district electoral authority to a meeting of the district electoral authority on Monday, 23 May 2016, 4:30 p.m. No other invitations to meetings on the election day or on the day after the election day were sent out. The agenda for this meeting includes item 2. "Determination of the final result incl. votes cast by postal ballot". 232

The head of department of the registry office Villach, in his office, continuously verified the absentee ballots received as to the existence of "evident grounds for nullity" (cf. item III.2.4.7.) and "pre-sorted" the absentee ballots into those to be included and those not to be included. Moreover, in his office, he continuously opened the absentee ballots to be included and removed the ballot paper envelopes. 233

On Monday, 23 May 2016, at 6:45 a.m., together with five staff members of the municipal department Villach, he began to open the ballot paper envelopes and to count the votes cast by postal ballot. This process was completed shortly before 9:00 a.m. Neither the District Chief Electoral Officer nor the Assistant Electoral Officers were present during that process. 234

On Monday, 23 May 2016, from 4:30 p.m. to approx. 4:45 p.m., the meeting of the district electoral authority for the day after the election day took place. This meeting was chaired by the District Chief Electoral Officer *****. The meeting was attended by six Assistant Electoral Officers, two Substitute Assistant Electoral Officers, a trusted representative as well as the head of department of the registry office Villach as keeper of the minutes. At this meeting, neither absentee ballots were opened nor were votes counted. Rather, the result of the counting of the votes cast by postal ballot ascertained between 6:45 a.m. and shortly before 9:00 a.m. was adopted as a resolution by the district electoral authority. 235

2.5.3.4. Regarding the lawfulness of the evaluation process carried out by the district electoral authority Villach, the Constitutional Court has considered the following: 236

In the electoral district Villach, the district electoral authority was not duly convened. Contrary to the provision of section 14a *BPräsWG* and the principle of secret ballot pursuant to Article 60 paragraph 1 of the Constitution, the absentee ballots were opened in the absence of the Assistant Electoral Officers, and not during a meeting of the district electoral authority. The votes were counted in the same way. 237

For this reason alone, the ascertainment of the result of the counting of votes cast by postal ballot in the electoral district Villach is in violation of section 14a of the *BPräsWG* and the principle of secret ballot pursuant to Article 60 paragraph 1 of the Constitution and is therefore unlawful. 238

This unlawfulness concerned, in any case, the 3,498 absentee ballots included in the ascertainment of the result in the electoral district Villach. 239

2.5.4. Kitzbühel 240

2.5.4.1. According to the pleadings of the challenging party, the evaluation of the absentee ballots was in its entirety not performed by the district electoral authority but by staff members of the municipality of Kitzbühel and staff members of the Kitzbühel district authority, and the counting started prematurely. 241

In its statement of defence, the Federal Electoral Authority did not comment on the pleadings of the challenging party regarding the occurrences at the district electoral authority Kitzbühel. 242

The interested party, in its written observations, basically argued that the counting of the votes cast by postal ballot did not start before Monday, 23 May 2016, in the morning and that the members of the district electoral authority were expressly requested to take part in the counting. 243

2.5.4.2. At the public oral hearing, the Constitutional Court interviewed the District Chief Electoral Officer *****, the Deputy District Chief Electoral Officer *****, as well as the Assistant Electoral Officers ***** and ***** as witnesses. 244

2.5.4.3. On the basis of the content of the file and the witness statements, which are substantially consistent, the Constitutional Court has established the following facts of legal relevance to the application: 245

In the electoral district Kitzbühel, 4,549 absentee ballots were received by the district electoral authority; 4,237 of these absentee ballots were included in the ascertainment of the result. 54 votes were declared invalid; out of the 4,183 valid votes, 1,710 votes went to Norbert Hofer and 2,473 to Alexander Van der Bellen. 246

By letter of 11 May 2016, the District Chief Electoral Officer invited the members of the district electoral authority to a meeting on Sunday, 22 May 2016. The invitation, after listing the agenda for the election day, reads as follows: 247

"It is planned to adjourn the meeting until Monday, 23 May 2016 once the preliminary overall result has been determined.

When the meeting is resumed, the district electoral authority will have to take the following measures, starting from 9:00 a.m.:

1. Examining the postal ballots received for the integrity of the seal as well as the visibility of the data and the voter's signature and declaration in lieu of an oath, respectively. Absentee ballots that do not meet these requirements must not be included in the ascertainment of the result.

2. Establishing whether there is a ground for nullity as referred to in section 10 paragraph 5 subparagraphs 1 to 11 of the *BPräsWG* excluding the postal ballots concerned from the ascertainment of the results. [...]

3. Evaluating the postal ballots to be included by sorting them into valid and invalid votes and allocating the votes to the individual candidates, and making an immediate notification of the result to the provincial electoral authority.

[...]

You are requested to attend reliably on Monday, 23 May 2016, 5:30 p.m. when the final election results of the electoral district Kitzbühel will be attested or, should you be unable to attend, arrange for your Substitute Assistant Electoral Officer to attend."

The members of the district electoral authority were duly convened for Monday, 23 May 2016, 9:00 a.m. 248

At the meeting of the district electoral authority on Sunday, 22 May 2016, after 5:00 p.m. the District Chief Electoral Officer and the Deputy District Chief Electoral Officer drew attention to the absentee ballots not to be included. The meeting was attended by the District Chief Electoral Officer and the Deputy District Chief Electoral Officer as well as by five Assistant Electoral Officers and one Substitute Assistant Electoral Officer. The Deputy District Chief Electoral Officer showed those absentee ballots which she assumed, on the basis of a preliminary examination, would not be included due to "evident grounds for nullity" (see item III.2.4.7.) to the members of the district electoral authority and mentioned the more than 4,000 absentee ballots to be included in the ascertainment of the result, which were kept in a locked room. She explained the various reasons for not including absentee ballots to the members of the electoral authority and expressly asked whether the members of the district electoral authority wanted to take a look at the individual absentee ballots or whether she should pass them around. A few Assistant Electoral Officers then checked the absentee ballots not to be included on a random basis. 249

On Monday, 23 May 2016, 9:00 a.m., the Deputy District Chief Electoral Officer resumed the meeting of the district electoral authority. At that time, an Assistant Electoral Officer, *****, was present. First of all, under the direction of the Deputy District Chief Electoral Officer and with the assistance of the staff members of the district authority Kitzbühel and the Assistant Electoral Officer ***** and in the occasional presence of the District Chief Electoral Officer, those absentee ballots that were to be included in the ascertainment of the result were opened, then the ballot paper envelopes were taken out and shuffled, and between 11:00 a.m. and 2:00 p.m. the votes were counted. 250

On Monday 23 May 2016, after 5:30 p.m., the District Chief Electoral Officer 251
asked the other members of the district electoral authority whether they had
any objections to the result and pointed out that if they wanted to raise any
objections, then that was the time to do so.

2.5.4.4. Regarding the lawfulness of the evaluation process carried out by the 252
district electoral authority of Kitzbühel, the Constitutional Court has considered
the following:

The examination of the absentee ballots as to whether they met the statutory 253
requirements for inclusion in the ascertainment of the result, with a view to the
existence of "evident grounds for nullity" (cf. item III.2.4.7.), had already been
performed continuously before Monday, 23 May 2016, 9:00 a.m. Considering the
review performed in the course of the meeting on Sunday, 22 May 2016 (cf. item
III.2.5.4.3.), the Constitutional Court has come to the conclusion that no
infringement of the law to be taken up by the Constitutional Court had occurred
in that respect. All actions carried out in the evening of 22 May 2016 and in the
morning of the following day were covered by the invitation to the meeting to
which all members of the district electoral authority had been duly invited, and
which was only interrupted during the night. The agenda explicitly included the
items "Examining the postal ballots for the integrity of the seal as well as the
visibility of the data and the voter's signature and declaration in lieu of an oath,
respectively. Absentee ballots that do not meet these requirements must not be
included in the ascertainment of the results." and "Establishing whether there is
a ground for nullity as referred to in section 10 paragraph 5 subparagraphs 1 to
11 [*BPräsWG*]". The fact that part of these review processes had already been
prepared does not render the review unlawful in the case at hand as the "non-
inclusion" of the absentee ballots concerned was made transparent to all
members present and they were given (and they also made us of) the
opportunity of verification and therefore, within the meaning of the law, they
also observed this process.

Furthermore, the absentee ballots were opened in accordance with section 14a 254
of the *BPräsWG*, namely on Monday after the election day, after 9:00 a.m., by
the Deputy District Chief Electoral Officer. Eventually, the district electoral
authority, in agreement with the law, determined the number of votes cast by
postal ballot. Pursuant to section 18 paragraph 1 *NRWO* in conjunction with
section 2 *BPräsWG*, the lawfulness of that process is not compromised by the

fact that only one Assistant Electoral Officer was still present at that time, because all members of the district electoral authority had been duly invited to the election procedures on the day after the election, stating the time and agenda (also for that day).

As the failure to observe the starting time of 9:00 a.m. alone, provided for in section 14a paragraph 1 of the *BPräsWG* is not yet an infringement to be taken up by the Constitutional Court, no fault was found in the process of evaluating the votes cast by postal ballot in the electoral district of Kitzbühel. 255

2.5.5. Villach-Land 256

2.5.5.1. Regarding the evaluation of the votes cast by postal ballot in the electoral district Villach-Land, the challenging party states, in summary, that the votes cast by postal ballot were counted already on Sunday 22 May 2016, i.e. "before the time set out in law, excluding the district electoral authority, in contravention of section 14a *BPräsWG*". The members of the district electoral authority delegated by the *FPÖ*, ***** and *****, did not have any opportunity to take part in the examination of the absentee ballots for grounds of nullity and in the counting of the votes. The district electoral authority Villach-Land was convened only for Monday 23 May 2016, 2:00 p.m. One of the two Assistant Electoral Officers went to the district electoral authority on 23 May 2016, at 9:00 a.m., aware that this was the time to start as stipulated by law, and found that at that moment in time the counting of the votes cast by postal ballot had already been completed; it had been performed by persons who were not members of the district electoral authority. The (convened) meeting of the district electoral authority on that day at 2:00 p.m. merely served to "formally sign the minutes of the district electoral authority which had been prepared in advance". 257

In its statement of defence, the Federal Electoral Authority did not comment on the pleadings of the challenging party regarding the occurrences at the district electoral authority Villach-Land. 258

In its written observations, making reference to the witness *****, the interested party basically argues that the invitation to the meeting of the district electoral authority on Monday, 23 May 2016, 2:00 p.m., included the information that it was possible to be present during the counting from 9:00 a.m. 259

2.5.5.2. At the public oral hearing, the Constitutional Court interviewed the District Chief Electoral Officer *****, the Deputy District Chief Electoral Officer *****, the Assistant Electoral Officer ***** and the Substitute Assistant Electoral Officer ***** as witnesses. 260

2.5.5.3. On the basis of the content of the file and the witness statements, which are substantially consistent, the Constitutional Court has established the following facts of legal relevance to the application: 261

In the electoral district Villach-Land, 4,657 absentee ballots were received by the district electoral authority; 4,332 of these absentee ballots were included in the ascertainment of the result. 119 votes were declared invalid; out of the 4,213 valid votes, 1,955 votes went to Norbert Hofer and 2,258 to Alexander Van der Bellen. 262

By written invitation of 5 April 2016, the District Chief Electoral Officer invited the district electoral authority to a "preliminary discussion of the election of the Federal President 2016" on Wednesday, 13 April 2016, 9:00 a.m., without stating an agenda. According to the minutes of this meeting of 13 April 2016, except for *****, all Assistant Electoral Officers of the district electoral authority and the Substitute Assistant Electoral Officer ***** attended the meeting. One of the topics discussed at the meeting was "3. Procedure regarding the determination of the election results". 263

Regarding this item, the minutes read as follows: 264

"It is recorded that, as already resolved during the constitutive meeting of the district electoral authority Villach-Land held on 29 July 2013 for the National Council elections 2013, the Assistant Electoral Officers present – in this case for the election of the Federal President 2016 – continue to unanimously authorise the District Chief Electoral Officer or his Deputy to have the preparatory determinations regarding the election result in the electoral district pursuant to section 14a *BPräsWG* 1971, Federal Law Gazette *BGBl. No. 57/1971*, last amended by Federal Law Gazette *BGBl. I No. 158/2015*, both on the election day at 5:00 p.m. and on the day after the election, 9:00 a.m., performed by the qualified support staff of the district authority Villach-Land under the monitoring of the aforementioned Chief Electoral officers.

This includes, without limitation, the ascertainment of the result of the absentee ballots received through postal voting, the verification of the local election results as to possible inconsistencies in the numerical result on the basis of the election files transmitted by the municipal electoral authorities, and the

ascertainment of the overall result for the electoral district.

The members of the district electoral authority are, of course, given the opportunity to personally participate in the ascertainment process at any time."

By written "invitation" of 9 May 2016, the members of the district electoral authority were convened for Monday, 23 May 2016, 2:00 p.m. to a meeting with the following agenda:

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- "1. Welcome and determination of quorum
2. Review and determination of the election result in the electoral district
3. Review and determination of the result of the postal vote
4. Determination of the final district result
5. Miscellaneous"

This invitation also contains the following passage:

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"The members of the district electoral authority are, of course, at liberty to gather information about the election results in the individual municipalities from the district electoral authority already on the election day or to inform themselves of the current status of the ascertainment process or to inspect the documents on site from 5:00 p.m. or on Monday, 23 May 2016, from 9:00 a.m."

On Sunday, 22 May 2016, from 5:00 p.m., the Deputy District Chief Electoral Officer *****, together with eight other staff members of the district authority Villach-Land assigned to the district electoral authority, performed the following tasks: The absentee ballots received – unless they had already been "pre-sorted" – were examined as to whether they had to be included in the ascertainment of the result within the meaning of section 14a paragraph 1 *BPräsWG*. The absentee ballots to be included were opened, the ballot paper envelopes (where present) were taken out and the ballot papers (where contained therein) were removed from the envelopes, their validity was verified, invalid ballot papers were discarded and registered, and the valid votes were allocated to the two candidates and counted. The results of this evaluation were recorded. On Monday, 23 May 2016, from 9:00 a.m., these results were reviewed and the minutes required for the election file were prepared. On that day, at 2:00 p.m., a meeting of the district electoral authority was held, attended by the District Chief Electoral Officer *****, his Deputy *****, as well as the Assistant Electoral Officers *****, *****, *****, ***** and *****, and the Substitute Assistant Electoral Officers *****, ***** and *****.

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2.5.5.4. Regarding the lawfulness of the evaluation process carried out by the district electoral authority Villach-Land, the Constitutional Court has considered the following: 268

The authorisation granted to the District Chief Electoral Officer or his Deputy at the meeting of the district electoral authority on 13 April 2016, to have the "preparatory determinations regarding the election result in the electoral district pursuant to section 14a *BPräsWG* 1971", both on the election day at 5:00 p.m. and on the day after the election, 9:00 a.m., performed "by the qualified support staff of the district authority Villach-Land", is not covered by section 18 paragraph 3 *NRWO* in conjunction with section 2 *BPräsWG* and is thus unlawful. Therefore, taking the steps provided for in section 14a *BPräsWG* in order to ascertain the result of the votes cast by postal ballot in the absence of the members of the district electoral authority is unlawful. Opening the absentee ballots in the absence of the Assistant Electoral Officers, and thus having the possibility to open the ballot paper envelopes, contravenes the principle of secret elections pursuant to Article 60 paragraph 1 of the Constitution. Since the information provided in the invitation of 9 May 2016, stating that the members of the district electoral authority can obtain information on the current status of the ascertainment process and inspect the documents, does not constitute an invitation within the meaning of section 18 paragraph 1 *NRWO* in conjunction with section 2 *BPräsWG*, the acts reserved to the district electoral authority pursuant to section 14a *BPräsWG* should not have been performed by the Deputy District Chief Electoral Officer together with aides within the meaning of section 7 paragraph 2 *NRWO* in conjunction with section 2 *BPräsWG*. 269

This unlawfulness concerned, in any case, the 4,332 absentee ballots included in the ascertainment of the result in the electoral district Villach-Land. 270

2.5.6. Schwaz 271

2.5.6.1. According to the pleadings of the challenging party, the votes cast by postal ballot were counted prematurely by unauthorised persons in the absence of the members of the district electoral authority on Monday 23 May 2016, 9:00 a.m. 272

In its statement of defence, the Federal Electoral Authority did not comment on the pleadings of the challenging party regarding the occurrences at the district 273

electoral authority Schwaz.

The interested party, in its written observations, basically argues that even according to the challenging party itself the counting did not start before 9:00 a.m. on Monday, 23 May 2016, even though on Sunday, 22 May 2016, the district electoral authority had unanimously resolved that the District Chief Electoral Officer, together with staff members of the district authority Schwaz, would start counting the absentee ballots on Monday, 23 May 2016, as early as 7:00 a.m. The meeting on Monday, 23 May 2016 was duly convened and a resolution pursuant to section 18 paragraph 3 *NRWO* was adopted. The counting was carried out in accordance with the provisions of the law.

2.5.6.2. At the public oral hearing, the Constitutional Court interviewed the Deputy District Chief Electoral Officer *****, the Assistant Electoral Officers ***** and ***** as well as the Substitute Assistant Electoral Officer ***** as witnesses.

2.5.6.3. On the basis of the content of the file and the witness statements, which are substantially consistent, the Constitutional Court has established the following facts of legal relevance to the application:

In the electoral district Schwaz, 5,273 absentee ballots were received by the district electoral authority; 4,957 of these absentee ballots were included in the ascertainment of the result. 103 votes were declared invalid; of the 4,854 valid votes, 2,217 votes went to Norbert Hofer and 2,637 to Alexander Van der Bellen.

The meeting of the district electoral authority on Monday, 23 May 2016, was convened by the Deputy District Chief Electoral Officer for 2:00 p.m. The relevant passage of the invitation of 11 May 2016 reads as follows (without the highlightings contained in the original):

"The absentee ballots used for postal voting must be evaluated by the district electoral authority on the day following the election. For the purpose of ascertaining the result of the postal vote you are kindly invited to another meeting on

Monday, 23 May 2016, 2:00 p.m.
on the 3rd floor of the premises of the district authority Schwaz, room no. H 312
(meeting room)

and, again, your reliable attendance is requested.

As already done during the first ballot, the staff members of the district authority Schwaz, by order of the district electoral authority, will start to open the absentee ballots on Monday, 23 May 2016, 7:00 a.m., and then, in teams of two, carry out the evaluation. The members of the district electoral authority are, of course, free to observe the process.

Please find the current composition of the district electoral authority attached.

Should you be unable to attend, please make sure that your substitute participates in the meeting."

The absentee ballots were opened and the further evaluations carried out on Monday, 23 May 2016, from 9:00 a.m., by the Deputy District Chief Electoral Officer (partly) in the presence of two Assistant Electoral Officers. That means that the absentee ballots had been opened and counted prior to the beginning of the meeting called for Monday, 23 May 2016, 2:00 p.m.

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The meeting of the district electoral authority was, in fact, opened on Monday, 23 May 2016, at 2:00 p.m., and the members of the district electoral authority were present in sufficient number for the meeting to have a quorum. The meeting ended at 2:15 p.m.

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2.5.6.4. Regarding the lawfulness of the evaluation process carried out by the district electoral authority Schwaz, the Constitutional Court has considered the following:

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The lawful performance of the official acts reserved to the district electoral authority as a collegiate body requires that the electoral authority was duly convened (see item III.2.4.5.). The date mentioned in the invitation by the Deputy District Chief Electoral Officer for the meeting to ascertain the result of the counting of the votes cast by postal ballot was Monday, 23 May 2016, 2:00 p.m. As absentee ballots were opened and other steps for ascertaining the result carried out prior to the point in time mentioned in the invitation in the presence of only two Assistant Electoral Officers, who had not been duly invited for that point in time, this is in violation of section 14a of the *BPräsWG* and of the principle of secret ballot pursuant to Article 60 paragraph 1 of the Constitution. It is not sufficient to (merely) point out to the members of the district electoral authority that it is possible for them to participate in measures

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to ascertain the result; rather, section 17 paragraph 1 in conjunction with section 18 paragraph 1 *NRWO* requires a proper (i.e. timely) invitation to a meeting of the district electoral authority, precisely stating the place, time and subject matter of the official act to be performed.

There is no need to determine whether, at the meeting of the district electoral authority on the election day, Sunday, 22 May 2016, 6:00 p.m., a resolution was actually adopted – as stated by the Deputy District Chief Electoral Officer at the public oral meeting – authorising the Chief Electoral Officer (together with the staff members of the district authority Schwaz) to evaluate the absentee ballots on the day after the election day, Monday, 23 May 2016, 7:00 a.m. In fact, the opening of absentee ballots is, in principle, excluded from being the subject matter of a resolution pursuant to section 18 paragraph 3 *NRWO* in conjunction with section 2 *BPräsWG*.

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This unlawfulness concerned, in any case, the 4,957 absentee ballots included in the ascertainment of the result in the electoral district Schwaz.

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2.5.7. Wien-Umgebung

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2.5.7.1. According to the pleadings of the challenging party, in the electoral district Wien-Umgebung the absentee ballots had already been "pre-sorted" into void absentee ballots and absentee ballots to be included in the ascertainment of the result when the meeting of the district electoral authority began on Monday, 23 May 2016, 9:00 a.m. At that time, the absentee ballots had been opened and the ballot paper envelopes had been taken out of the absentee ballots. These activities had been performed by unauthorised persons. The opening of the ballot paper envelopes and the removal of the ballot papers contained therein was not performed by authorised persons either, at any rate not by the District Chief Electoral Officer under the monitoring of the Assistant Electoral Officers or by other members of the district electoral authority. Moreover, a first count revealed that ten ballot papers were missing. After a second count, three ballot papers were still missing. They were declared to be invalid by resolution of the district electoral authority. These shortcomings were not recorded because one Assistant Electoral Officer, though having asked several times, was assured that it was customary and in conformity with the law to open absentee ballots in the "presence" [obviously meant to read: absence] of the Assistant Electoral Officers.

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In its statement of defence, the Federal Electoral Authority argues with reference to the district electoral authority Wien-Umgebung that the nomination of ***** as an Assistant Electoral Officer of the district electoral authority was unlawful, because she was also a member of the municipal electoral authority Schwechat. Being a member of the district electoral authority on the one hand and of the municipal electoral authority on the other hand, it is argued, is incompatible pursuant to section 10 paragraph 5 *NRWO*. 287

In its written observations, the interested party did not respond to the statement of challenge with reference to the district electoral authority Wien-Umgebung. 288

2.5.7.2. At the public oral hearing, the Constitutional Court interviewed the Deputy District Chief Electoral Officer ***** , the Assistant Electoral Officer ***** (the objections raised by the Federal Electoral Authority were no obstacle to her being interviewed as a witness) and the Substitute Assistant Electoral Officer ***** as witnesses. 289

2.5.7.3. On the basis of the content of the file and the witness statements, which are substantially consistent, the Constitutional Court has established the following facts of legal relevance to the application: 290

In the electoral district Wien-Umgebung, 10,914 absentee ballots were received by the district electoral authority; 10,142 of these absentee ballots were included in the ascertainment of the result. 266 votes were declared invalid; of the 9,876 valid votes, 3,757 votes went to Norbert Hofer and 6,119 to Alexander Van der Bellen. 291

The District Chief Electoral Officer invited the district electoral authority to a meeting on Monday, 23 May 2016, 9:00 a.m. When the meeting started, the absentee ballots had already been sorted into those to be included and those not to be included. This "pre-sorting" had been done by staff members of the district authority Wien-Umgebung already on Sunday, 22 May 2016, between 6:00 p.m. and 9:00 p.m. The District Chief Electoral Officer and the Deputy District Chief Electoral Officer were present on Sunday evening as well to monitor the sorting process. There were no Assistant Electoral Officers present on Sunday evening. Following the "pre-sorting", the absentee ballots were opened and the ballot paper envelopes were removed from the absentee ballots on Sunday evening. The opened absentee ballots were stored in cardboard boxes in the meeting 292

room. The ballot paper envelopes taken from the absentee ballots were stacked on the desks in the meeting room. After these actions had been completed, the meeting room was locked and sealed.

The absentee ballots eliminated as not to be included in the count were stored in the office of a staff member of the district authority Wien-Umgebung. 293

The meeting on Monday, 23 May 2016, was attended by the Deputy District Chief Electoral Officer, six Assistant Electoral Officers and three Substitute Assistant Electoral Officers. The meeting was chaired by the Deputy District Chief Electoral Officer *****. The district electoral authority started the process of evaluating the ballot paper envelopes, which had already been taken out of the absentee ballots on Sunday, on Monday, 23 May 2016, at around 9:15 a.m. 294

Three missing ballot papers were declared to be invalid by resolution of the district electoral authority with one dissenting vote. The meeting was closed on Monday, 23 May 2016, at 1:35 p.m. 295

2.5.7.4. Regarding the lawfulness of the evaluation process carried out by the district electoral authority Wien-Umgebung, the Constitutional Court has considered the following: 296

The opening of the absentee ballots in violation of the requirements of section 14a of the *BPräsWG*, without giving the Assistant Electoral Officers of the district electoral authority the opportunity to observe and monitor the process, is unlawful and contravenes the principle of secret ballot pursuant to Article 60 paragraph 1 of the Constitution. 297

This unlawfulness concerned, in any case, the 10,142 absentee ballots included in the ascertainment of the result in the electoral district Wien-Umgebung. 298

2.5.8. Landeck 299

2.5.8.1. According to the pleadings of the challenging party, when the meeting of the district electoral authority started on Monday, 23 May 2016, the absentee ballots had already been sorted into void absentee ballots and absentee ballots to be included in the ascertainment of the result; at that point in time they had already been opened and the ballot paper envelopes had been taken out of the 300

ballots. These activities had been performed by persons not authorised to do so; only the opening of the ballot paper envelopes and the removal of the ballot papers were carried out by the district electoral authority.

Neither the Federal Electoral Authority in its statement of defence, nor the interested party in its written observations, commented on the pleadings of the challenging party regarding the occurrences at the district electoral authority Landeck.

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2.5.8.2. At the public oral hearing, the Constitutional Court interviewed the Deputy District Chief Electoral Officer ***** as well as the Assistant Electoral Officers ***** , ***** and ***** as witnesses.

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2.5.8.3. On the basis of the content of the file and the witness statements, the Constitutional Court has established the following facts of legal relevance to the application:

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In the electoral district Landeck, 2,655 absentee ballots were received by the district electoral authority; 2,449 of these absentee ballots were included in the ascertainment of the result. 59 votes were declared invalid; of the 2,390 valid votes, 838 votes went to Norbert Hofer and 1,552 to Alexander Van der Bellen.

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By letter of the District Chief Electoral Officer ***** the members of the district electoral authority were invited for Sunday, 22 May 2016, 6:00 p.m., to determine the preliminary district result on the basis of the election files of the municipalities. The same letter also contained the invitation to a meeting of the district electoral authority on Monday, 23 May 2016, 9:00 a.m., for the evaluation of the absentee ballots received. In this letter, it was mentioned that at around 11:30 a.m. (depending on the number of absentee ballots received) the final district result would be determined by the district electoral authority.

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On Monday, 23 May 2016, the meeting of the electoral authority that had been convened in writing was held on the premises of the district administrative authority. Starting from 9:00 a.m., the Deputy District Chief Electoral Officer ***** , the Assistant Electoral Officer ***** (who had arrived already earlier) as well as nine additional staff members of the district authority Landeck assigned to the district electoral authority were present. Starting from around 9:30 a.m., another Assistant Electoral Officer, ***** , was present as well. When the

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resolution on the result of the counting of the votes was passed at the end of the meeting, which according to the minutes was closed at 12:00 noon, two more Assistant Electoral Officers, ***** and *****, as well as the Substitute Assistant Electoral Officer ***** were present.

From 9:00 a.m., with the support of the staff members of the district authority Landeck, including two persons operating a device to cut open the absentee ballots, the absentee ballots to be included in the ascertainment of the result were cut open, the ballot paper envelopes were removed and opened, and the ballot papers – after having been sorted into valid and invalid ones – were counted. These activities were performed in the same room by the Deputy District Chief Electoral Officer *****, the Assistant Electoral Officers ***** (from the very beginning) and ***** (from around 9:30 a.m.), and the staff members of the district authority Landeck. Shortly before the evaluation was completed, approx. between 11:00 a.m. and 11:30 a.m., the Assistant Electoral Officers ***** and ***** as well as the Substitute Assistant Electoral Officer ***** arrived and were given the opportunity to carry out random checks.

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2.5.8.4. The established facts result from the documents submitted including, without limitation, the minutes "on the day after the election day" of Monday, 23 May 2016, the evidentiary power of which was only compromised with regard to the time periods during which the individual Assistant Electoral Officers and Substitute Assistant Electoral Officers of the electoral authority recorded as present were actually present. The precise course of events at the meeting and the occurrences during the evaluation of the absentee ballots received emerge from the testimonies of the witnesses *****, ***** and ***** which, apart from minor details, were consistent. The relevant process of evaluating the votes cast by postal ballot was also confirmed in detail by the witness ***** who, in the first part of her interview, stated that she remembered the Assistant Electoral Officer ***** to be present from 9:00 a.m. The witnesses ***** and ***** made statements to the contrary. In a second interview of ***** and ***** it was possible – as the two witnesses made a credible impression on the Constitutional Court – to clarify that this was an error on the part of witness Ms *****, who had confused the Assistant Electoral Officers ***** and *****.

308

The witness ***** offered by the challenging party was summoned twice; he excused himself because he was abroad and therefore not available for the Constitutional Court. Given the other results of evidence, the Constitutional

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Court considers the content of the minutes "on the day after the election day" of Monday, 23 May 2016, refuted only with a view to the recorded time periods during which the Assistant Electoral Officers and Substitute Assistant Electoral Officers were present before the formal resolution was passed.

2.5.8.5. Regarding the lawfulness of the evaluation process carried out by the district electoral authority Landeck, the Constitutional Court has considered the following: 310

In the sphere of competence of the Landeck district electoral authority, the evaluation of the votes cast by postal ballot pursuant to section 14a of the *BPräsWG* was performed lawfully pursuant to section 18 paragraph 1 *NRWO* in conjunction with section 2 *BPräsWG*, according to which the Chief Electoral Officer has to perform official acts independently if a meeting of an electoral authority – irrespective of having been duly convened – does not have a quorum and the urgency of the official act does not allow its postponement. 311

2.5.9. Hermagor 312

2.5.9.1. According to the pleadings of the challenging party, the absentee ballots received had already been sorted into void ballots and ballots to be included and opened when the meeting of the district electoral authority started on Monday, 23 May 2016. The ballot paper envelopes had already been taken out of the absentee ballots. This activity had not been performed by authorised persons. Only the opening of the ballot paper envelopes and the removal of the ballot papers was carried out by the district electoral authority. This process had been chosen on the basis of a resolution adopted in 2013. 313

In its statement of defence, the Federal Electoral Authority did not comment on the pleadings of the challenging party regarding the occurrences at the district electoral authority Hermagor. 314

The interested party, in its written observations, basically argues that the Assistant Electoral Officer ***** informed it that the members of the district electoral authority had been invited to check everything and to be present during the activities. Although this would have been possible, none of the Assistant Electoral Officers took advantage of this possibility. The election procedure was carried out under the monitoring of the District Chief Electoral 315

Officer. The requirements set forth in section 18 paragraph 1 *NRWO* in conjunction with section 2 *BPräsWG* were met.

2.5.9.2. At the public oral hearing, the Constitutional Court interviewed the District Chief Electoral Officer ***** as well as the Assistant Electoral Officers ***** and ***** as witnesses. 316

2.5.9.3. On the basis of the content of the file and the witness statements, which are substantially consistent, the Constitutional Court has established the following facts of legal relevance to the application: 317

In the electoral district Hermagor, 1,707 absentee ballots were received by the district electoral authority; 1,627 of these absentee ballots were included in the ascertainment of the result. 51 votes were declared invalid; of the 1,576 valid votes, 686 votes went to Norbert Hofer and 890 to Alexander Van der Bellen. 318

The members of the district electoral authority were convened by the District Chief Electoral Officer for Monday, 23 May 2016, 9:00 a.m. The content of the invitation – to the extent relevant – was as follows: 319

"On the occasion of the election of the Federal President on 22 May 2016, a meeting of the district electoral authority Hermagor will be held on Monday, 23 May 2016, at 09:00 a.m., at the district authority Hermagor [...] with the following agenda:

- Welcome, determination of quorum
- Ascertainment and determination of the result of the postal vote
- Ascertainment and determination of the final district result
- Miscellaneous

Your reliable attendance of the meeting is requested. [...]

As already resolved in the course of the elections to the National Council, the preliminary district result will be ascertained by the District Chief Electoral Officer and his staff on Sunday and transmitted to the provincial electoral authority.

In the same manner, all preparatory measures for evaluating the postal ballots will be performed as usual. In this connection it is pointed out that every member of the district electoral authority is free, at any time, to inspect these preparatory measures. On the election day, the district electoral authority will be staffed from 08:00 a.m."

The District Chief Electoral Officer invited the members of the district electoral authority to a meeting on Monday, 23 May 2016, starting at 9:00 a.m. The invitation only mentioned that the district electoral authority would be staffed from 8:00 a.m. on the election day. The invitation to the meeting on the election day was only extended orally on 24 April 2016. One of the items on the agenda included in the written invitation for Monday, 23 May 2016, was "Ascertainment and determination of the result of the postal vote ". 320

On Sunday, 22 May 2016, from 5:00 p.m., the District Chief Electoral Officer, together with the Deputy District Chief Electoral Officer and a staff member of the district authority Hermagor, opened the absentee ballots received. The ballot paper envelopes were taken out of the absentee ballots and put in a closed ballot box. This procedure was completed at 7:45 p.m. There were no Assistant Electoral Officers present during this procedure. 321

On Monday, 23 May 2016, between 9:00 a.m. and 11:45 a.m., the meeting of the district electoral authority scheduled for the day following the election day took place. This meeting was chaired by the District Chief Electoral Officer. The Deputy District Chief Electoral Officer as well as seven Assistant Electoral Officers and one Substitute Assistant Electoral Officer were also present during the meeting. At this meeting, the ballot paper envelopes were opened and the votes cast by postal ballot were counted. 322

2.5.9.4. Regarding the lawfulness of the evaluation process carried out by the district electoral authority Hermagor, the Constitutional Court has considered the following: 323

In the electoral district Hermagor, the absentee ballots were, in violation of the provision of section 14a of the *BPräsWG*, checked and opened in the absence of the Assistant Electoral Officers. At the same time, the ballot paper envelopes were taken out and put into a container prepared for that purpose. This procedure violates the requirement of section 14a *BPräsWG* to verify and open the absentee ballots exclusively under the observation of the Assistant Electoral Officers present, and contravenes the principle of secret ballot pursuant to Article 60 paragraph 1 of the Constitution. This is not changed by the fact that the invitation stated that every member of the district electoral authority was, at any time, to inspect "these preparatory measures" and that the district electoral authority would be staffed from 8:00 a.m. on the election day. 324

For this reason alone, the process of evaluating the votes cast by postal ballot in the electoral district of Hermagor is in violation of section 14a of the *BPräsWG* and the principle of secret ballot pursuant to Article 60 paragraph 1 of the Constitution and is therefore unlawful. 325

This unlawfulness concerned, in any case, the 1,627 absentee ballots included in the ascertainment of the result in the electoral district Hermagor. 326

2.5.10. Wolfsberg 327

2.5.10.1. According to the pleadings submitted by the challenging party, the absentee ballots had already been "pre-sorted" into void ballots and ballots to be included and opened, when the meeting started on Monday, 23 May 2016. This had been done by unauthorised persons. 328

Neither the Federal Electoral Authority nor the interested party have commented substantively on the occurrences at the district electoral authority Wolfsberg. 329

2.5.10.2. At the public oral hearing, the Constitutional Court interviewed the District Chief Electoral Officer ***** as well as the Assistant Electoral Officers ***** and ***** as witnesses. 330

2.5.10.3. On the basis of the content of the file and the witness statements, which are substantially consistent, the Constitutional Court has established the following facts of legal relevance to the application: 331

In the electoral district of Wolfsberg, 3,154 absentee ballots were received by the district electoral authority; 2,921 of these absentee ballots were included in the ascertainment of the result. 89 votes were declared invalid; of the 2,832 valid votes, 1,457 votes went to Norbert Hofer and 1,375 to Alexander Van der Bellen. 332

The meeting of the district electoral authority on Monday, 23 May 2016, was convened by the District Chief Electoral Officer for 9:00 a.m. The text of the invitation dated Monday, 2 May 2016, reads as follows (without the highlightings contained in the original): 333

"On the occasion of the run-off election of the Federal President 2016, you are kindly invited to a meeting of the district electoral authority Wolfsberg.

Date: 23 May 2016, 09:00 a.m.
Venue: district authority Wolfsberg, meeting room 1, basement

Agenda:

1. Determination of quorum
2. Counting of absentee ballots received by 22 May 2016, 5:00 p.m.
3. Determination and transmission of the voting result to the provincial electoral authority
4. Miscellaneous

Your reliable attendance is requested.

Should you be unable to attend, please inform the District Chief Electoral Officer ([...], phone no. [...], e-mail [...]) without delay so that the substitute can be invited."

The absentee ballots were opened on Monday, 23 May 2016, from 8:15 a.m., exclusively by the District Chief Electoral Officer, his Deputy and staff members of the district authority Wolfsberg. When the meeting started on Monday, 23 May 2016, 9:00 a.m., approx. 3,000 absentee ballots had already been opened. The further counting steps were taken during the meeting from 9:00 a.m. in the presence of the members of the district electoral authority. 334

The meeting of the district electoral authority on Monday, 23 May 2016, actually started at 9:00 a.m., and the members of the district electoral authority were present in sufficient number to constitute a quorum. The meeting was closed at 11:10 a.m. 335

2.5.10.4 Regarding the lawfulness of the evaluation process carried out by the district electoral authority Wolfsberg, the Constitutional Court has considered the following: 336

In the electoral district of Wolfsberg, the absentee ballots – contrary to section 14a *BPräsWG* and the principle of secret ballot pursuant to Article 60 paragraph 1 of the Constitution – were already opened by the Chief Electoral Officer and his Deputy and by staff members of the district authority Wolfsberg, in the absence of the Assistant Electoral Officers, on Monday, 23 May 2016, 8:15 a.m., and thus prior to the meeting of the district electoral authority called for Monday, 23 May 2016, 9:00 a.m. 337

There is no need to determine whether – as explained by the District Chief Electoral Officer at the public oral hearing – a resolution – which, in any case, was neither documented nor official – was passed in the meeting of the district electoral authority on the election day for the first round of elections, authorising the District Chief Electoral Officer (together with staff members of the district authority) to perform tasks of the district electoral authority, *inter alia*, during the run-off election. In fact, the opening of absentee ballots and ballot paper envelopes is, in principle, excluded from being the subject matter of a resolution pursuant to section 18 paragraph 3 *NRWO* in conjunction with section 2 *BPräsWG*. 338

Thus, the ascertainment of the result of the postal vote in the electoral district Wolfsberg is in violation of section 14a of the *BPräsWG* and the principle of secret ballot pursuant to Article 60 paragraph 1 of the Constitution and is therefore unlawful. 339

This unlawfulness concerned, in any case, the 2,921 absentee ballots included in the ascertainment of the result in the electoral district of Wolfsberg. 340

2.5.11. Hollabrunn 341

2.5.11.1. According to the pleadings of the challenging party, in the electoral district of Hollabrunn, the absentee ballots had, in part, already been opened when the meeting of the district electoral authority started on Monday, 23 May 2016, 9:00 a.m. Moreover, the absentee ballots had already been "pre-sorted" into void absentee ballots and absentee ballots to be included. Neither activity was performed by persons authorised to do so (neither by the District Chief Electoral Officer under the observation of the Assistant Electoral Officers nor by other members of the district electoral authority). 342

In its statement of defence, the Federal Electoral Authority did not comment on the pleadings of the challenging party regarding the occurrences at the district electoral authority of Hollabrunn. 343

The interested party, in its written observations of 17 June 2016, states to have been informed by the Assistant Electoral Officer ***** that she arrived at the district electoral authority on Monday, 23 May 2016, shortly before 9:00 a.m. At that time, apart from herself and another member of the district electoral 344

authority, everyone else was already present and they had just started to open the absentee ballots. The opening was performed by staff members of the district authority Hollabrunn assigned to the district electoral authority in the presence and under the monitoring of the district electoral authority. Thus, the opening of the absentee ballots took place in the presence of the quorate district electoral authority. Any unlawfulness, it is argued, that might have happened during the short time period before 9:00 a.m. on Monday, 23 May 2016, would not have been suited to influence the election result and is therefore irrelevant.

In this context, the interested party requested that the Constitutional Court interview ***** as a witness. However, the interested party withdrew its request at the oral hearing on 22 June 2016. 345

2.5.11.2. At the public oral hearing, the Constitutional Court interviewed the Deputy District Chief Electoral Officer as well as the Assistant Electoral Officers ***** and ***** as witnesses. 346

2.5.11.3. On the basis of the content of the file and the witness statements, which are substantially consistent, the Constitutional Court has established the following facts of legal relevance to the application: 347

In the electoral district of Hollabrunn, 4,315 absentee ballots were received by the district electoral authority; 4,024 of these absentee ballots were included in the ascertainment of the result. 193 votes were declared invalid; of the 3,831 valid votes, 1,765 went to Norbert Hofer and 2,066 to Alexander Van der Bellen. 348

The meeting of the district electoral authority on Monday, 23 May 2016, had been convened for 8:30 a.m. At around 8:40 a.m., when the members of the district electoral authority were present in sufficient number to have a quorum, the meeting was officially opened by the Deputy District Chief Electoral Officer. With a view to the pleadings of the interested party, it has to be stated that ***** , who arrived later (shortly before 9:00 a.m.) was not an Assistant Electoral Officer but a trusted representative (section 15 paragraph 4 *NRWO*) and therefore not a member of the district electoral authority. At the beginning of the meeting, the Deputy District Electoral Officer explained that the absentee ballots had already been "pre-sorted" upon receipt into absentee ballots to be included and void absentee ballots. 349

This "pre-sorting" was carried out under the supervision of and instructions from the District Chief Electoral Officer by a staff member of the district authority Hollabrunn assigned to the district electoral authority, who had also removed the flaps from the absentee ballots. When the meeting of the district electoral authority started, the absentee ballots that had preliminarily been qualified as invalid on the basis of "evident grounds for nullity" (cf. item III.2.4.7.) had already been placed in a separate box in the meeting room, where they had been taken together with all other absentee ballots, by the Deputy District Chief Electoral Officer and a staff member of the district authority Hollabrunn shortly before the meeting started. Before that, they had been stored in a locked room of the district authority Hollabrunn. The members of the district electoral authority were at liberty, during the meeting on Monday, 23 May 2016, to inspect the absentee ballots "pre-sorted" as void.

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At around 8:45 a.m. staff members of the district authority Hollabrunn started to cut open the absentee ballots in the hallway in front of the meeting room, with the approval of the members of the district electoral authority present. The members of the authority had the opportunity, at any time, to be present during the "cutting process". Immediately after having been cut open, the opened absentee ballots were returned to the meeting room, where they were counted by the members of the district electoral authority and examined as to further grounds for nullity (e.g. missing or "wrongly coloured" ballot paper envelopes). Then the actual counting process, which is not contested by the challenging party, started. The counting was completed at around 12:00 noon, and at 12:15 p.m. the meeting of the district electoral authority was closed.

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The witness ***** clarified the statements he had made in the declaration in lieu of an oath attached to the statement of challenge, explaining that when stating that the absentee ballots had in part already been opened he was referring to 9:00 a.m. and not to the beginning of the meeting at 8:40 a.m. At that time, according to the witness, no absentee ballot had been opened.

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2.5.11.4. Regarding the lawfulness of the evaluation process carried out by the district electoral authority of Hollabrunn, the Constitutional Court has considered the following:

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During the meeting on Monday, 23 May 2016, the members of the district electoral authority were given the opportunity to examine all absentee ballots,

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which had been "pre-sorted" by a staff member of the district authority Hollabrunn assigned to the district electoral authority under the observation of the District Chief Electoral Officer, – and thus to review the sorting process on the basis of "evident grounds for nullity" (cf. item III.2.4.7.) performed independently by such staff member; the absentee ballots were in the meeting room during the meeting. This procedure was lawful. The members of the district electoral authority did not object to the results of the "pre-sorting". In the statement of challenge it was not alleged that the assessment of these grounds for nullity was incorrect.

The opening of the absentee ballots and the "non-inclusion" of absentee ballots due to the existence of grounds for nullity pursuant to section 14a paragraph 1 in conjunction with section 10 paragraph 5 subparagraphs 2 to 7 *BPräsWG*, and eventually also the evaluation of the ballot paper envelopes contained in the absentee ballots to be included, was performed – with the involvement of aides (section 7 paragraph 2 *NRWO*) – under the supervision and with the participation of the district electoral authority. The fact that the evaluation of the absentee ballots might have started slightly earlier than provided for in section 14a paragraph 1 *BPräsWG* (8:45 a.m.), which corresponded to the point in time stated in an invitation sent to all members of the district electoral authority, is of no legal significance to the electoral challenge. Hence, the evaluation process is lawful in that respect.

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2.5.12. Freistadt

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2.5.12.1. According to the pleadings of the challenging party, the absentee ballots received had already been sorted into void absentee ballots and absentee ballots to be included in the ascertainment of the result, and opened, when the meeting of the district electoral authority started on Monday, 23 May 2016. These activities had been performed by unauthorised persons, at any rate not by the District Chief Electoral Officer under the monitoring of the Assistant Electoral Officers or by other members of the district electoral authority.

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In its statement of defence, the Federal Electoral Authority did not comment on the pleadings of the challenging party regarding the occurrences at the district electoral authority of Freistadt.

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In its written observations, the interested party replies that the District Chief

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Electoral Officer was authorised by the members of the district electoral authority to start counting already on Sunday, 22 May 2016, from 5:00 p.m. All members were invited in writing for that date and requested to participate, even though participation was voluntary. The District Chief Electoral Officer or his Deputy, the Assistant Electoral Officers ***** and ***** as well as staff members of the district authority Freistadt participated in the counting. On Monday, 23 May 2016, the district electoral authority met and everyone was given the opportunity to review everything.

2.5.12.2. At the public oral hearing, the Constitutional Court interviewed the District Chief Electoral Officer ***** as well as the Assistant Electoral Officers ***** , ***** and ***** as witnesses. 360

2.5.12.3. On the basis of the content of the file and the witness statements, which are substantially consistent, the Constitutional Court has established the following facts of legal relevance to the application: 361

In the electoral district of Freistadt, 6,491 absentee ballots were received by the district electoral authority; 6,185 of these absentee ballots were included in the ascertainment of the result. 247 votes were declared invalid; of the 5,938 valid votes, 2,312 votes went to Norbert Hofer and 3,626 to Alexander Van der Bellen. 362

By letter of 5 April 2016, the District Chief Electoral Officer informed the Assistant Electoral Officers and Substitute Assistant Electoral Officers about a total of five meetings in connection with the election of the Federal President 2016; including one on Wednesday, 20 April 2016, 8:00 a.m., one on Sunday, 22 May 2016, 5:00 p.m. and one on Monday, 23 May 2016, 8:45 a.m. 363

The agenda for the meeting on 20 April 2016 read, *inter alia*, as follows: 364

"2. Information on the election preparations, the course of events on the election day and the day following the election.
3. Authorisation of the Chief Electoral Officer to independently perform the administrative business, such as accepting and forwarding the preliminary election result, as well as all unpostponable measures on the election day."

Item 2. of the agenda for 24 April and 22 May 2016 read as follows: 365

"2. Processing of the postal votes"

Items 2. and 3. of the agenda for 25 April and 23 May 2016 both read: 366

"2. Determination of the election result
3. Determination of the final result of the postal vote"

At the meeting of the district electoral authority on 20 April 2016, apart from the District Chief Electoral Officer, all Assistant Electoral Officers except for *****, as well as two Substitute Assistant Electoral Officers, ***** and *****, were present. According to the minutes of 20 April 2016, which were signed by all persons present, "information on the election preparations, the course of events on the election day and the day following the election" was dealt with under item 3. The minutes read as follows: "The district electoral authority was convened before the election day in order to inform [...] that on the election day the administrative business, such as receiving and forwarding the election result, as well as all unpostponable measures, will be prepared independently by the Chief Electoral Officer and the support staff following the respective authorisation by the district electoral authority". Furthermore, that meeting resolved to start with preparations for the counting of the postal ballots already on the election day at 5:00 p.m. 367

As announced on 5 April 2016, a meeting of the district electoral authority was held on Sunday, 22 May 2016, from 5:00 p.m. The meeting was attended by the District Chief Electoral Officer *****, the Assistant Electoral Officers ***** and *****, the staff member of the district authority of Freistadt ***** and some other staff members (approx. ten) of the district authority of Freistadt. 368

Starting from 5:00 p.m. these persons removed the ballot paper envelopes and later examined the ballot papers inside the ballot paper envelopes for their validity and counted them. These tasks were completed at around 9:30 p.m.; by then, the result of the votes cast by postal ballot in the electoral district Freistadt were ascertained. 369

On Monday, 23 May 2016, between 8:45 a.m. and 9:30 a.m., a meeting of the district electoral authority was held and attended by the persons recorded in the minutes of Monday, 23 May 2016 on the "day after the election day". At that meeting, the documents regarding the absentee ballots received, which had been evaluated on the previous evening, were available for inspection by the members of the district electoral authority in the meeting room. At that meeting, the district results recorded in the aforementioned minutes of the "day after the 370

election day" were determined.

2.5.12.4. To the extent the established facts deviate from the documents mentioned, they are based on the detailed statement of the witness *****, who made a credible impression on the Constitutional Court and whose statement was also consistent with those of the witnesses ***** and *****, who, however, were not personally present during the occurrences on Sunday, 22 May 2016, but rather knew the facts by hearsay. The fact that the meeting of the district electoral authority took place on Sunday, 22 May 2016, 5:00 p.m. and lasted until 9:30 p.m. also emerges from the statement of the witness *****, who refused to give evidence beyond that.

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2.5.12.5. Regarding the lawfulness of the evaluation process carried out by the district electoral authority Freistadt, the Constitutional Court has considered the following:

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The resolution by the district electoral authority of 20 April 2016, authorising the District Chief Electoral Officer to "perform the preparations for the ascertainment of the result of the postal vote with the assistance of staff members of the district authority Freistadt", is unlawful insofar as this includes measures reserved to the electoral authority as a collegiate body pursuant to section 14a paragraph 1 *BPräsWG* – as is suggested by other passages of the respective minutes and the announcement of 5 April 2016 of the meetings of the district electoral authority – because section 18 paragraph 3 *NRWO* in conjunction with section 2 *BPräsWG* does not refer to such processes (see item III.2.4.5.). As on Sunday, 22 May 2016, from 5:00 p.m., only two Assistant Electoral Officers were present, the electoral authority did not have a quorum pursuant to section 17 paragraph 1 *NRWO* in conjunction with section 2 *BPräsWG*. As this was no case pursuant to section 18 paragraph 1 *NRWO* in conjunction with section 2 *BPräsWG* either – the evaluation of the absentee ballots received should have been performed on the following day, 9:00 a.m., only and would only have been urgent within the meaning of this provision from that point in time onwards – the evaluation of these absentee ballots was carried out unlawfully.

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This unlawfulness concerned, in any case, the 6,185 absentee ballots included in the ascertainment of the result in the electoral district Freistadt.

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2.5.13. Liezen	375
2.5.13.1. The challenging party submits that the absentee ballots received had already been sorted into void absentee ballots and such which are to be included, and also opened, when the meeting started on Monday, 23 May 2016. These activities had been performed by unauthorised persons. Only the removal and opening of the ballot paper envelopes and the counting of the votes were performed by the district electoral authority.	376
In its statement of defence, the Federal Electoral Authority did not comment on the pleadings of the challenging party regarding the occurrences at the district electoral authority Liezen.	377
The interested party, in its written observations, basically argues that the entire procedure was "more than correct", that the absentee ballots had already been "pre-sorted" when the meeting of the district electoral authority started, but were still closed.	378
2.5.13.2. At the public oral hearing, the Constitutional Court interviewed the District Chief Electoral Officer ***** and the Assistant Electoral Officer ***** as witnesses.	379
2.5.13.3. On the basis of the content of the file and the witness statements, which are substantially consistent, the Constitutional Court has established the following facts of legal relevance to the application:	380
In the electoral district of Liezen, 9,328 absentee ballots were received by the district electoral authority; 8,748 of these absentee ballots were included in the ascertainment of the result. 209 votes were declared invalid; of the 8,539 valid votes, 3,937 votes went to Norbert Hofer and 4,602 to Alexander Van der Bellen.	381
By letter of 4 May 2016, the District Chief Electoral Officer invited the members of the district electoral authority to meetings on Sunday, 22 May 2016, and on Monday, 23 May 2016. The content of this invitation – to the extent relevant – was as follows:	382
"Invitation to the meetings of the district electoral authority Liezen for the election of the Federal President 2016 on Sunday, 22 May 2016 – beginning: 6:00 p.m. and Monday, 23 May 2016 – beginning: 09:00 a.m. at the meeting	

room of the district authority Liezen [...]

Assistant Electoral Officers, Substitute Assistant Electoral Officers and trusted representatives, respectively, who have not yet been sworn in will be sworn in by the district governor ***** before the meeting.

Agenda for Sunday, 22 May 2016

1. Welcome, determination of quorum and opening of the meeting
2. Checking the numerical municipal results[...], adding up the local election results for the political district of Liezen and reporting to the provincial electoral authority (section 88 *NRWO* 1992 as amended).
3. Miscellaneous

Agenda for Monday, 23 May 2016

1. Welcome, determination of quorum and opening of the meeting
2. Review and ascertainment of the votes cast by postal ballot
3. Immediate notification to the provincial electoral authority
4. Miscellaneous

Your reliable attendance is requested."

The members of the district electoral authority were duly convened for Monday, 23 May 2016, 9:00 a.m. The meeting was opened at 9:10 a.m. by the District Chief Electoral Officer in the presence of the Deputy District Chief Electoral Officer and the attending Assistant Electoral Officers und Substitute Assistant Electoral Officers. The Deputy District Chief Electoral Officer showed the members of the district electoral authority those absentee ballots, which he assumed, on the basis of a preliminary examination, were not to be included for "evident grounds for nullity" (cf. item III.2.4.7.). He explained the various reasons for non-inclusion to the members of the district electoral authority and asked the Assistant Electoral Officers to examine the absentee ballots themselves. Some of the Assistant Electoral Officers then randomly checked the absentee ballots not to be included. The absentee ballots to be included were then opened during the meeting while, at the same time, the ballot paper envelopes were removed and the votes were counted by groups of persons. The meeting ended at 1:15 p.m.

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2.5.13.4. Regarding the lawfulness of the evaluation process carried out by the district electoral authority Liezen, the Constitutional Court has considered the following:

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The examination of the absentee ballots as to whether they meet the statutory requirements for being included in the ascertainment of the result – following a

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"pre-sorting" by staff members of the district authority Liezen on the basis of "evident grounds for nullity" (cf. item III.2.4.7.) – took place during the meeting on Monday, 23 May 2016, in a manner allowing the members of the district electoral authority to review the absentee ballots not to be included, so that no infringement occurred in that respect.

The absentee ballots were also opened in accordance with section 14a of the *BPräsWG*, namely by the members of the district electoral authority with the involvement of staff members of the district authority Liezen on Monday after the election day, after 9:00 a.m. 386

Finally, the district electoral authority, in agreement with the law, counted the votes cast by postal ballot in the presence of the duly convened members of the district electoral authority and determined the result. 387

Hence, the process of evaluating the votes cast by postal ballot in the electoral district Liezen was not unlawful. 388

2.5.14. Bregenz 389

2.5.14.1. According to the pleadings of the challenging party, the absentee ballots had already been "pre-sorted" into void absentee ballots and such which are to be included, and opened, when the meeting of the district electoral authority started on Monday, 23 May 2016. This had been done by unauthorised persons. 390

In its statement of defence, the Federal Electoral Authority did not comment on the pleadings of the challenging party regarding the occurrences at the district electoral authority of Bregenz. 391

The interested party, in its written observations, basically argues that the counting and opening of the absentee ballots started on Monday, 23 May 2016, before 9:00 a.m. The members of the district electoral authority had been informed of that date (Monday, 23 May 2016, 9:00 a.m.) and it was up to them to participate or not. On Monday, 23 May 2016, 9:00 a.m., approx. 1,500 of the approx. 10,000 absentee ballots had been opened. This process had been made transparent by the District Chief Electoral Officer; all Assistant Electoral Officers had expressed their approval. Thus, it is argued, a resolution pursuant to 392

section 18 paragraph 3 *NRWO* existed and the failure to participate on the part of members of the district electoral authority has to be evaluated in the light of section 18 paragraph 1 *NRWO*, respectively. The premature counting of the votes cast by postal ballot could not have influenced the election result and is therefore irrelevant, even more so as the member of the district electoral authority nominated by the challenging party was present.

2.5.14.2. At the public oral hearing, the Constitutional Court interviewed the Deputy District Chief Electoral Officer ***** as well as the Assistant Electoral Officers ***** and ***** as witnesses. 393

2.5.14.3. On the basis of the content of the file and the witness statements, which are substantially consistent, the Constitutional Court has established the following facts of legal relevance to the application: 394

In the electoral district of Bregenz, 10,159 absentee ballots were received by the district electoral authority; 9,523 of these absentee ballots were included in the ascertainment of the result. 140 votes were declared invalid; of the 9,383 valid votes, 2,718 votes went to Norbert Hofer and 6,665 to Alexander Van der Bellen. 395

The convocation to the meeting of the district electoral authority on Monday, 23 May 2016, was expressed at the meeting of 14 March 2016. In the minutes on the meeting of 14 March 2016, under "ITEM V – Miscellaneous", it was recorded that "in the case of a run-off election (date: 22 May 2016) [...] an additional meeting of the district electoral authority will be held on 23 May 2016, starting at 9:00 a.m. " In addition, the subject matter and place of the meeting were specified. 396

The meeting of the district electoral authority was actually opened on Monday, 23 May 2016, at 9:00 a.m. with the members of the district electoral authority attending in sufficient number for the meeting to have a quorum. The meeting ended at 4:30 p.m. 397

When the meeting started on Monday, 23 May 2016, 9:00 a.m., the absentee ballots had been "pre-sorted" into void absentee ballots and such to be included and – according to the statement of the witness ***** – 300 absentee ballots or – according to the statement of the witnesses ***** and ***** – 1,000 to 1,500 absentee ballots had been opened. The absentee ballots had been opened by 398

staff members of the district authority Bregenz without any instruction to do so and in the absence of the District Chief Electoral Officer or his Deputy. The absentee ballots to be included and those to be discarded were located in the meeting room during the meeting of the district electoral authority on Monday, 23 May 2016.

As is verified by the minutes on the meeting of the district electoral authority of 14 March 2016, a resolution to authorise the District Chief Electoral Officer pursuant to section 18 paragraph 3 *NRWO* in conjunction with section 2 *BPräsWG* to perform the following tasks of the district electoral authority on the day after the election and on the day after the "run-off election" was passed:

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"3.1. acceptance of the absentee ballots accepted by the municipalities (regardless of the electoral district) and immediate notification of their number to the provincial electoral authority (section 88 paragraph 2 *NRWO*) and

3.2. starting from 9:00 a.m., examination and counting of absentee ballots cast by postal voting and received in time, adding up and passing on the result to the provincial electoral authority (section 90 paragraph 2 *NRWO*)."

2.5.14.4. Regarding the lawfulness of the evaluation process carried out by the district electoral authority Bregenz, the Constitutional Court has considered the following:

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In the electoral district of Bregenz absentee ballots were, in violation of section 14a *BPräsWG* and the principle of secret ballot pursuant to Article 60 paragraph 1 of the Constitution, already opened before the meeting of the district electoral authority called for Monday, 23 May 2016, 9:00 a.m., by staff members of the Bregenz district authority in the absence of the District Chief Electoral Officer or his Deputy. As the opening of absentee ballots is, in principle, excluded from being the subject matter of a resolution pursuant to section 18 paragraph 3 *NRWO* in conjunction with section 2 *BPräsWG* (see. item III.2.4.5.), this is a violation of section 14a *BPräsWG* and the principle of secret ballot pursuant to Article 60 paragraph 1 of the Constitution.

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This unlawfulness concerned no more than 1,500 absentee ballots include in the ascertainment of the result in the electoral district of Bregenz.

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2.5.15. Kufstein 403

2.5.15.1. According to the pleadings of the challenging party, in the electoral district of Kufstein the absentee ballots to be included had already been "pre-sorted" into void absentee ballots and such to be included in the ascertainment of the result when the meeting of the district electoral authority started on Monday, 23 May 2016. At that time, some of these absentee ballots had already been opened and the ballot paper envelopes had been taken from the absentee ballots. These activities had been performed by unauthorised persons. Only the opening of the ballot paper envelopes and the removal of the ballot papers was performed by the district electoral authority. It is argued that the mere fact that the absentee ballots were opened by unauthorised persons and without observation by the Assistant Electoral Officers made manipulation possible.

In its statement of defence, the Federal Electoral Authority did not comment on the pleadings of the challenging party regarding the occurrences at the district electoral authority Kufstein. 405

The interested party, in its written observations, basically argues that according to the Assistant Electoral Officer *****, the proper handling and counting started on Monday, 23 May 2016, at 9:00 a.m. The District Chief Electoral Officer or his Deputy, individual Assistant Electoral Officers and staff members of the district authority of Kufstein were present. Prior to the meeting, only unopened absentee ballots had been sorted. The absentee ballots were opened by staff members of the district authority Kufstein and by members of the district electoral authority. 406

2.5.15.2 At the public oral hearing, the Constitutional Court interviewed the District Chief Electoral Officer ***** as well as the Assistant Electoral Officers ***** and ***** as witnesses. 407

2.5.15.3. On the basis of the content of the file and the witness statements, which are substantially consistent, the Constitutional Court has established the following facts of legal relevance to the application: 408

In the electoral district of Kufstein, 5,667 absentee ballots were received by the district electoral authority; 5,313 of these absentee ballots were included in the ascertainment of the result. 57 votes were declared invalid; of the 5,256 valid 409

votes, 2,198 votes went to Norbert Hofer and 3,058 to Alexander Van der Bellen.

The absentee ballots received by the district electoral authority had already been sorted into absentee ballots to be included and such not to be included when the meeting started on Monday, 23 May 2016, 9:00 a.m. The sorting had been performed on Sunday, 22 May 2016, by the Deputy District Chief Electoral Officer and the staff member of the district authority assigned to the district electoral authority.

410

At the beginning of the meeting of the district electoral authority on Monday, 23 May 2016, 9:00 a.m., all absentee ballots, those to be included and those not to be included, were kept in the room of the district authority Kufstein in which the counting was performed by the district electoral authority. Checking the absentee ballots, including the ones not to be included, was possible for the members of the district electoral authority at any time. The members of the district electoral authority were expressly informed of such opportunity.

411

On Monday, 23 May 2016, at around 8:00 a.m., the Deputy District Chief Electoral Officer, in part together with the staff member of the district authority assigned to the district electoral authority, started to cut open the absentee ballots in an office on the second floor of the district authority Kufstein, using a mechanical device. No other members of the district electoral authority were present. The members of the district electoral authority had neither been informed about the point in time when the opening of the absentee ballots was to start nor had they been invited. As convincingly stated by the witness *****, approx. 1,000 absentee ballots had been opened by the beginning of the meeting of the district electoral authority on Monday, 23 May 2016, 9:00 a.m.

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On Monday, 23 May 2016, after the meeting had started at 9:00 a.m., the Deputy District Chief Electoral Officer continued opening the absentee ballots by means of a mechanical device in the aforementioned office on the second floor of the district authority Kufstein. This took him until around 10:00 a.m. The counting took place in a room on the first floor of the Kufstein district authority. The members of the district electoral authority knew where the absentee ballots were being cut open and, starting from the beginning of the meeting, had the opportunity, at any time, to supervise and monitor the opening of the absentee ballots.

413

No ballot paper envelopes had been removed from the absentee ballots before the meeting of the district electoral authority started on Monday, 23 May 2016, 9:00 a.m. 414

2.5.15.4. Regarding the lawfulness of the evaluation process carried out by the district electoral authority Kufstein, the Constitutional Court has considered the following: 415

In the course of the meeting on Monday, 23 May 2016, it was possible for the members of the district electoral authority – following a "pre-sorting" by the Deputy District Chief Electoral Officer and the staff member of the district authority Kufstein assigned to the district electoral authority Kufstein – to examine the absentee ballots as to whether they met the statutory requirements for inclusion in the ascertainment of the result; therefore the law was not violated. 416

In the electoral district of Kufstein, contrary to the provision of section 14a *BPräsWG* and contrary to the principle of secret ballot pursuant to Article 60 paragraph 1 of the Constitution, absentee ballots were already opened before Monday, 23 May 2016, 9:00 a.m. The members of the district electoral authority were neither informed in advance about the point in time when the opening of the absentee ballots was to start, nor were they invited to attend. 417

For this reason alone, the ascertainment of the result of the votes cast by postal ballot in the electoral district Kufstein is in violation of section 14a of the *BPräsWG* and the principle of secret ballot pursuant to Article 60 paragraph 1 of the Constitution and is therefore unlawful. 418

As it was not possible to determine the exact number of votes cast by postal ballot and affected by the infringement, this unlawfulness concerned no more than 1,000 absentee ballots included in the ascertainment of the result in the electoral district Kufstein. 419

2.5.16. Graz-Umgebung 420

2.5.16.1. According to the pleadings of the challenging party, the votes cast by postal ballot were counted by "civil servants". 421

In its statement of defence, the Federal Electoral Authority did not comment on the pleadings of the challenging party regarding the occurrences at the district electoral authority Graz-Umgebung. 422

In its written observations, the interested party basically argues that it emerged from the invitation to the meeting of the district electoral authority for Monday, 23 May 2016, that the counting would start on that day, from 9:00 a.m., and that all members would have the opportunity to participate and to observe the process. 423

2.5.16.2. At the public oral hearing, the Constitutional Court interviewed the District Chief Electoral Officer *****, the Assistant Electoral Officer ***** as well as the Substitute Assistant Electoral Officer ***** as witnesses. 424

2.5.16.3. On the basis of the content of the file and the witness statements, which are substantially consistent, the Constitutional Court has established the following facts of legal relevance to the application: 425

In the electoral district Graz-Umgebung, 17,376 absentee ballots were received by the district electoral authority; 15,901 of these absentee ballots were included in the ascertainment of the result. 402 votes were declared invalid; of the 15,499 valid votes, 7,596 votes went to Norbert Hofer and 7,903 to Alexander Van der Bellen. 426

By written invitation of 6 May 2016, the Deputy District Chief Electoral Officer convened a "closing meeting" of the district electoral authority for Monday, 23 May 2016, 5:00 p.m. According to item 3 of the agenda, this meeting was held to "explain the processes involved in the counting of the votes cast by postal ballot and to adopt a resolution". In addition, the invitation reads as follows: 427

"As you will certainly know, the votes cast by postal ballot/absentee ballot are to be counted by the district electoral authority. This will be done by a team of staff members of the district authority Graz-Umgebung on Monday, 23 May 2016, from 9:00 a.m. in the large meeting room; as a member of the district electoral authority, you are of course free to monitor these activities at any time. This is, however, not necessarily required."

The major part of the absentee ballots received by the district electoral authority by way of postal voting were already cut open using a mechanical device ("slit open") by a staff member of the district authority Graz-Umgebung, under the 428

monitoring of the Deputy District Chief Electoral Officer, on Friday, 20 May 2016; the remaining absentee ballots including, without limitation, those received after that point in time, between Friday and Sunday, 22 May 2016, 5:00 p.m., were cut open on Sunday from that time onwards – again using a mechanical device – under the monitoring of the District Chief Electoral Officer or the Deputy District Chief Electoral Officer. Neither any other members of the district electoral authority nor any other persons were present.

On Sunday, 22 May 2016, in the late afternoon, the District Chief Electoral Officer arranged for Assistant Electoral Officers and/or Substitute Assistant Electoral Officers of the *FPÖ* and the Green Party to be informed, by telephone, of the meeting of the district electoral authority on the following day, as emerges from a memorandum to the files dated Monday, 23 May 2016.

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Starting from Monday, 23 May 2016, 7:15 a.m., in the presence of the Assistant Electoral Officer ***** (from 11:00 a.m.) and the Substitute Assistant Electoral Officer ***** (from 8:55 a.m.), the District Chief Electoral Officer, his Deputy and other staff members of the district authority Graz-Umgebung assigned to the district electoral authority removed the ballot paper envelopes from the absentee ballots, counted the ballot papers and ascertained the result of the votes cast by postal ballot.

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During the (formal) meeting of the district electoral authority at 5:00 a.m., the evaluated electoral records, including those absentee ballots that were not included in the ascertainment of the result, were kept in the meeting room; they were available for inspection by the Assistant Electoral Officers present. At that meeting, the district result was officially determined.

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2.5.16.4. Regarding the lawfulness of the evaluation process carried out by the district electoral authority Graz-Umgebung, the Constitutional Court has considered the following:

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The opening (using a slitting device) of the absentee ballots in the absence of the Assistant Electoral Officers is in violation of section 14a of the *BPräsWG* and the principle of secret ballot pursuant to Article 60 paragraph 1 of the Constitution and is therefore unlawful. As the Assistant Electoral Officers and/or Substitute Assistant Electoral Officers had not been duly invited within the meaning of section 18 paragraph 1 *NRWO* in conjunction with section 2 *BPräsWG*, the

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independent performance of these activities by the District Chief Electoral Officer or his Deputy was not permitted. Pursuant to section 18 paragraph 3 *NRWO* in conjunction with section 2 *BPräsWG*, a resolution authorising the District Chief Electoral Officer to perform these acts is unlawful and, in addition, it has to be emphasised that the submitted authorisation of the District Chief Electoral Officer from 2013 only referred to the 2013 elections to the National Council and that an authorisation not referring to specific elections would, according to section 18 paragraph 3 *NRWO* in conjunction with section 2 *BPräsWG*, not even be permitted if the other requirements mentioned in such provision were met. The fact that one could have told from the look of the absentee ballots if the ballot paper envelopes had been removed from the opened absentee ballots, especially if that had been done in great numbers, as was argued by the District Chief Electoral Officer during his interview before the Constitutional Court, is of no relevance for this assessment: As the absentee ballots were opened, they were accessible in a manner which would have made it possible to determine who had cast the vote, because the data of the voter appear on the absentee ballot. Therefore, this process violated the principle of secret ballot pursuant to Article 60 paragraph 1 of the Constitution.

This unlawfulness concerned, in any case, the 15,901 absentee ballots included in the ascertainment of the result in the electoral district Graz-Umgebung. 434

2.5.17. Leibnitz 435

2.5.17.1. According to the pleadings of the challenging party, the meeting of the district electoral authority was opened already on Sunday, 22 May 2016, 5:00 a.m., and the absentee ballots received were counted from that point in time onwards. 436

In its statement of defence, the Federal Electoral Authority did not comment on the pleadings of the challenging party regarding the occurrences at the district electoral authority Leibnitz. 437

In its written observations, the interested party basically argues that the counting was already performed on Sunday, 22 May 2016, but that this was done exclusively by the district electoral authority. 438

2.5.17.2. At the public oral hearing, the Constitutional Court interviewed the 439

Deputy District Chief Electoral Officer *****, the Assistant Electoral Officer ***** and the trusted representative ***** as witnesses.

2.5.17.3. On the basis of the content of the file and the witness statements, 440
which are substantially consistent, the Constitutional Court has established the
following facts of legal relevance to the application:

In the electoral district of Leibnitz, 7,303 absentee ballots were received by the 441
district electoral authority; 6,794 of these absentee ballots were included in the
ascertainment of the result. 178 votes were declared invalid; of the 6,616 valid
votes, 3,785 votes went to Norbert Hofer and 2,831 to Alexander Van der Bellen.

By letter of 13 May 2016, the District Chief Electoral Officer invited the members 442
of the district electoral authority. The invitation – to the extent of relevance –
reads as follows:

"On Sunday, 22 May 2016, starting at 4:00 p.m., a meeting of the district
electoral authority will be held at the large meeting room on the first floor of the
district authority Leibnitz.

As members of the district electoral authority you are invited to this meeting and
your reliable attendance is requested. Should you be unable to attend, please
contact your party leader so that a substitute member can be delegated instead.

Agenda:

29. Welcome by the chairperson
30. Swearing in of those members who have not yet been sworn in
31. Determination of the result for the election day
32. Miscellaneous

In addition to this invitation, the following announcement is made:

On Monday, 23 May 2016, (day after the election day) another meeting of the
district electoral authority will be held on the above stated premises of the
district authority Leibnitz.

Agenda:

22. Determination of the result of the votes cast by postal ballot in the electoral
district
23. Determination of the result for the day after the election day
24. Miscellaneous

The members of the district electoral authority are requested to perform their

tasks on that day as well."

That means that by letter of 13 May 2016, the District Chief Electoral Officer invited the members of the district electoral authority for Sunday, 22 May 2016, 4:00 p.m., and announced another meeting for Monday, 23 May 2016. According to the agenda for the meeting on Sunday, 22 May 2016, this meeting was only held to determine the result for the election day and not the result of the votes cast by postal ballot in the electoral district; the latter was announced for the meeting on Monday, 23 May 2016.

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On Sunday, 22 May 2016, the Deputy District Chief Electoral Officer opened the meeting of the district electoral authority. At around 5:00 p.m. the Deputy District Chief Electoral Officer asked the six Assistant Electoral Officers and the trusted representative present whether they agreed to perform the election procedures in connection with the votes cast by postal ballot, which had been scheduled for the day after the election, already on Sunday evening. All attending members of the district electoral authority agreed.

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On Sunday, 22 May 2016, from 5:00 p.m., the Deputy District Chief Electoral Officer, together with the attending Assistant Electoral Officers, a trusted representative and the staff members of the district authority Leibnitz, opened the absentee ballots received. The ballot paper envelopes were removed from the absentee ballots and the ballot papers were counted. The process of opening the absentee ballots and counting the votes was completed at 8:30 p.m. No meeting of the electoral commission was held on Monday, 23 May 2016.

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2.5.17.4. Regarding the lawfulness of the evaluation process carried out by the district electoral authority Leibnitz, the Constitutional Court has considered the following:

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In the electoral district of Leibnitz, the absentee ballots were opened in violation of the provision of section 14a *BPräsWG* and the principle of secret ballot pursuant to Article 60 paragraph 1 of the Constitution. It is true that six Assistant Electoral Officers and one trusted representative were present and that, before the opening of the absentee ballots started on Sunday, 22 May 2016, the Deputy District Chief Electoral Officer had asked those present whether they approved to open the absentee ballots received and count the votes cast by postal ballot already on Sunday, 22 May 2016. However, not all members of the district electoral authority were present on Sunday evening and, in particular, it was not

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possible for those not present to understand from the invitation that the votes cast by postal ballot would already be counted on Sunday evening and that no meeting would be held on Monday after the election day.

The ascertainment of the result of the postal vote in the electoral district Leibnitz is in violation of section 14a of the *BPräsWG* and the principle of secret ballot pursuant to Article 60 paragraph 1 of the Constitution and is therefore unlawful. Given this result, there is no need to clarify, in light of partly contradictory witness statements, whether the process of reviewing the absentee ballots not to be included was performed in accordance with the law.

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This unlawfulness concerned, in any case, the 6,794 absentee ballots included in the ascertainment of the result in the electoral district Leibnitz.

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2.5.18. Gänserndorf

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2.5.18.1. According to the pleadings of the challenging party, a "pre-sorting" of the absentee ballots had been carried out prior to the meeting of the district electoral authority on Monday, 23 May 2016, without giving the members of the district electoral authority any opportunity to monitor this process. The absentee ballots not included had already been packed in boxes, only nine absentee ballots were presented to the district electoral authority. In addition, eleven absentee ballots, which had not been forwarded in time, were "found" after the close of the elections at 5:00 p.m. on the election day (Sunday, 22 May 2016). It was unanimously decided to no longer consider those absentee ballots. Moreover, the absentee ballots were not opened by the District Chief Electoral Officer.

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In its statement of defence, the Federal Electoral Authority did not comment on the pleadings of the challenging party regarding the occurrences at the district electoral authority Gänserndorf.

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In its written observations, the interested party basically argues that the evidence presented supports the allegations submitted by the challenging party to a very limited extent only. In their "data sheets" both Assistant Electoral Officers, who were also heard as witnesses, referred to discarded absentee ballots already having been packed in boxes, but apparently had not seen that themselves. Neither witness, it is argued, deemed it necessary to carry out a

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check. The election witness ***** told the interested party something different, which contradicted the pleadings of the challenging party. As the inspection of the absentee ballots prior to the meeting was common practice, the election witness ***** did not pay attention as to whether that was expressly mentioned. The meeting of the district electoral authority started on Monday, 23 May 2016, at 9:00 a.m., the discarded absentee ballots had been visibly and centrally placed on a table. The grounds for nullity were referred to, and it was possible to check the absentee ballots. In some cases, there were discussions about the non-inclusion of absentee ballots; the absentee ballots to be counted were shuffled several times.

2.5.18.2. At the public oral hearing, the Constitutional Court interviewed the Deputy District Chief Electoral Officer *****, the Assistant Electoral Officer ***** as well as the election witness ***** as witnesses. 454

2.5.18.3. On the basis of the content of the file and the witness statements, which are substantially consistent, the Constitutional Court has established the following facts of legal relevance to the application: 455

In the electoral district of Gänserndorf, 7,112 absentee ballots were received by the district electoral authority; 6,646 of these absentee ballots were included in the ascertainment of the result. 193 votes were declared invalid; of the 6,453 valid votes, 3,254 votes went to Norbert Hofer and 3,199 to Alexander Van der Bellen. 456

The meeting of the district electoral authority on Monday, 23 May 2016, was convened by the District Chief Electoral Officer for 9:00 a.m. 457

The meeting of the district electoral authority was actually opened on Monday, 23 May 2016, 9:00 a.m., and the members of the district electoral authority were present in sufficient number for the meeting to have a quorum. The meeting ended at 2:45 p.m. 458

The absentee ballots had not been opened when the meeting started; all counting processes were performed at the meeting on Monday, 23 May 2016, from 9:00 a.m. in the presence of the members of the district electoral authority. 459

At the beginning of the meeting on Monday, 23 May 2016, 9:00 a.m., the 460

absentee ballots had been "pre-sorted" into void absentee ballots and such to be included. During the meeting on Monday, 23 May 2016, the members of the district electoral authority had the opportunity to verify the sorting into absentee ballots to be included and those to be discarded. At the meeting, the "non-inclusion" of 18 absentee ballots was discussed and, eventually, decided.

After the close of the (run-off) election on Sunday, 22 May 2016, 5:00 p.m., 11 absentee ballots, which had been received by the district authority Gänserndorf as early as Friday, 20 May 2016, were transmitted to the district electoral authority. Since these absentee ballots were not received by the district electoral authority in time, they were not included.

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2.5.18.4. Regarding the lawfulness of the evaluation process carried out by the district electoral authority Gänserndorf, the Constitutional Court has considered the following:

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All steps taken to ascertain the result of the counting of the votes cast by postal ballot were performed, following a proper invitation, by the district electoral authority in the presence of the Deputy District Electoral Officer and the Assistant Electoral Officers.

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There are no reservations against the "pre-sorting" of the absentee ballots into void absentee ballots and such to be included on the basis of "evident grounds for nullity" (cf. item III.2.4.7.), carried out in the course of the evaluation process according to section 10 paragraph 6 *BPräsWG* by the District Chief Electoral Officer or the Deputy District Chief Electoral Officer and by staff members of the district authority Gänserndorf – under the monitoring and on the instructions of the District Chief Electoral Officer – prior to the meeting of the district electoral authority on Monday, 23 May 2016, 9:00 a.m. As the district electoral authority acting as a collegiate body had the opportunity to inspect the "pre-sorted" absentee ballots at the meeting on Monday, 23 May 2016, 9:00 a.m., no unlawfulness occurred in this respect.

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As it did not emerge from the taking of evidence before the Constitutional Court that the "non-inclusion" of the 11 absentee ballots forwarded too late and of 18 other absentee ballots by the district electoral authority was unlawful, the infringements alleged by the challenging party did not occur in the electoral district Gänserndorf.

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- 2.5.19. Völkermarkt 466
- 2.5.19.1. The challenging party submits that in the electoral district Völkermarkt 467
it was not possible to scrutinise the absentee ballots discarded as void. At the
statutory starting time of the meeting of the district electoral authority on
Monday, 23 May 2016, 9:00 a.m., the void absentee ballots had already been
separated ("pre-sorted") from the absentee ballots to be included in the
ascertainment of the result and the Assistant Electoral Officers and election
witnesses did not even have the (theoretical) possibility to subsequently verify
this process. Moreover, the Assistant Electoral Officer ***** never saw the
minutes "on the day after the election day" but only signed a "list of
attendance". Apparently, only the last page was presented to the Assistant
Electoral Officer for signing, not the complete minutes.
- The Federal Electoral Authority and the interested party have not commented on 468
the occurrences in the electoral district Völkermarkt.
- 2.5.19.2. At the public oral hearing, the Constitutional Court interviewed the 469
Deputy District Chief Electoral Officer ***** and the Assistant Electoral Officers
***** and ***** as witnesses.
- 2.5.19.3. On the basis of the content of the file and the witness statements, 470
which are substantially consistent, the Constitutional Court has established the
following facts of legal relevance to the application:
- In the electoral district of Völkermarkt, 2,712 absentee ballots were received by 471
the district electoral authority; 2,462 of these absentee ballots were included in
the ascertainment of the result. 90 votes were declared invalid; of the 2,372 valid
votes, 982 votes went to Norbert Hofer and 1,390 to Alexander Van der Bellen.
- The District Chief Electoral Officer of the electoral district Völkermarkt invited 472
the members of the district electoral authority to a meeting on Monday, 23 May
2016, 9:00 a.m. This meeting was attended by nine persons; the District Chief
Electoral Officer, the Deputy District Chief Electoral Officer and seven Assistant
Electoral Officers. The absentee ballots had already been "pre-sorted" into
absentee ballots to be included and void absentee ballots when the meeting
started. This "pre-sorting" had been performed continuously upon receipt of the
absentee ballots by the staff of the secretariat of the district governor on the

basis of "evident grounds for nullity" (cf. item III.2.4.7.). The secretariat is located between the office of the District Chief Electoral Officer and the office of the Deputy District Chief Electoral Officer. Both reviewed the "pre-sorting" and were available to the secretaries for questions. The ballot boxes used to store the absentee ballots were locked and kept at the secretariat.

At the beginning of the meeting on Monday, 23 May 2016, 9:00 a.m., the absentee ballots were brought into the room. The Assistant Electoral Officers had the opportunity, at the meeting of the district electoral authority, to check the absentee ballots already discarded in advance.

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When the meeting started, the absentee ballots were still closed and they were only opened during the meeting of the district electoral authority. Assistant Electoral Officers were present during the opening of the absentee ballots. The opening of the absentee ballots took from approx. 9:15 a.m. to approx. 11:30 a.m. After that, the ballot papers were counted.

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2.5.19.4. Regarding the lawfulness of the evaluation process carried out by the district electoral authority Völkermarkt, the Constitutional Court has considered the following:

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As the members of the district electoral authority – following a "pre-sorting" by staff members of the district authority Völkermarkt under the supervision of the District Chief Electoral Officer or the Deputy District Chief Electoral Officer – had the opportunity, during the meeting on Monday, 23 May 2016, to examine the absentee ballots as to whether they met the statutory requirements for being included in the ascertainment of the result, no infringement occurred.

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The opening of the absentee ballots was also performed in accordance with section 14a *BPräsWG*, namely on Monday after the election day, after 9:00 a.m., by the members of the district electoral authority.

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Finally, the votes cast by postal ballot were, in accordance with the law, counted in the presence of the members of the district electoral authority and the result was determined.

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Therefore, the evaluation process performed by the district electoral authority Völkermarkt was not unlawful.

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2.5.20. Reutte	480
2.5.20.1. According to the pleadings of the challenging party, it was not possible to inspect the discarded absentee ballots as they were not even stored in the room in which the counting took place.	481
In its statement of defence, the Federal Electoral Authority did not comment on the pleadings of the challenging party regarding the occurrences at the district electoral authority Reutte.	482
In its written observations, the interested party basically argues that the District Chief Electoral Officer announced the number of absentee ballots discarded as void at the meeting of the district electoral authority; this was taken note of. It was possible for the members of the district electoral authority to inspect these absentee ballots at any time.	483
2.5.20.2. At the public oral hearing, the Constitutional Court interviewed the District Chief Electoral Officer ***** as well as the Assistant Electoral Officers *****and ***** as witnesses.	484
2.5.20.3. On the basis of the content of the file and the witness statements, which are substantially consistent, the Constitutional Court has established the following facts of legal relevance to the application:	485
In the electoral district of Reutte, 2,322 absentee ballots were received by the district electoral authority; 2,170 of these absentee ballots were included in the ascertainment of the result. 40 votes were declared invalid; of the 2,130 valid votes, 777 went to Norbert Hofer and 1,353 to Alexander Van der Bellen.	486
By written "invitation" of 26 April 2016, the members of the district electoral authority were invited to attend two meetings to ascertain the result of the 2016 election of the Federal President, on Sunday, 22 May 2016, 5:30 p.m., and on Monday, 23 May 2016, 9:00 a.m. The agenda for the first meeting included the item "determination of the preliminary election result", the agenda for the second meeting included the item "evaluation of the postal ballots and determination of the final election result".	487
As announced in the invitation of 26 April 2016, a meeting of the district	488

electoral authority was held on Monday, 23 May 2016, from 9:00 a.m. to 11:45 a.m., which was attended by those persons recorded as present in the minutes. In addition, a number of staff members (approx. five) of the district authority Reutte assigned to the district electoral authority were present. At the meeting, first the absentee ballots to be included in the ascertainment of the result were opened, the ballot paper envelopes were removed and placed on several desks in the room, where one team each consisting of at least one member of the district electoral authority and a staff member of the district authority Reutte sorted the votes into valid and invalid ones and performed the counting. The absentee ballots received had already been sorted into those to be included and those to be discarded on the basis of "evident grounds for nullity" (cf. item III.2.4.7.) during the recording pursuant to section 10 paragraph 6 *BPräsWG* by the Deputy District Chief Electoral Officer; those not to be included were kept under seal separately. When ascertaining the district result during the meeting on Monday, 23 May 2016, these 112 discarded absentee ballots (see annex to the minutes of the district electoral authority) were not available in the meeting room. The District Electoral Officer mentioned these absentee ballots and the criteria on the basis of which they had been discarded. The absentee ballots not to be included could have been brought into the meeting room immediately, in no time at all, if any of the members of the district electoral authority had so requested. However, no member of the district electoral authority asked any questions or requested to check these absentee ballots.

2.5.20.4. Regarding the lawfulness of the evaluation process carried out by the district electoral authority Reutte, the Constitutional Court has considered the following:

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The ascertainment of the votes on the basis of the absentee ballots to be included pursuant to section 10 paragraph 5 *BPräsWG* was performed in accordance with section 14a *leg.cit.* and is therefore lawful. However, with a view to those absentee ballots that were not included in the ascertainment of the result for "evident grounds for nullity" (cf. item III.2.4.7.), the following unlawfulness occurred: According to this legal provision, the examination as to whether an absentee ballot is to be included in the ascertainment of the result or to be qualified as void because the criteria pursuant to section 10 paragraph 5 *leg.cit.* are met, is to be performed by the District Chief Electoral Officer under the monitoring of the Assistant Electoral Officers. It is not contrary to this provision to perform a "pre-sorting" when the absentee ballots are recorded, but

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this requires that the absentee ballots not to be included are available to the district electoral authority for a (double) check (cf. item III.2.4.7.). This requirement is only met when these absentee ballots are available at the meeting of the district electoral authority, allowing every member of the district electoral authority to easily carry out an examination as to whether the decision to exclude the absentee ballots from the ascertainment of the result was justified. As this requirement was not met at the meeting of the district electoral authority on Monday, 23 May 2016, the determination of the district result is unlawful.

This unlawfulness concerned a total of 112 absentee ballots discarded as void on the basis of "evident grounds for nullity". 491

2.6. The challenging party, with reference to the case law of the Constitutional Court, states that the infringements of the law in connection with the votes cast by postal ballot had an influence on the election result. 492

In its statement of defence, the Federal Electoral Authority objects that "there are no indications of any kind of manipulation whatsoever" and "it would take a substantial amount of imagination and logistical effort – even if the absentee ballot envelope was opened by an official in violation of the law (in the absence of the members of the electoral authority) – to intend to alter the voting behaviour". 493

In its written observations and in the course of the oral hearing, the interested party also stated that "due to the circumstance that the Constitutional Court has so far always been able to decide in cases of electoral challenges following an exclusively written procedure on the basis of the electoral files – without taking evidence itself – [...] the Constitutional Court [has developed] the established practice of allowing an electoral challenge if an infringement could have had an influence on the election result, without any evidence for actual manipulation having to be furnished". If, however, the Constitutional Court bases its decision on the taking of evidence and on interviews, a different standard has to be applied. In such case, it is argued, it must be clarified whether the election result was actually manipulated. Therefore, the Constitutional Court has to examine whether there is any indication of manipulation, in particular with regard to absentee ballots. Moreover, when clarifying whether an infringement was or could have been of influence on the election result, it is not sufficient to only 494

consider the "merely hypothetical (and, according to general experience of life, totally unrealistic) shift of all votes cast by postal ballot for Alexander Van der Bellen in the disputed districts to Norbert Hofer". In fact, – based on general experience of life alone – it is in contradiction to any statistical probability to hypothetically allocate all postal votes affected by an infringement in an electoral district to one of two candidates standing for run-off election, in the case at hand Norbert Hofer; purely speculative hypothetical eventualities must be left out of consideration. Furthermore, given the total number of invalid votes cast by postal ballot it must, according to the interested party, be ruled out from the outset that tampering by "invalidating" postal votes could have had an influence on the election result. After all, even when assuming the unlawfulness of all votes cast by postal ballot in an electoral district, the sum total of votes cast by postal ballot was, in all disputed electoral districts, below the "relevance threshold" resulting from the difference in the number of votes for Alexander Van der Bellen and for Norbert Hofer in each electoral district. In addition to that, it is argued, it is possible for the Constitutional Court to examine whether the ballot papers included in the election result in the disputed electoral districts are official ballot papers or counterfeits or non-official duplicates, so that a review of the ballot papers received has to be performed.

2.6.1. According to the established case law of the Constitutional Court, an electoral challenge is not to be allowed just because the alleged unlawfulness of the election procedure is proven; it must also have been of influence on the election result (Article 141 paragraph 1, third sentence, of the Constitution in conjunction with section 70 paragraph 1, first sentence *VfGG*). In this connection, the Constitutional Court has repeatedly held that this (second) criterion was already met if the unlawfulness could have been of influence on the election result (cf., for instance, *VfSlg. 11.738/1988, 19.278/2010, 19.345/2011, 19.734/2013; VfGH 18/06/2015, W I 1/2015; 13/06/2016, W I 22/2015*).

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2.6.2. According to the established case law of the Constitutional Court, this criterion is to be deemed met as soon as any provision of the electoral rules which intends to preclude the possibility of manipulation and abuse in election procedures was violated, without any evidence of a specific incident of manipulation – which actually changed the outcome of the election – being required.

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2.6.2.1. As early as in its ruling *VfSlg. 888/1972* – handed down with regard to

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substantially the same legal provisions (albeit on ordinary-law level) – regarding a case in which the Constitutional Court was no longer able to reliably review the election result of an electoral ward because the election file had been unlawfully opened, the Constitutional Court proceeded on the assumption that it was not required to furnish proof that the infringements taken as proven by the Court had actually influenced the election result in such a way that it could be determined exactly how many votes too many or too few had been allocated to a party; if such an interpretation were applied, repeals would be possible in extremely few cases only. Therefore, the Constitutional Court arrives at the following result:

"Thus, it must suffice that the proven unlawfulness could have been of influence on the election result (cf. No. 256, 327, 391 and 447 of the compendium of the Constitutional Court rulings). Ultimately, it is, however, at the discretion of the Constitutional Court to assess if this is the case. The very strict standard applied by the Constitutional Court in the case at hand was chosen in the interest of lawful elections which, in a democratic republic, where all relevant government bodies are appointed by election, constitute one of the foundations of the state."

The Constitutional Court has adhered to this case law, including in its most recent rulings (cf., most recently, *VfGH 13/06/2016, W I 22/2015*). As early as in *VfSlg. 1904/1950*, it emphasised that this point of view was not only the relevant standard for the definition of the right to vote and the right to stand for election and for the submission of election proposals, but, in particular, also for the formal design of the voting and ascertainment procedure as well as "to at least the same extent for the evaluation of the validity of the ballot papers cast" (see also *VfSlg. 2157/1951*). In its ruling *VfSlg. 3047/1956*, the Constitutional Court annulled an election as of the beginning of the voting procedure, because the election files had not been sufficiently sealed and it was consequently not possible to "rule out any doubt as to the integrity of the election files and ballot papers".

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In *VfSlg. 5861/1968*, the Constitutional Court held that it was not relevant whether the challenging party itself could be held responsible for the infringements invoked in its challenge. In *VfSlg. 11.167/1986*, the Constitutional Court even considered the unlawful setting up of electoral authorities to be an infringement that made it impossible to guarantee the lawful conduct of elections and therefore could have an influence on the election result and required a repeat election. In *VfSlg. 11.740/1988*, the Constitutional Court assumed that the unlawful, unauthorised presence of persons at a polling station

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was enough to potentially have an influence on the election result.

In numerous other cases, including most recent ones, the Constitutional Court has annulled elections on grounds of such infringements without it being of relevance whether any abuse was proven, or even if any abuse was probable; and it was in no way required that the infringement resulted in an actual distortion of the election result of such dimension that it had an influence on the outcome of the election (cf., for instance, *VfSlg. 11.020/1986, 11.740/1988, 14.556/1996, 14.847/1997, 15.375/1998, 16.035/2000, 17.418/2004, 19.246/2010, 19.278/2010; VfGH 23/11/2015, W I 3/2015, and 23/11/2015, W I 4/2015*).

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The electoral challenge at hand and the arguments submitted by the parties to the proceedings are no reason to depart from this case law. It is based on the basic idea that only in very few cases it will be possible for an individual to prove a specific incident of abuse in the form of a violation of legal provisions governing election procedures in an individual case. The purpose of the statutory provisions governing the election procedure is to rule out the possibility of abuse from the outset. The electoral authorities play a central role in this context: their collegiate organisation, including Assistant Electoral Officers who are entitled to vote and who are nominated by the political parties concerned by the elections (in the case of federal elections, parties that are represented in the National Council), facilitates mutual control which is to ensure that the electoral principles are observed and no illegal influence on, or shift in, the election result takes place (cf., in this matter, the explanations under item III.2.4.5.).

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For that reason, the legal provisions reserve, in particular, the ascertainment processes and other measures to be taken during the election procedure, in the course of which a change or influence of the election result through direct manipulation of the election documents – including the ballot papers – is possible, to these collegiate electoral authorities. In strictly limited exceptional cases these measures may only be performed by the Chief Electoral Officer or his/her deputies, regardless of the fact that they, being civil servants or other public administration staff members, are obliged to act in accordance with the law at all times anyway.

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Ultimately, the case law cited is based on the consideration that democratic elections limit the political power of the highest office-holders of the state, who

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– as experience and occurrences in the history of other countries without a functioning democracy have shown – could be tempted, using the tools of power available to them, to manipulate the election results. Even in a stable democracy, compliance with the electoral provisions ensures the citizens' trust in the lawfulness of elections and thus – as already stated in ruling *VfSlg. 888/1927* – in one of the fundamental bases of the state.

2.6.2.2. Section 14a of the *BPräsWG* governs how the electoral authority is to proceed when counting the votes cast by postal ballot and, thus, directly ensures the observance of the electoral principles and the prevention of manipulation and abuse. Therefore, the ascertained violations of this provision and of the provisions connected to it, including, without limitation, section 18 paragraph 1 *NRWO*, are infringements that could have been of influence on the election result within the meaning of Article 141 of the Constitution. No proof of whether manipulations did actually occur is required.

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In such case – contrary to the view taken by the interested party – it does not make any difference how the Constitutional Court has taken evidence, in particular whether or not an oral hearing was held. The procedure of taking evidence, in connection with the alleged infringements, serves the purpose of ascertaining whether the alleged infringements of the electoral provisions intended to rule out the possibility of manipulation and abuse occurred.

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The Constitutional Court explicitly states that none of the witnesses interviewed at the public oral hearing perceived any signs of actual manipulation.

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According to the case law of the Constitutional Court presented above and the underlying considerations, the probability of manipulation or abuse, based on general experience of life, must not be used as the critical criterion, as the challenging party demands in its line of argumentation; furthermore, the explanation that the result of the counting of the votes cast by postal ballot in those districts in which infringements were identified statistically did not differ from that in other electoral districts, ultimately implies that large-scale manipulation was unlikely.

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2.6.3. With respect to ruling *VfSlg. 11.738/1988*, which the interested party referred to in this connection at the public oral hearing, it has to be stated that it deals with different facts, namely "purely speculative and hypothetical"

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considerations on the outcome of the elections in case a campaigning group had not participated in the election for reasons of not having been admitted. In contrast, according to the case law of the Constitutional Court on the evaluation of the possible consequences of violations of provisions intending to prevent manipulation and abuse during the evaluation of votes – given the fact that voter behaviour is bound to remain unknown – the, at least theoretical, shift of all votes concerned by the infringements identified is to be used as the critical criterion (cf., for instance, *VfSlg. 14.556/1996, 19.278/2010*). Therefore, not only individual possible incidents of manipulation, which are potentially "more likely", such as the "invalidation" of votes, but rather all theoretically possible forms of manipulation and abuse have to be taken into account; because – as explained above – the legal provisions intended to safeguard the electoral principles are also to serve as protection against manipulation and abuse by the state itself as the organiser of the elections. For this reason, in cases like the one at hand, it is also necessary to evaluate the different types of infringements identified in the individual electoral districts and their possible consequences as a whole, meaning that the votes cast by postal ballot and concerned by the infringements have to be added up for the purpose of assessing the possible influence on the election result (cf., in this respect, e.g. *VfSlg. 14.847/1997*).

Pursuant to Article 60 paragraph 2 of the Constitution, the candidate who receives more than half of all valid votes is elected Federal President. Based on the election result presented under item I.3., the difference in votes between the candidates Alexander Van der Bellen and Norbert Hofer is 30,863 votes. This election result (also) represents the sum total of the results of the individual electoral districts, so that the votes of those electoral districts in which the counting was made in breach of the law have to be added up as well. If one sums up the votes concerned by the infringements identified – which theoretically could have been attributable either to Norbert Hofer or to Alexander Van der Bellen – from the electoral districts Innsbruck-Land, Südoststeiermark, Villach, Villach-Land, Schwaz, Wien- Umgebung, Hermagor, Wolfsberg, Freistadt, Graz-Umgebung and Leibnitz, it becomes clear that this sum total already exceeds the difference of 30,863 votes because infringements occurred with reference to more than 77,769 votes, and that, given the fact that the number of 77,769 votes exceeds 30,863 by far, there is no need to dwell on the question of how many votes were actually concerned by the infringements in the electoral districts Bregenz, Kufstein and Reutte (see item III.2.5.14., 15. and 20.).

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Electoral district	Absentee ballots included	Valid votes	Invalid votes	Votes for Norbert Hofer	Votes for Alexander Van der Bellen	Votes affected by infringements
Innsbruck-Land	13,814	13,549	265	5,208	8,341	13,814
Südoststeiermark	7,598	7,394	204	4,201	3,193	7,598
Villach	3,498	3,443	55	1,305	2,138	3,498
Land	4,332	4,213	119	1,955	2,258	4,332
Schwaz	4,957	4,854	103	2,217	2,637	4,957
Wien-Umgebung	10,142	9,876	266	3,757	6,119	10,142
Hermagor	1,627	1,576	51	686	890	1,627
Wolfsberg	2,921	2,832	89	1,457	1,375	2,921
Freistadt	6,185	5,938	247	2,312	3,626	6,185
Graz-Umgebung	15,901	15,499	402	7,596	7,903	15,901
Leibnitz	6,794	6,616	178	3,785	2,831	6,794
Sum total	77,769	75,790	1,979	34,479	41,311	77,769

In concrete terms, the Constitutional Court bases this calculation on the following considerations: If the total votes cast for Norbert Hofer (i.e. 2,220,654) and Alexander Van der Bellen (i.e. 2,251,517) were adjusted for those valid votes which were allocated to these candidates in the electoral districts concerned by infringements and included in this calculation, and if then the sum total of the votes concerned by the ascertained infringements (these also include the votes qualified as invalid) were allocated exclusively to Norbert Hofer (even though only theoretically), then the latter would have received 53,738 votes more than Alexander Van der Bellen. This means that the infringements could have influenced the outcome of the election.

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2.7. Regarding the pleadings in connection with the principle of free elections:

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2.7.1. Regarding the applicability of Article 3 of Protocol No. 1 to the European Convention on Human Rights – ECHR

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2.7.1.1. According to Article 3 of Protocol No. 1, the contracting states undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. It follows from the reference to "legislature" that only elections to bodies with legislative powers are within the scope of protection of this fundamental right (*Frowein/Peukert, Europäische Menschenrechtskonvention*³, 2009, 681 et seq.).

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2.7.1.2. In principle, elections of heads of state are not covered by Article 3 of

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Protocol No. 1 (*Grabenwarter/Pabel, Europäische Menschenrechtskonvention*⁶, 2016, section 23 point 109). The European Court of Human Rights expressly held that the election of the President of Lithuania was not covered by the guarantee of Article 3 of Protocol No. 1 (ECtHR 06/01/2011 [GK], in the case of *Paksas*, Appl. 34.932/04 [Z 72], Newsletter Human Rights NLMR 2011, 8).

2.7.1.3. The same has to apply to the election of the Federal President of the Republic of Austria: Even though the Federal President is involved in the legislative procedure by authenticating the constitutional enactment of federal laws (Article 47 paragraph 1 of the Constitution), this does not make him/her part of the legislature within the meaning of Article 3 of Protocol No. 1. 515

2.7.1.4. Thus, Article 3 of Protocol No. 1 does not apply to the election of the Federal President. 516

2.7.2. Regarding the publication of advance information: 517

2.7.2.1. The challenging party claims that the principle of free elections was violated, in particular through the passing on of advance information to "selected media representatives" (in particular to APA), but also, for instance, to *ARGE Wahlen*, by the electoral authorities contrary to the requirement of official secrecy pursuant to Article 20 paragraph 3 of the Constitution. In addition, the publication of individual election results by the municipalities – in social media or on the municipal websites – before 5:00 p.m. was unlawful. The publication of filled in ballot papers, of election results and other expressions of opinions by voters in social media, it is argued, influenced the voting behaviour and, consequently, also affected the principle of free elections. In the opinion of the challenging party, there is no need to disclose any information regarding the outcome of the elections before the voting is over and in the time period between the close of the voting and the presentation of the final result. The disclosure of information on actual voting behaviour before the polling stations have closed is not permitted, as it influences the voting behaviour of those who have not yet gone to the polls. The practice of "passing on information to selected media representatives 'only' with a not-to-be-disclosed-before note" is not provided for by law, it is argued, and results in information being spread to an extent "that can no longer be tolerated and is without doubt of significance for the outcome of the election". 518

2.7.2.2. In its statement of defence, the Federal Electoral Authority argues that Austrian legislation does not provide for "any rules on or sanctions against the [premature] publication of data on election outcomes", even though the announcement of official results, for instance by a municipality, is "undesirable in terms of democratic policy".

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For a long time now, it has been the Federal Electoral Authority's practice on the occasion of every election – with reference to the 2016 election of the Federal President by resolution dated 23 March 2016 – to resolve that "information on the results be passed on to the media by the Federal Ministry of the Interior from around 1:00 p.m., provided that the responsible media representatives have previously assured the Federal Minister of the Interior, by means of a written media statement, that they will not publish any data before 5:00 p.m.". Moreover, APA imposes a penalty if data published with a not-to-be-disclosed-before note are passed on. This approach chosen by the Federal Electoral Authority is intended to prevent that the media, through different measures, obtain data "from a potentially less reliable source" (e.g. election witnesses who according to section 61 paragraph 2 *NRWO* are not subject to any obligations of confidentiality). Even though the Federal Electoral Authority does not support the "posting" of results in social media, this is "*de facto* unpreventable". The advance "posting" could only be effectively curbed by setting a uniform closing time for all polling stations in Austria, which would inevitably result in a reduction in the number of local electoral authorities.

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The interested party states that the publication of election results by the Federal Electoral Authority is not prohibited by law. The publication of individual results by APA, individual online media or private individuals is not part of the election procedure. Actions taken by private companies and individual citizens cannot be blamed on the electoral authorities and therefore cannot form the basis for an electoral challenge.

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2.7.2.3. Articles 26, 95 and Article 117 paragraph 2 of the Constitution are based on the principle of "purity", to be understood in the sense of "freedom" of elections (to the National Council, to the provincial parliaments and to the municipal councils) (cf. *VfSlg.* 13.839/1994, 14.371/1995; see also *VfSlg.* 4527/1963, 17.418/2004, 19.107/2010). Article 60 of the Constitution, since Federal Law Gazette *BGBI. I* 27/2007, also expressly stipulates the principle of free suffrage for the election of the Federal President.

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2.7.2.4. The "freedom to form and exercise political will" and the requirement of "purity of elections", the result of which is to reflect the true will of the electorate, correspond to this principle (cf. *VfSlg.* 2037/1950, 13.839/1994, 19.772/2013, 19.820/2013). As held by the Constitutional Court in its established case law on the freedom of campaign advertising, the voter must neither legally nor factually be restricted in his/her freedom to vote. (cf. *VfSlg.* 13.839/1994, 14.371/1995, 17.418/2004, 19.107/2010; *VfGH* 25/09/2015, *W I* 5/2015; cf. also *VfSlg.* 3000/1956, 4527/1963).

2.7.2.5. It is of no relevance whether influence on the voters is exercised by government bodies within the scope of public or private administration. If, due to the actions of government bodies, the limits defined in order to protect the freedom of elections are violated, this is to be taken up – within the scope of the pleadings made in the statement of challenge – by the Constitutional Court in proceedings pursuant to Article 141 of the Constitution (cf. *VfSlg.* 3000/1956, 13.839/1994; *VfGH* 24/02/2016, *W I* 11/2015 etc.).

2.7.2.6. Therefore, it first has to be stated clearly that the principle of free elections is intended to protect the voters from any state influence, without unreasonably restricting the freedom of campaign advertising, which is inherent in this principle in a manner defeating its intended purpose (cf. *VfSlg.* 3000/1956, 17.418/2004; *VfGH* 25/09/2015, *W I* 5/2015). Contrary to the allegations made in the statement of challenge, it is not the aim of this principle to prevent purely private exertion of influence on the election decision of individuals or large numbers of persons (cf. already *VfSlg.* 47/1921).

2.7.2.7. On the basis of the content of the file and the taking of evidence, the Constitutional Court has established the following facts of legal relevance to the application:

Together with the statement of challenge, the challenging party submitted several APA releases marked not to be disclosed before 22 May 2016, 5:00 p.m., which prove and sufficiently substantiate that, through social media, information on the election result was made known to a large group of persons entitled to vote. According to these press releases, the election victory of Norbert Hofer was "pretty certain" and a "turn-around" of the result was unlikely. Moreover, they contain relatively detailed information on the counting progress made and the partial results of individual municipalities. In a press release by *Wirtschaftsblatt*

(1:06 p.m.), the final results of some municipalities in Lower Austria and Burgenland are mentioned, indicating the exact number of votes cast.

2.7.2.8. In its statement of defence and at the oral hearing, the Federal Electoral Authority confirmed that – following the signing of a written assurance not to publish any information before 5:00 p.m. by the approx. 20 "recipients" (primarily media and research institutes) – results (referred to as "raw data") were passed on to these "recipients" from around 1:00 p.m. According to the media observation carried out by the Federal Ministry of the Interior on the election day, "the requirements of the Federal Ministry of the Interior were strictly complied with and all premature publications identified were made by mass media or social networks such as Twitter and Facebook which did not have access to the data of the Federal Ministry of the Interior". However, it is argued, it cannot be ruled out completely that the information published early by third parties was based on the "raw data" passed on to the recipients.

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2.7.2.9. As already established by the Constitutional Court, the mere release of information to persons entitled to vote by government bodies (cf. *VfSlg. 14.371/1995, 19.107/2010*) is permitted, and so is responding to criticism by means of a correction or reply (cf. *VfSlg. 3000/1956, 17.418/2004*; see also *VfSlg. 19.107/2010*; cf., in addition, *VfSlg. 19.772/2013*). The scope of the state's activities must at no time amount to "disinformation by the state" that would have an actual effect on the voting behaviour (cf. *VfSlg. 13.839/1994*). It is precisely the fact that, in the case of elections to general representative bodies and the election of the Federal President, the citizens entitled to vote have to choose between several parties or candidates standing for election, that requires a special degree of equidistance on the part of the government bodies vis-à-vis the campaigning parties (cf. *VfSlg. 3000/1956, 17.418/2004*; cf., regarding the direct election of the mayor, *VfGH 25/09/2015, W I 5/2015*; cf., in contrast, regarding referenda, *VfSlg. 13.839/1994*). These considerations may also be applied to the run-off election of the Federal President.

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2.7.2.10. In light of the above, the Constitutional Court takes the view that the publishing of information on the (overall) results prior to the close of elections (referred to as "raw data") and, in particular, the passing on of such data to approx. 20 selected recipients (primarily media and research institutes), a practice which was admitted to by the Federal Electoral Authority in its statement of defence and at the oral hearing, and recently explicitly approved of

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by resolution dated 23 March 2016, and is thus attributable to the Federal Electoral Authority, contravenes the principle of free elections. Despite the unconditional duty of official secrecy of the members of the electoral authority (cf. *VfSlg. 11.740/1988*), it cannot be ruled out that the systematic passing on of such advance information by the electoral authorities to certain "recipients" and the ensuing forwarding to third parties, which cannot be controlled by the authorities, may have an influence on the voting behaviour and consequently on the outcome of the election; this holds true even more so with today's communication technology facilitating the immediate and extensive dissemination of such information across the entire federal territory. This is not altered by the fact that, for instance, the election projections published might not only be based on the "raw data" transmitted by the Federal Electoral Authority, but also on data obtained from other sources, especially because – as was also stated by the representative of the Federal Electoral Authority at the oral hearing – it cannot be ruled out that the data published by third parties – at least in part – are based on the (partial) election results transmitted by the Federal Electoral Authority.

2.7.2.11. With a view to the nature of the proven unlawfulness, it has to be assumed that – given the close outcome of the election and the provable Austrian-wide dissemination of the election results published in advance – it could have had an influence on the election result (cf. *VfSlg. 3000/1956, 8270/1978, 17.418/2004; VfGH 25/09/2015, W I 5/2015; to the contrary VfSlg. 47/1921, 8694/1979*).

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2.7.2.12. The statement that the transmission of advance information by the electoral authorities during the opening hours of the polling stations contravenes the principle of free elections is made in light of the fact that there are currently no other effective rules or measures to prevent the publication of (partial) election results prior to the close of the elections. Within the scope of discretion granted to it, the legislator has several possibilities to guarantee that information on the results in individual municipalities is not passed on to substantial parts of the population while the polling stations are still open (cf. a uniform closing time for polling stations, which already exists in several countries, the enactment of "information bans" or of a "ban on premature counting"; cf. the proposals made in the annex to the report by the Parliamentary Enquiry Committee, *1004 BlgNR 21. GP*), and that these voters, if they have not gone to the polls yet, do not base their election behaviour on the results disclosed and/or the projections made on

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the basis of such data.

2.7.3. The challenging party furthermore refers to the requirement of objectivity under broadcasting law that applies to media coverage of elections and regards the violation of the requirement of neutrality by the public service media's coverage as an unlawfulness of the election procedure. The complaints of the challenging party in its - insufficiently substantiated – references to the "election coverage" of the ORF, the alleged lack of objectivity of individual journalists and moderators when asking questions in debates (verbal and subjective "attacks") as well as of certain print media, are not found to constitute an (undue) influence on the election campaign to be taken up in the electoral challenge proceedings to Article 141 of the Constitution (cf. *VfSlg. 13.839/1994* [in particular items 2.2.3.6. and 2.2.4.2.2.]; *VfGH 24/02/2016, W I 11/2015* etc.); no allegations were made regarding any actions taken by government bodies – which, in contrast, would be of relevance for the lawfulness of the election procedure (cf. already *VfSlg. 10.948/1986* with additional references) – that were incompatible with the requirement of equidistance from the candidates to be derived from the principle of free elections (cf. *VfSlg. 17.418/2004*) (cf. *VfSlg. 17.589/2005*).

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2.7.4. The pleadings regarding the prohibition of adverts, commercials or other promotion in other media are not substantiated; it is therefore not necessary to elaborate on the general allegations of discrimination by certain media (cf., regarding the ORF, e.g. *VfSlg. 10.948/1986, 11.572/1987, 13.839/1994, 17.589/2005*; cf., regarding *Welser Privatfernsehen, VfGH 24/02/2016, W I 11/2015* etc.).

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2.7.5. It is furthermore stated that the persons entitled to vote were exposed to considerable psychological pressure owing to the publication of ballot papers already filled in. Voters, it is argued, decided against Norbert Hofer so as not having to fear any social disadvantage. This resulted in factual limitations of the electoral principles due to the pressure exercised by private individuals, so that the true will of the electorate was not reflected. Freedom of speech, it is argued, ends where this is necessary in order to protect material interests of the state.

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The voluntary publication of their personal voting behaviour by private individuals, in particular in social media, does not – as already explained under item III.2.7.2.6. – constitute a violation of the principle of free elections.

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2.8. Given the facts of the case and the applicable law, it is unnecessary to respond to the other errors in implementation alleged in the statement of challenge, even if they relate to the electoral districts commented on in detail under item III.2.5. or if they were admitted to in the statement of defence. In the electoral district Baden, for instance, "120 blue ballot paper envelopes instead of the beige ballot paper envelopes provided for by law" were issued together with the absentee ballots. Faced with this fact, the district electoral authority apparently decided to include 78 absentee ballots with blue ballot paper envelopes and, in addition, also three absentee ballots with white ballot paper envelopes in the ascertainment of the result (cf. the minutes of the district electoral authority of 23 May 2016, in particular the decision to include these absentee ballots; see also item I.5.4.). Therefore, 81 absentee ballots which should have been discarded were erroneously included. 537

2.9. Regarding the scope of the repeal: 538

2.9.1. The challenging party claims that the entire election procedure of the run-off election is to be repealed because infringements of influence on the overall election result have occurred. The interested party objects that, if at all, only a few district electoral authorities and exclusively the ascertainment of the result of the votes cast by postal ballot are concerned and that therefore, should the challenged run-off election be repealed, this should be done within such scope only. As all voters voting by postal ballot in the electoral districts concerned on 22 May 2016 can be fully and completely identified on the basis of the data recorded pursuant to section 10 paragraph 6 *BPräsWG*, it is, according to the interested party, possible to order a separate rerun of the postal vote for each electoral district. 539

2.9.2. Pursuant to section 70 paragraph 1, second sentence, *VfGG*, in its decision allowing the challenge, the Constitutional Court is to repeal either the complete election procedure or parts thereof to be specifically defined. 540

2.9.2.1. A limitation of the repeal to those voters whose absentee ballots were received by the district electoral authority by way of postal vote and whose data was recorded by the electoral authority pursuant to section 10 paragraph 6 *BPräsWG* is not an option: 541

Pursuant to section 3 paragraph 2 *BPräsWG*, votes are cast, notwithstanding the 542

rules on voting by absentee ballot, before the local electoral authority. Local electoral authorities include the municipal electoral authorities and the ward electoral authorities. Section 3 paragraph 3 *leg.cit.* provides that every political district, in the provinces of Lower Austria and Vorarlberg every administrative district, and every chartered town constitutes an electoral district; in the city of Vienna, every municipal district constitutes an electoral district. Within an electoral district, the election results of the local elections are added up. The electoral districts of the provincial constituencies are combined, in line with Annex 1 of the *NRWO*, in one or more of the regional constituencies set up pursuant to section 3 *NRWO*. This means that the law does not provide for a separate constituency or electoral district for postal voters. Limiting the repeal to those voters whose data were recorded pursuant to section 10 paragraph 6 *BPräsWG*, as suggested by the interested party, is therefore not possible because they are not recorded in any separate electoral ward within the meaning of the statutory provisions. Moreover, they do not form a group of voters that can be determined and clearly defined in advance; rather, the group of persons casting their vote by postal ballot only becomes evident after the absentee ballots have been received and the data appearing under the flaps has been recorded pursuant to section 10 paragraph 6 *leg.cit.*

Pursuant to section 36 *NRWO* in conjunction with section 5 *BPräsWG*, only persons whose names appear in the final electoral roll may participate in the election of the Federal President. Pursuant to section 23 *NRWO* in conjunction with section 5 *BPräsWG*, the persons entitled to vote in the election of the Federal President are to be entered in an electoral roll prepared by the municipalities within their sphere of competence assigned to them at the federal level. Pursuant to section 23 paragraph 4 *NRWO* in conjunction with section 5 *BPräsWG*, in municipalities not divided into wards, the electoral rolls are to be prepared in alphabetical order of the names of the persons entitled to vote in elections and referenda, and in municipalities divided into wards they are to be broken down by electoral ward and, where necessary, by place, street and house number. Pursuant to section 24 paragraph 1 *NRWO* in conjunction with section 5 paragraph 2 *BPräsWG*, every person entitled to vote is to be entered in the electoral roll of the place (the municipality, the electoral ward) where he/she has his/her main place of residence on the qualifying date. The correction and complaint procedure is, according to section 5 paragraph 2 *BPräsWG*, governed by sections 28 et seq. *NRWO*. These rules guarantee the verifiability of the electoral rolls which eventually comprise the group of persons entitled to vote in

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a municipality or an electoral ward. There is no comparable possibility of verification of the data recorded, according to section 10 paragraph 6 *BPräsWG*, by the district electoral authority upon receipt of the absentee ballots used for postal voting – including those from other electoral districts (section 14 paragraph 3 and section 14a paragraph 1, first sentence, *leg.cit.*) (cf. *VfGH 13/06/2016, W I 22/2015*).

2.9.2.2. The provisions of the *BPräsWG* and the applicable provisions of the *NRWO* allocate the electorate – on the basis of the electoral rolls of the local electoral authorities – to the superordinate electoral authorities in line with their hierarchical structure based on their geographical sphere of competence in such a manner that they each form an electoral entity within which, when ascertaining the result, it is not differentiated whether a vote was cast at the ballot box or by way of postal voting. Limiting the repeal of the election to an entire electoral district, in which infringements happened during the evaluation of the votes cast by postal ballot, or to a part of the respective superordinate electoral authorities, is not possible for the following reasons:

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Pursuant to section 10 paragraph 2 *BPräsWG*, voters who have been issued with absentee ballots according to section 5a *leg.cit.* can exercise their right to vote by way of sending the sealed absentee ballot to the competent district electoral authority (postal voting) or at every polling station. This means that voters who had been issued with an absentee ballot in the municipalities of the electoral districts concerned could not only cast their vote before the electoral authority competent on the basis of their initial entry in the electoral roll or before another electoral authority within the respective electoral district, but also at a polling station outside their electoral district. Contrary to the provisions of the *NRWO*, according to section 14 paragraph 3 *BPräsWG*, the votes cast by absentee ballot are not counted in the regional constituency of the municipality in whose electoral roll the person entitled to vote was entered, but rather within the sphere of competence of the electoral authority in which it was cast (cf. section 14a paragraph 1, first sentence, *BPräsWG*). Ultimately, this leads to a mixing of the votes cast by voters from the respective electoral district and by voters from other electoral districts, which does not allow for a limited repeal of the election within the sphere of competence of individual electoral authorities, as the latter cannot be clearly defined.

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A limitation of the repeal to the voters entered in the electoral rolls of the

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electoral districts in which infringements were identified would, on the one hand, mean that voters who had already cast their vote in the challenged run-off election in another electoral district by way of postal ballot would be given the chance to exercise their right to vote again in a repeat election ("double voting"). On the other hand, if the repeal was limited in that way, those voters who have been entered in the electoral rolls of other electoral districts and who have voted by absentee ballot in an electoral district concerned by any of the established infringements, would not have a vote in the repeat election and would therefore be excluded from the right to vote.

Against this background, it does not suffice to take into account the electoral rolls of the respective electoral districts, but rather it would be required, on the one hand, to deduct those voters from the electoral rolls who voted by presenting their absentee ballot at a polling station in a different electoral district – in order to prevent "double voting" – and, on the other hand, to add those voters who had been issued with an absentee ballot in another electoral district and who cast their vote in an electoral district concerned by the repeal – in order to avoid their exclusion from the right to vote.

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If this method were chosen – even though according to section 70 paragraph 1, second sentence, *NRWO* in conjunction with section 10 paragraph 1 *BPräsWG* the names of voters voting by absentee ballot are to be entered at the end of the electoral roll, numbered consecutively, and recorded in the minutes of the election procedure – it would not be possible to determine and define in advance the group of voters entitled to participate in a rerun. Summarising the persons entitled to vote in the repeat election in such way would not allow for verification to the same extent as is guaranteed by a complete electoral roll (cf. item III.2.9.2.1.); for that reason, the consequences of a repeal in the case at hand cannot be compared to *VfSlg. 14.847/1997* and *VfGH 18/06/2015, W I 1/2015*.

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2.9.2.3. Moreover, there are no relevant statutory provisions for a repeat election; in particular, there are no provisions on how and by which authority absentee ballots could be issued to those voters who voted in an electoral district concerned by the repeal but whose absentee ballot was issued in another electoral district.

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2.9.2.4. In addition, it is also necessary to repeal the run-off election of the

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Federal President in its entirety because the illegal forwarding of advance information by the Federal Electoral Authority (cf. item III.2.7.) concerned the entire federal territory.

2.10. Thus, the application filed by the challenging party that the Constitutional Court "repeal and declare null and void the entire election procedure concerning the election of the Federal President announced by Federal Law Gazette *BGBI II 28/2016* as of the order to hold a run-off election announced by the Federal Electoral Authority on 2 May 2016" is to be allowed. The second round of elections for the Federal President of 22 May 2016 is repealed as of the date of announcement by the Federal Electoral Authority on 2 May 2016, inasmuch as this announcement ordered the holding of a run-off election on 22 May 2016.

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Even though sections 18 and 19 of the *BPräsWG* contain provisions on ordering a run-off election, these do not apply to repeat elections: Section 18 *leg.cit.* provides that "if no candidate wins the majority of votes within the meaning of section 17, first sentence, [...] a run-off election between those candidates for whom most of the valid votes were cast in the first round of the election (short-listed) is to be held on the forth Sunday following the first ballot and, if the first ballot was not held on a Sunday, on the fifth Sunday following the first ballot". Section 19 paragraph 1 *leg.cit.* stipulates that "[t]he Federal Electoral Authority [...] shall order such run-off election with a shortlist of two candidates no later than on the eighth day after the election day by announcement on the official notice board of the Federal Ministry of the Interior and on the internet". As, however, both dates have already passed, these provisions cannot be applied in the case of a repeat election. Nor does section 20 paragraph 3 *leg.cit.* apply in this case. In the absence of specific statutory provisions for a repeat election, section 1 paragraph 1, second sentence, *leg.cit.* is to be applied; the Federal Government, in agreement with the Main Committee of the National Council, is to issue a regulation setting the election day for the rerun of the run-off election of the Federal President for a Sunday or a public holiday.

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IV. Result

1. In the electoral districts Innsbruck-Land, Südoststeiermark, Villach, Villach-Land, Schwaz, Wien-Umgebung, Hermagor, Wolfsberg, Freistadt, Bregenz, Kufstein, Graz-Umgebung, Leibnitz and Reutte the votes cast by postal ballot were evaluated in an unlawful manner.

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2. The passing on of (partial) election results prior to the closing of the elections to selected recipients by the Federal Electoral Authority is in violation of the principle of free elections. 554
3. The infringements mentioned under items 1. and 2. have influenced the election result. 555
4. The challenge is therefore allowed. The second round of elections for the Federal President of 22 May 2016 is repealed as of the date of announcement by the Federal Electoral Authority on 2 May 2016, inasmuch as this announcement ordered the holding of a run-off election on 22 May 2016. 556
5. In accordance with section 1 paragraph 1, second sentence, *BPräsWG*, the Federal Government, in agreement with the Main Committee of the National Council, is to issue a regulation setting the election day for the rerun of the run-off election of the Federal President for a Sunday or a public holiday. 557

Vienna, 1 July 2016
The President: HOLZINGER

Recording clerk:
VERDINO