Supplementary opinion by Supreme Court Justice Nele Siitam in case No 5-25-3

I agree with the operative part of the Chamber judgment of 11 April 2025 and with most of the reasoning. However, I consider it important to note the following.

The Chamber states that the Riigikogu Election Act does not provide for the possibility to declare a meeting of the National Electoral Committee (NEC) closed and it is not unequivocally clear whether the legislator's failure to regulate this option was a conscious choice or not (para. 25 of the judgment). Indeed, § 12(3) of the Riigikogu Election Act lays down that a meeting of the NEC is public. I am of the opinion that by establishing the principle of the public nature of NEC meetings, the Riigikogu Election Act does not preclude declaring a meeting closed if a countervailing interest outweighs the principle of public access.

I agree with the Chamber that the requirement of the public nature of NEC meetings fulfils a compelling purpose in a democratic system of government, ensuring that organisation of elections is transparent and the election process is legitimate (para. 25 of the judgment). However, in certain situations, transparency may conflict with another constitutional value in such a way that the public accessibility must partially or completely give way. For such situations, almost all procedural laws allow the possibility to declare a matter (documents, meeting, hearing, etc) partially or fully closed, i.e. restrict the possibility for persons not involved in proceedings (in some cases even for participants in proceedings) to examine the case materials and/or participate in procedural steps. This is the case in any type of court proceedings or other proceedings (see, e.g., §§ 79 et seq. of the Code of Administrative Court Procedure; §§ 37 et seq. of the Code of Civil Procedure; § 11 et seq. of the Code of Criminal Procedure; § 7 of the Administrative Procedure Act).

Where no relevant procedural norm exists in the Constitutional Review Court Procedure Act, the Constitutional Review Chamber has, in its consistent case-law, applied the Administrative Procedure Act by analogy in adjudicating election complaints (see e.g., Supreme Court Constitutional Review Chamber judgment 5-24-13/3, para. 6 and the case-law cited therein). This is despite the fact that the Constitutional Review Court Procedure Act is a constitutional law (§ 104 clause 14 of the Constitution), while the Administrative Procedure Act is a simple law.

Section 7(1) of the Administrative Procedure Act, in the chapter on the general provisions under the sub-chapter laying down the principles of administrative procedure (see the title of the sub-chapter) establishes the principle of the public nature of administrative proceedings. However, subsection (3) of the section obliges an administrative authority to keep confidential, inter alia, information intended for internal use of an agency. Section 45 of the Administrative Procedure Act in the chapter focusing on the conduct of administrative proceedings does not stipulate the extent to which the hearing of a matter must be public. At the same time, it is clear that, in deciding on this, the principles set out in the general provisions of the Administrative Procedure Act will apply. Thus, the administrative authority must decide on this on a case-by-case basis, seeking to ensure the public nature of administrative proceedings on the one hand, while protecting relevant secrets, including personal data, on the other hand. An appropriate balance must be found between them.

In my opinion, the above also applies to National Electoral Committee meetings. The rule should be the public nature of a NEC meeting, but in the case of a more compelling countervailing interest, measures must be taken to protect appropriate secrecy and, by way of

exception, access by external persons both to the materials discussed at the meeting affected by the restriction as well as to the meeting itself should be restricted. The exception to the public nature must be interpreted narrowly and the restriction should be applied to the minimum extent possible. There may be situations where an agenda item of a meeting with access restrictions can also be discussed publicly but so as not to jeopardise disclosure of the relevant secret. However, situations may also arise where this is not possible, in which case the meeting must still be declared closed to the relevant extent.

I do not consider it to be the right solution where the actual substantive discussion within the frame of an agenda item of the NEC meeting takes place outside the official meeting format and at the official meeting the decision (e.g. to take note, or the like) is simply recorded (so to speak, rubber-stamped) merely because the Riigikogu Election Act does not expressly lay down the possibility of declaring a NEC meeting closed. In my opinion, this amounts to a mere semblance of public accessibility and undermines the authority of the National Electoral Committee. Substantive NEC activities and deliberations should take place in official formats. This is particularly true in cases where information subject to access restrictions is provided by an external person, agency or body. Considering the authoritative nature of the composition of the NEC (§ 10(2) Riigikogu Election Act), there is no reason to fear that the NEC would abuse its right to restrict public access to its meetings.

(signed digitally)