Decision 25/2021 (VIII. 11.) AB

on finding a conflict with the Fundamental Law by section 47 (3) (a) and (b), section 47 (4) and section 48 (2) (e) incorporated in section 1 of the Act adopted on the Parliament's session of 15 June 2021 on the amendment of the Act LXXVIII of 1993 on certain rules related to the Rent and the Sale of Flats and Premises and the Act CXCVI of 2011 on National Assets, and laying down a constitutional requirement

In the prior review of compliance with the Fundamental Law of an Act of Parliament adopted but not yet promulgated, the plenary session of the Constitutional Court – with concurring reasonings by *Justices dr. Ágnes Czine, dr. Ildikó Hörcherné dr. Marosi, dr. Balázs Schanda and dr. Péter Szalay* as well as with dissenting opinions by *Justices dr. Egon Dienes-Oehm, dr. Tünde Handó, dr. Imre Juhász, dr. Zoltán Márki, dr. Béla Pokol and dr. Mária Szívós* – adopted the following

decision:

1. The Constitutional Court establishes that section 47 (3) *a)* and *b)*, section 47 (4) and section 48 (2) *e)* incorporated in section 1 of the Act adopted on the Parliament's session of 15 June 2021 on the amendment of the Act LXXVIII of 1993 on certain rules related to the Rent and the Sale of Flats and Premises and the Act CXCVI of 2011 on National Assets are contrary to the Fundamental Law.

2. The Constitutional Court lays down as a constitutional requirement stemming from Article P (1) of the Fundamental Law that in the course of the joint application of section 1 and section 2 of the Act adopted on the Parliament's session of 15 June 2021 on the amendment of the Act LXXVIII of 1993 on certain rules related to the Rent and the Sale of Flats and Premises and the Act CXCVI of 2011 on National Assets as well as section 55 (4) of the Act LXXVIII of 1993 on certain rules related to the Rent and the Sale of Flats and Premises, the addressee of the heritage protection authority's scope of power should not subordinate, in its decision-making, the interests of heritage protection to other considerations and thus should give consent to the alienation of property by taking into account the aspects of heritage protection as a condition for exercising the purchase option.

3. The Constitutional Court rejects the motion in all other respect.

The Constitutional Court orders the publication of its decision in the Hungarian Official Gazette.

Reasoning

I

[1] 1 The President of the Republic, in accordance with his powers under Articles 6 (4) and 9 (3) (i) of the Fundamental Law, requested the Constitutional Court to establish that section 1, section 2 and section 3 of the Act adopted on the Parliament's session of 15 June 2021 on the amendment of the Act LXXVIII of 1993 on certain rules related to the Rent and the Sale of Flats and Premises and the Act CXCVI of 2011 on National Assets (hereinafter: "Act") are contrary to the Fundamental Law.

[2] 2. In his motion, the President of the Republic stated that the express purpose of the Act was to enable the tenants of flats in national heritage buildings – excluded from the application of the purchase option granted for state and municipal flats from 31 March 1994 to 30 November 1995, in the context of the privatisation of exclusive state property that had existed prior to the regime change – to acquire ownership of the flats they rented. To this end, section 1 of the Act establishes a purchase option for the flats in State-owned and municipally-owned national heritage buildings located on the World Heritage Site and in its protection zone.

[3] In his view, this legislative objective alone, and in particular the introduction of a purchase option established for this purpose, is not compatible with the Fundamental Law. During the privatisation process, which took place and was completed in the 1990s, the law-maker did not allow the purchase of flats in national heritage buildings because of the special protection and maintenance tasks that they require. The petitioner recalled that the Constitutional Court had also examined the constitutionality of this issue in its decision 64/1993 (XII. 22.) AB (hereinafter: C.C.Dec).

[4] He stressed that, compared to the Constitution, Article P (1) of the Fundamental Law sets even stricter requirements for cultural heritage. The built environment is a part of cultural heritage, including specifically the buildings listed under national heritage protection. One of the guarantees of protection and preservation is non-derogation, a requirement that permeates the entire legal system. He stressed that, according to the Constitutional Court's case-law followed from early times, the level of protection once achieved must not be reduced and that effective preventive safeguards are needed to maintain this level.

[5] The President of the Republic has stated that in the present case the purchase option applies to flats located on the World Heritage Site and in its protection zone. Hungary promulgated the Convention Concerning the Protection of the World Cultural and Natural Heritage adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization in Paris on 16 November 1972 (hereinafter referred to as the World Heritage Convention) by the Decree-Law No 21 of 1985, and the provisions necessary for its effective implementation are summarised in the Act LXXVII of 2011 on World Heritage (hereinafter referred to as the World Heritage Act). On the basis of the public interest in the protection and conservation-based value-safeguarding use of the World Heritage Site and the territory

expected to gain protection, the Act establishes specific rules and requirements for the use and development of these outstanding universal values.

[6] In order to assess the legal institution of purchase option, the petitioner also noted that the provisions in force of the Act LXXVIII of 1993 on certain rules related to the Rent and the Sale of Flats and Premises (hereinafter: Act on Flats) do not currently exclude the disposal of state- and municipality-owned flats However, according to section 55 (4) of the Act on Flats, an flat or premises located in a national heritage building may be alienated only with the consent of the national heritage authority, taking into account the specific statutory provisions of the law.

[7] In his view, the encumbrance of the entire scope of State- and municipality-owned properties on the World Heritage Site and its protection zone, which form part of the cultural heritage, and thus the unconditional transfer of these properties to private ownership, does not satisfy the requirements stemming from Article P (1) of the Fundamental Law, in view of the special need for protection of the World Heritage Site and the monuments, and due to the absence of the safeguards and guarantees resulting from the requirement of non-derogation as well as the lack of individual assessment, and is therefore contrary to the Fundamental Law.

[8] 3 In relation to the right to property under Article XIII of the Fundamental Law, the petitioner stated that although the institution of purchase option is not a deprivation of property, but it is burdening, limiting the right to property. Purchase option is usually established by the owner by way of a contract. Exceptionally, purchase option may also be created by virtue of the law, but this is a very serious encumbrance on the property of the obliged party, because the change of ownership depends on the unilateral will of the right-holder. Since there is no possibility of judicial review against the decision of the right-holder on the transfer the property comparable to the one applicable in the case of expropriation, the Constitutional Court ruled in the CCDec – and later confirmed in several decisions – that the lack of judicial way to protect property can be replaced by the review of the Constitutional Court on the statutory creation of purchase option.

[9] The petition emphasised that in the CCDec the Constitutional Court did not find the purchase option established on state- and municipality-owned flats to be unconstitutional in the given social situation, since the marketisation of the housing system, the privatisation of flats was part of the economic regime-change. However, after more than twenty-five years, making a reference to the public interest of, and the need to establish purchase option is, in the view of the President of the Republic, unfounded, in particular since the passage of time presumably involves different right-holders and flats originally excluded from privatisation anyway.

[10] The petitioner stressed that a further aspect of assessing the constitutionality of the restriction on property is the proportionality of the restriction. He recalled that in the CCDec, the Constitutional Court had stated, with regard to proportionality, that the purchase option could only be constitutional if the guarantee of value was respected, i.e. the compensation in this case must be full compensation required for classical expropriation. The regulation

included in section 1 of the Act as the new section 47 (3) to (5) of the Act on Flats is, in the view of the petitioner, manifestly not in line with the concept of full compensation resulting from the value guarantee.

[11] According to the opinion of the President of the Republic, the taking into account of the longer term of tenancy as a criterion for determining the amount of the purchase price, or more precisely, for reducing it, is in itself questionable, since the tenants who paid a significantly lower rent than the market price for a longer period of time did not incur any costs related to the maintenance and renovation of the flats, as these were borne by the owner managing public funds. If indeed, these costs were paid by the tenant, he or she was reimbursed or could set it off as rent reduction. In its view, therefore, there is no reasonable justification for a reduction of the purchase price in line with the duration of the lease. Similarly, an exchange of ownership cannot justify a discount of 65% of the market value.

[12] The petitioner stated that the new section 46 (2) of the Act on Flats, included in section 1 of the Act, extends the purchase option to flats located in buildings under ongoing conversion, modernisation or renovation after their completion, i.e. an flat in a converted, modernised or renovated building may be transferred to the tenant even at a purchase price of 14.25% of market value, which in turn results in a strikingly high disproportion in value.

[13] Referring to the decision of the Constitutional Court of AB 20/2014 (VII.3.), he also pointed out that the unilateral right of the right-holder of the purchase option to schedule the payment in instalments under the new section 48 (2) (e) of the Act on Flats, incorporated in section 1 of the Act, violates the principle of immediacy and the guarantee of value due to the delay in compensation.

[14] In the petitioner’s opinion, the question of the proportionality of the restriction is similarly raised by the new section 45 (1) of the Act on Flats, incorporated in section 1 of the Act, from the aspect that in the case of leases of duration shorter than five years, but existing on 31 December 2020 it leaves the purchase option open to tenants until the end of the five years period, i.e. until 31 December 2025 at the latest. Given the length and uncertainty of the duration, he also considers this provision to be disproportionate.

[15] 4 Based on the arguments set out above, the President of the Republic requested the Constitutional Court to declare that the provisions amending the Act on Flats, incorporated in section 1 and, by virtue of their close connection, in sections 2 and 3 of the Act, violate Article P (1) and Article XIII (1) and (2) of the Fundamental Law.

[16] 5 In response to the Constitutional Court's request, the Minister of Justice sent information explaining her position on the petition.

[17] 1 The provisions of the Fundamental Law referred to by the petition:

“Article P (1) Natural resources, in particular arable land, forests and the reserves of water; biodiversity, in particular native plant and animal species; and cultural artefacts, shall form the common heritage of the nation, it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations.”

“Article XIII (1) Everyone shall have the right to property and inheritance. Property shall entail social responsibility.

(2) Property may only be expropriated exceptionally, in the public interest and in those cases and ways provided for by an Act, subject to full, unconditional and immediate compensation.”

[18] 2. The challenged provisions of the Act:

“Section 1 The following sections 45 to 48 shall be added to Part Three of the Act LXXVIII of 1993 on certain rules related to the Rent and the Sale of Flats and Premises (hereinafter: Act on Flats):

»Section 45 (1) If, after the entry into force of this provision, the duration of the indefinite tenancy in force on 31 December 2020 for a municipality-owned or State-owned flat on a World Heritage Site and its protection zone reaches five years, a purchase option will be granted to the private individuals referred to in paragraph (2), provided that on 30 November 1995 the flat was

(a) classified as a flat located in a national heritage building;

(b) subject to a prohibition on alienation and encumbrance and the prohibition is no longer in force at the date of entry into force of this provision; or

(c) located in a building designated for conversion, modernisation, renovation or demolition by a decision of the municipality prior to 1 January 1994, or the building was located in an area designated for rehabilitation under the municipality's zoning plan, and the designation no longer exists at the time this provision enters into force.

(2) The purchase option under paragraph (1) is granted to

(a) the private individual tenant;

(b) the private individual co-tenants jointly and in equal shares;

(c) private individual co-tenants jointly in proportion to their exclusive occupancy of the residential spaces;

(d) in place of the persons listed in points (a) to (c) and subject to their consent, their direct relatives and adopted children.

(3) In the case of a co-tenancy, the jointly used residential space shall be taken into account in the proportion referred to in paragraph 2 (c).

(4) In determining the duration of the tenancy's existence under paragraph (1), the following shall be counted together:

(a) in the case of an offer of a replacement flat pursuant to section 23/A (2) and section 26, if the tenant is the same, the duration of the indefinite tenancy of the flat concerned and the previous flat

(b) the duration of the tenancy of the persons who are deemed to continue the tenancy within the meaning of section 32 and their predecessors in title.

(5) In the case of a co-tenancy already existing at the time of the entry into force of this provision, for the purposes of the duration referred to in paragraph (1), with regard to each tenant, the duration of tenancy of the tenant who first established the tenancy and is entitled to exercise the purchase option shall be the applicable duration of tenancy.

(6) In the event of the exercise by the right-holder of the purchase option regulated in this section, the right of pre-emption to which the municipality and the State are entitled by law may not be exercised.«

»Section 46 (1) No purchase option is applicable

(a) to municipal flats located in a building designated for demolition by a decision of the municipality in force on 1 January 2021;

(b) to flats subject to a right of appointing the tenant or repeatedly selecting the tenant;

(c) to flats classified by law as a service or company flat or which is leased under a contract until a condition is fulfilled;

(d) to flats subject to a prohibition of alienation and encumbrance;

(e) to flats in retired people's houses and small flat houses;

(f) to art studio flats, living quarters in houses with rented rooms.

(2) With respect to a municipality flat located in a building undergoing conversion, modernisation or renovation based on a decision of the municipality taken before 1 January 2021, the purchase option may be exercised after 30 June 2022, or after the completion of the conversion, modernisation or renovation, if it takes place at an earlier date.

(3) The purchase option may not be exercised by the right-holder if he or she has been in arrears with rent exceeding three months' rent to the lessor in the period of one year preceding the entry into force of this provision.

(4) The purchase option may not be exercised by the holder as long as he/she has outstanding public debts to be recovered by way of taxes or duties, debts to be paid to the Social Security Fund or debts to the State or municipality as the owner which have not been paid and are overdue.

(5) The right-holder of purchase option may not alienate the flat subject to the purchase option within four years from the date of the decision registering his or her ownership title. Contracts concluded in violation of the prohibition are null and void, and application for registration based on such contract shall be rejected pursuant to section 51 of the Act CXLI of 1997 on Real Estate Registry (hereinafter: Real Estate Registry Act).

(6) Simultaneously with the registration of the ownership title of the right-holder of purchase option, the real estate authority shall register a prohibition of alienation of the flat in the land register for a period of four years.«

»Section 47 (1) The market value of the flat subject to a purchase option under this Act, as determined pursuant to section 52, shall be notified to the right-holder of purchase option within six months of submitting his or her relevant application. The State or municipality owner is liable for any damage resulting from the delay in notification. The right-holder of the purchase option may request the determination of the market value from the State or municipality owner within one year after the entry into force of this provision or, if the duration of the tenancy on which the purchase option is based is less than five years at the time of entry into force of this provision, within one year after the expiry of the five-year period, and may not exercise the purchase option if the application is submitted after this deadline.

(2) If the owner municipality fails to communicate the market value pursuant to paragraph (1) to the right-holder of the purchase option within six months, the State shall, at the request of the right-holder of the purchase option, ensure that the market value is determined and notified to the right-holder, in which case the owner municipality shall reimburse the State for the costs incurred by the State in this respect.

(3) The purchase price of the flat subject to the purchase option is

(a) 80% of the market value, if the duration of the tenancy underlying the purchase option is between 5 years and 15 years at the time of communicating the unilateral declaration;

(b) 50% of the market value, if the duration of the tenancy underlying the purchase option is between 15 years and 25 years at the time of communicating the unilateral declaration;

(c) 15% of the market value, if the duration of the tenancy underlying the purchase option is 25 years or more at the time of communicating the unilateral declaration.

(4) By way of derogation from points (a) and (b) of paragraph (3), the purchase price of the flat subject to the purchase option shall be 35% of the market value in the case where the tenancy underlying the purchase option was established by exchange pursuant to section 29 and the exchange involved an exchange of ownership for tenancy.

(5) In case of payment of the purchase price in a single lump sum, the right-holder shall be entitled to an additional discount of 5 percent of the purchase price.

(6) Paragraphs (4) and (5) of section 45 shall apply when determining the duration of the

tenancy under paragraph (3).«

»Section 48 (1) The purchase option may be exercised by the right-holder pursuant to section 45 by unilateral declaration addressed to the owner within six months from the date of the communication of the market value. The exercise of the right shall be reported to the competent capital-city or county government office (hereafter referred to as the "government office").

(2) The declaration aimed at exercising the purchase option shall include

(a) the data pursuant to section 32 (1) (a) and (b) of the Real Estate Registry Act and the declaration pursuant to section 32 (1) (g) of the Real Estate Registry Act;

(b) the exact designation of the flat concerned pursuant to section 32 (1) (c) of the Real Estate Registry Act (name of the municipality, topographical lot number) and the ownership share concerned by the registration;

(c) the market value communicated pursuant to section 47;

(d) the purchase price determined pursuant to section 47;

(e) the schedule of payment of the purchase price, specifying that payment may be made in equal monthly instalments over a period of not more than twenty-five years and that at least ten per cent of the purchase price shall be paid in one lump sum within eight days of the date of the notice of exercise of the purchase option;

(f) an unconditional and irrevocable declaration to exercise the purchase option, to acquire ownership;

(g) the legal title of the change of right.

(3) In the event of payment in instalments, the municipality or the State shall be entitled to a statutory mortgage on the flat up to the amount of the purchase price to secure payment of the purchase price until the full purchase price has been paid. Within 30 days from the date of payment in full of the purchase price, the municipality or the State shall issue a declaration of unconditional and irrevocable consent to the cancellation of the mortgage, in a form and with annexes suitable for registration in the land register.

(4) The declaration under paragraph (2) shall be accompanied by the documents from which the lawfulness of the exercise of the purchase option can be verified.

(5) The State or the municipality owning the property shall submit the declaration and its annexes pursuant to paragraph (2) to the government office for consent within 15 days of receipt. If the owner considers that any of the conditions for exercising the purchase option set out in this Act are not fulfilled, that the first instalment of the purchase price pursuant to paragraph (2) (e) has not been paid in full or that the declaration for exercising the purchase option is incorrect or incomplete, it shall send its reasoned written comments to the government office together with the declaration pursuant to paragraph (2) and its annexes.

(6) The government office shall examine the declaration, any comments and the attached documents and, if necessary, shall invite the declarant or the owner to submit a supplementary declaration, setting an appropriate deadline.

(7) If, in the opinion of the government office, the fulfilment of any of the conditions for the exercise of the purchase option set out in this Act is not proven even after the request for the submission of missing documents, the first instalment of the purchase price pursuant to paragraph (2) (e) has not been paid even in the course of the submission of missing documents, or the declaration for the exercise of the purchase option is still incorrect or incomplete after the request for the submission of missing documents, the government office shall refuse to grant consent.

(8) If the government office grants the consent, it shall issue a decision ordering the registration of the ownership title of the right-holder of the purchase option, the registration of the mortgage pursuant to paragraph (3) and the noting of the prohibition of alienation pursuant to section 46 (6), and shall request the real estate authority for the registration.

(9) Based on the request of the government office containing the decision pursuant to paragraph (8), the real estate authority shall decide on the registration of the ownership title of the right-holder of the purchase option, the registration of the mortgage pursuant to paragraph (3) and the noting of the prohibition of alienation pursuant to section 46 (6).«"

"Section 2 Section 50 of the Act on Flats shall be replaced by the following provision:

»Section 50 (1) The flat of a tenant who is a pensioner or a recipient of a regular social benefit in the form of a pension as defined by law and who does not exercise his or her right of purchase option may be alienated to a third person until the end of his or her contract only with the written consent of the tenant.

(2) The flat of a tenant who does not exercise the purchase option provided for in this Act – provided that the tenancy of the flat concerned has not been terminated earlier – may be alienated for the rest of his or her life only with the written consent of the tenant.

(3) The provisions of paragraph (2) shall not apply to flats owned by the State to which section 81 (1) applies.«"

"Section 3 Section 51 (1) of the Act on Flats shall be replaced by the following provision:

»(1) Before the conclusion of the first contract of sale and purchase or the expiry of the deadline for the communication of the first market value provided for in section 47 (1), the building shall be converted into a condominium, with the exception of single-flat buildings or buildings consisting of one room (group of rooms). The State or the municipality as the owner is liable for any damage resulting from the delay in establishing the condominium.«"

[19] 1 According to the petition, the provisions of the Act are contrary to the principle of non-derogation enshrined in Article P (1) of the Fundamental Law – also applicable to the protection of the built environment –, because it does not require the consent of the State (exercised through administrative bodies) for the sale (exercise of the purchase option) of the flats found in the real estates located in the relevant World Heritage Site and also enjoying protection as national heritage.

[20] In assessing the above, the Constitutional Court first provided an overview of the rules on the sale of real estates listed as national heritage in the World Heritage area, then it interpreted the principle of non-derogation in relation to cultural heritage, and finally it analysed whether the constitutional requirement of non-derogation is fulfilled in relation to the contested provisions.

[21] The provisions of the Act challenged by the petition concern Part Three on the special provisions applicable to the sale of state- and municipality-owned flats, by establishing purchase option for a specific scope of persons in the case of flats located in a World Heritage Site and its protected zone, and by providing for formal (procedural) rules for its enforcement.

[22] Some of the State-owned and municipality-owned flats (may) enjoy a differentiated protection, i.e. cultural heritage protection, on the basis of their age-specificity, i.e. the historical value that they may represent. It should be noted that in Hungary, State-owned heritage buildings were transferred to the ownership of municipalities on the basis of the Act XXXIII of 1991 on the Transfer of Certain State-owned Assets to Municipalities (hereinafter: Asset Transfer Act) (sections 3 to 6)

[23] 1.1 In the domestic legal system, the general rules on the sale of real estates are set out in the contract law part of the Act V of 2013 on the Civil Code (hereinafter: Civil Code). In the case of a real estate with a special characteristic, the law-maker may lay down a different or additional provision to this general rule. In this area, a special regulation applicable to national heritage is justified by the distinction according to certain (historical, aesthetic) value of the real estate, i.e. if the real estate subject of the sale falls under one of the protection categories of the Act LXIV of 2001 on the Protection of Cultural Heritage (hereinafter: Cultural Heritage Act).

[24] According to the regulatory concept of the Cultural Heritage Act, it provides for integrated protection applicable in three scopes: national heritage, archaeological heritage and movable cultural property. The rules of the Cultural Heritage Act apply to the cultural heritage protected by the Hungarian State, but the so-called world heritage protection is different from that. While the Cultural Heritage Act is designed to protect values of significance to the Hungarian nation, the World Heritage Act is designed to protect the universal values of humanity. The latter was created to implement the World Heritage Convention, with the main objective of mainstreaming World Heritage considerations into the development and implementation of

cultural heritage policy.

[25] Hungary has created a special legal regulation related to the protection and management of World Heritage Sites, thus in addition to the World Heritage Convention and its promulgation, the country has created its own national legislation with the creation of the World Heritage Act.

[26] The scope of the World Heritage Act covers both World Heritage Sites that have already been recognised and those that are candidates for world heritage status, for the latter the procedure for recognition is ongoing.

[27] With the Act, the law-maker created a transition between the categories enjoying national and universal protection, since according to section 1 (2) of the World Heritage Act, only a monument or a registered archaeological site that has been previously declared protected by a ministerial decision or resolution or by a ministerial decree under the Act on the Protection of Cultural Heritage and thus enjoying cultural heritage protection, or a protected natural site of national importance protected by virtue of the Act on the Protection of Nature or declared protected by virtue of the authorisation granted under the Act on the Protection of Nature, and the designated protection zone of a protected natural site of national importance, may be declared a World Heritage Site or a candidate World Heritage Site.

[28] This means that World Heritage protection can be attached as a secondary feature to cultural or natural properties protected under the conditions laid down in the national legal system.

[29] The concept of cultural heritage as used in the World Heritage Act can be defined as movable property and real estate the basic criterion of which is that it has historical, artistic, ethical or aesthetic value. At the same time, these criteria distinguish cultural heritage assets from other real estate in the world and from movable objects of daily use.

[30] The subject-matter of the present case, i.e. that State-owned and municipality-owned flats may be classified as protected national heritage values or historic heritage within the definition of cultural heritage, and that the UNESCO World Heritage Committee may recognise their value and significance for humanity beyond national-level protection by awarding the World Heritage title, which two categories overlap under the provisions of the World Heritage Act.

[31] The protection of built heritage features may vary according to their geographical extent and the forum that has ordered their protection. Depending on the nature of the protected object, protection may extend to individual buildings, but also to groups of buildings and their natural surroundings. The system of forums for ordering protection can be, on the one hand, the state ordering national protection, within which two further subcategories can be distinguished: registered national heritage values and national heritage under protection, with the fact of protection being based on an individual decision of the authorities in the former case and on the decree of the minister in the latter case. And if the protected object is of outstanding value to humanity, the protection is of World Heritage-level, i.e. the level of

international protection.

[32] 1.2. After an overview of the basic concepts, the Constitutional Court examined the characteristics of the regulatory concept of these subjects from the point of view of the specific rules applicable to their transfer.

[33] First it should be noted that the rules of the Act on Cultural Heritage on protected national heritage values also apply to World Heritage Sites, based on the above explanation of the definitions.

[34] In principle, compliance with the set of criteria for demonstrating the outstanding importance of the protected property is the basis for State protection, and it also justifies the possibility of selling national heritage properties (flats) in a way that is different from the general rule.

[35] In addition to containing the general rules on the protection of cultural heritage, the Act on Cultural Heritage also lays down special provisions for individual elements, thus dedicating a separate chapter to objects of national heritage. Among the conservation of national heritage that can be placed within the category of the values of national heritage, it contains provisions on (1) the maintenance of the protected values, (2) their dignified use and restoration, and (3) their utilisation and transfer of title.

[36] With regard to properties under national heritage protection, the regulation concerns the definition of special rules for the related legal transactions, including their sale. Under the regulatory regime, the state can guarantee the maintenance of the value of the protected property after the sale by two means.

[37] One of such instruments is the purchase option granted to the State and/or the municipalities. Pursuant to section 32 (d) of the Act on Cultural Heritage, the ministerial decree ordering national heritage protection must contain a provision on the purchase option, and the detailed rules on the purchase option applicable to national heritage are laid down in section 86 of the Act on Cultural Heritage. The Act on Cultural Heritage is supplemented by the provision on World Heritage Sites in section 6/A of the Act on World Heritage, as a background rule. It establishes a purchase option for the Hungarian State in respect of property located on a World Heritage Site, but this does not apply to buildings of housing nature (in particular: flats, dwellings) and land under the Act on Agricultural and Forestry Land Trade (section 6/A of the Act on Flats).

[38] The other State guarantee to preserve the protected value in the event of a change of ownership is the legal instrument of "consent" to the transaction.

[39] Pursuant to section 44 of the Act on Cultural Heritage, ministerial consent is required (1) for any legal transaction on the basis of which the ownership title of a national heritage forming part of national assets is transferred or otherwise removed from the scope of national assets or a shared ownership is established on it, (2) any legal transaction that encumbers, provides

as security a national heritage forming part of national assets, except for the right of use, right of way or easement established in the public interest, as provided by law, (3) the appointment or change of the trustee of a national heritage forming part of national assets, and finally (4) any legal transaction for the utilisation of a national heritage forming part of national assets in the absence of a trustee.

[40] This consent is a condition for the validity of the legal transaction according to section 44 (2) of the Act on Cultural Heritage, which may only be refused if the legal transaction endangers the value on which the protection is based or does not serve the establishment of a uniform ownership structure or uniform utilisation of the protected value. This declaration of consent is a compulsory annex to the land register application relating to legal transactions.

[41] In addition to the provisions of the Act on Cultural Heritage, section 55 of the Act on Flats makes the alienation of State- or municipality-owned flats and premises for rent subject to the authority's consent (consent to alienation). This regulatory scope includes flats or premises located in national heritage buildings under section 55 (4) of the Act on Flats: they may be disposed of with the consent of the national heritage authority, subject to the provisions of specific legislation. In this way, the Act on Flats requires a special consent for State- or municipality-owned flats under national heritage protection, as compared to the legal institution of consent regulated in the Act on Cultural Heritage

[42] On the basis of the provisions of the Act on Cultural Heritage, the Act on World Heritage and the Act on Flats examined in this section, it can be concluded that the provision of the Act on establishing purchase option for rented flats located on a World Heritage Site or on a candidate site applies jointly, in view of the dual nature of the protection.

[43] This is because according to section 91/A item 15 of the Act on Flats, a flat located in national heritage building is: a flat located in a building declared as national heritage under specific legislation. The term "national heritage" is defined in section 7 (15) of the Act on Cultural Heritage: it is a registered value of national heritage which has been declared protected by a ministerial decision or resolution or by ministerial decree under this Act.

[44] Any transfer/disposal of ownership (not only sale) related to the flats located in properties enjoying protection as World Heritage and at the same time as national heritage shall require the prior consent of the heritage protection authority.

[45] Consent to alienation qualifies as approval under section 6:118 of the Civil Code, in the absence of which the contract shall not become effective and performance of the contract may not be claimed. If it is nevertheless performed, the legal consequences of an invalid contract will apply. Furthermore, in the event of the refusal of providing the declaration required under the law according to section 1:5 (2) of the Civil Code, if this is prejudicial to overriding public interests or private interests that deserve special consideration, the court may substitute the declaration by its judgement, provided that the prejudice to the interests cannot be avoided otherwise.

[46] In the Government Decree No. 68/2018 (IV. 9.) Korm. on the rules for the protection of cultural heritage (hereinafter: Heritage Protection Decree), the legislator designated the Budapest-capital and the county government offices as heritage protection authorities.

[47] 2 According to the petition, the prohibition of derogation deductible from Article P (1) of the Fundamental Law arises because the Act placing the purchase option affects the entire scope of national heritage properties located in the World Heritage Site, while the legislator has disregarded the special nature of the flats concerned, therefore the conservation of their state is not guaranteed by the State in the event of a change of ownership

[48] The Constitutional Court based its assessment of the above on a general interpretation of Article P (1) of the Fundamental Law. In its interpretation, this provision of the Fundamental Law basically contains a State guarantee, a commitment, the fundamental rights side of which in the case of nature conservation is filled with content by Article XXI (1) of the Fundamental Law. Article P (1) of the Fundamental Law is based on the "constitutional formulation of the concept of public trust for environmental and natural values, the essence of which is that the State manages as a kind of trustee for future generations the natural and cultural treasures entrusted to it, and allows present generations to use and exploit these treasures only to the extent that this does not jeopardise the long-term survival of the natural and cultural values as assets to be protected in their own right. In managing and regulating the management of these treasures, the State must take into account the interests of both the present and the future generations. The rule on the preservation of natural and cultural resources for future generations as laid down in the Fundamental Law of Hungary can thus be seen as part of the newly established and consolidated universal customary law, and expresses the commitment of the constitution-setting power to the importance and preservation of environmental, natural and cultural values. […] Accordingly, Article P (1) can be seen as both the guarantee of the fundamental human right enshrined in Article XXI (1), and a *sui generis* obligation providing for the protection of the nation's common heritage, to be generally enforced beyond the scope of Article XXI (1). {Decision 13/2018. (IX. 4.) AB, Reasoning [14]}." {Decision 14/2020. (VII. 6.) AB, Reasoning [22], [34]}

[49] 2.1 The Constitutional Court then reviewed its practice on the principle of non-derogation, and then went on to analyse how this principle is enforced in the context of the purchase option of national heritage that are elements of the built environment.

[50] In its case-law, the Constitutional Court has developed under the scope of the Constitution the principle of non-derogation in the context of the right to a healthy environment. The case-law of the Constitutional Court in the field of environmental protection, which existed before the entry into force of the Fundamental Law, can also be used in the present case as follows: "the arguments, legal principles and constitutional connections based on Article 18 of the Constitution may be used to answer the questions of constitutionality that affect Article XXI (1) of the Fundamental Law" {Decision 3068/2013. (III. 14.) AB, Reasoning [46]; Decision 16/2015. (VI. 5.) AB, Reasoning [90]; Decision 17/2018. (X. 10.) AB, Reasoning [81]}. The Constitutional

Court also pointed out that the Fundamental Law not only preserved the level of protection of the fundamental right to a healthy environment as it contains more elaborate provisions. This way the Fundamental Law developed further the environmental values and attitude {Decision 16/2015. (VI. 5.) AB, Reasoning [91]; most recently reinforced in: Decision 3223/2017. (IX. 25.) AB, Reasoning [26]}.

[51] During the term of the Constitution, in its Decision 28/1994 (V. 20.) AB (hereinafter: CCDec1), the Constitutional Court gave a doctrinal foundation to the interpretation of the state's obligations arising from the right to the environment. According to this, "the right to environmental protection raises the guarantees for the implementation of the State duties in the area of environmental protection to the level of a fundamental right, including the conditions under which the degree of protection already achieved may be restricted. Due to the distinctive features of this right, what the State ensures by the protection of individual rights elsewhere it must ensure in this case by providing legal and organizational guarantees." (ABH 1994, 134, 138) In CCDec1, the Constitutional Court also established that the constitutional right to a healthy environment entails the responsibility of the State to protect the environment and maintain the natural basis of life. In this respect, "the State must therefore provide additional legislative and organisational guarantees to substitute for the function of individual rights" (ABH 1994, 134, 139) The Constitutional Court also stressed that the degree of institutional protection of the right to the environment is not arbitrary. "It follows from both the subject and the dogmatic peculiarities of the right to environmental protection that the State must not reduce the degree of protection of nature as guaranteed under law unless necessary to realise other constitutional rights or values. Even in the latter case, the degree of protection must not be reduced disproportionately to the desired objective." (ABH 1994, 134, 140) It also stated that the enforcement of the right to the environment also compels "the State not to regress from preventive rules of protection to protection ensured by sanctions. Also any action contrary to this requirement must be compelled by unavoidable necessity and it should be proportionate with this necessity." {ABH 1994, 134, 141; summarised in: Decision 16/2015. (VI. 5.) AB, Reasoning [81]}

[52] According to the Constitutional Court, the purpose of the prohibition of derogation is "not to reduce the level of protection once achieved", adding that "it is not enough to tighten prohibitions and sanctions: preventive safeguards are also needed to ensure that damage is as unlikely to occur as if the area were in public ownership and under the management of a nature conservation body" (ABH 1994, 134, 142)

[53] The Constitutional Court's case-law in relation to the Fundamental Law has declared the following in its joint interpretation of the right to a healthy environment and Article P (1).

[54] Article P (1) of the Fundamental Law now lays down the obligation of protecting the environment (extending beyond the provisions of the former Constitution) for the State and for everyone. A substantive standard of absolute character related to the state of the natural resources and thus to the conditions of the environment follows from Article P of the

Fundamental Law and it raises objective requirements concerning the State's activity at all times {Decision 28/2017. (X. 25.) AB, Reasoning [30] to [32]}.

[55] "Although Article P (1) does not provide an exhaustive list of natural values to be protected (see the phrase »in particular«), it does specify what environmental protection as an obligation of the State and the citizens actually means: (1) protecting, (2) maintaining and (3) preserving for the future generations. The obligation of the State has therefore been regulated and emphasised in Article P (1) of the Fundamental Law. The extension of the scope of the obliged parties is a major step forward in the Fundamental Law. Whereas under the Constitution only the State's obligations were emphasised in environmental protection, the Fundamental Law also speaks of the obligations of »everyone«, including civil society and every citizen." {Decision 16/2015. (VI. 5.) AB, Reasoning [92]}

[56] However, while the Constitution only declared the right to a healthy environment, and it had been primarily filled with content by the case-law of the Constitutional Court, after the entry into force of the Fundamental Law, it follows directly from the Fundamental Law, as the will of the lawmakers who adopted the Fundamental Law, that human life as well as its vital conditions should be protected in a way not derogating it in any way, in accordance with the generally accepted principle of no step-back {Decision 28/2017. (X. 25.) AB, Reasoning [28]}. The Constitutional Court now interprets the prohibition of derogation in conjunction with the principles of precaution and prevention: it lays down the requirement, as the content of Article P (1) and Article XXI (1), that "in every case when the regulations on protecting the environment are modified, the precautionary principle and the principle of prevention should be also taken into account by the lawmaker as »the failure to protect the nature and the environment may induce irreversible processes«" {Decision 13/2018. (IX. 4.) AB, Reasoning [20]; Decision 17/2018. (X. 10.) AB, Reasoning [87]}.

[57] The Constitutional Court presented a summary of the constitutional interpretation of the principle of non-derogation in its Decision 4/2019 (III. 7.) AB. It confirmed the interpretation that the prohibition to step back forms the subjective side of a fundamental right (the right to a healthy environment) and that its restrictability can be judged according to Article I (3) of the Fundamental Law (Reasoning [42]). The Constitutional Court thus pointed out that the right to a healthy environment is not an absolute right, it may be restricted in accordance with the fundamental rights' test laid down by the Constitutional Court {Decision 17/2018. (X. 10.) AB, Reasoning [94]}. As interpreted by the Court, "it follows from both the subject and the dogmatic peculiarities of the right to environmental protection that the State may not reduce the degree of protection of nature as guaranteed under the laws, unless it is necessary for the enforcement of other constitutional rights or values. Even in the latter case, the degree of protection must not be reduced disproportionately to the desired objective." {Decision 16/2015. (VI. 5.) AB, Reasoning [80]; Decision 3223/2017. (IX. 25.) AB, Reasoning [27]}

[58] In the case-law of the Constitutional Court, the prohibition of step-back is not automatic, it shall be enforced in accordance with its function, with the application of the fundamental

rights' test {Decision 17/2018. (X. 10.) AB, Reasoning [95]}. According to the test laid down in the Decision 4/2019 (III.7.) AB, it must be examined whether (1) the matters raised in the petition fall within the scope of the right to a healthy environment; (2) any derogation in the level of protection can be established; and if so, (3) the restriction manifesting itself in derogation can be justified in the light of Article I (3) of the Fundamental Law, i.e. whether it is constitutional according to the necessity-proportionality criteria (Reasoning [44]).

[59] 2.2 The Constitutional Court has subsequently extended the right to a healthy environment to the protection of the built environment. In its Decision 27/1995 (V.15.) AB, the Constitutional Court stated that it follows from the right to the environment that "the level of protection of the built environment provided by law cannot be reduced by legally arbitrary decisions of public authorities." (ABH 1995, 129, 134).

[60] According to the case-law of the Constitutional Court, the right to a healthy environment, interpreted synchronously with Article P (1) of the Fundamental Law, also extends to the protection of national heritage, as stated in the Decision 3104/2017 (V.8.) AB (hereinafter: CCDec2): "in the scope of the protection of national heritage, the State thus undertakes an obligation to preserve for future generations the values it wishes to preserve, according to its capacity to bear the burden, sharing – in a constitutional sense – the prohibition of derogation established in the context of the right to a healthy environment." (Reasoning [40])

[61] According to CCDec2, "Article P (1) is a pillar of the institutional safeguards of the fundamental right to a healthy environment, which makes the protection, maintenance and preservation for the future generations of the natural and built environment, the values of the common, natural and cultural heritage of the nation, a general constitutional responsibility of the State and of all, as a duty stemming from the Fundamental Law" (Reasoning [37]).

[62] The requirement of sustainability based on Article P (1) of the Fundamental Law is "the result of constitutional development, which may place fundamental rights and other constitutional values in a new development perspective as new constitutional values" (CCDec2., Reasoning [38])

[63] CCDec2 emphasised the State's obligation under Article P (1) of the Fundamental Law to preserve natural heritage. While the Constitutional Court referred the obligation to protect built environment back to the right to the environment on the basis of the Constitution, this obligation is already contained in Article P (1) of the Fundamental Law in an individual provision. Thus according to CCDec 2, "the constitutional responsibility for the common heritage of the nation is general and universal in the Fundamental Law, but based on the case-law of the Constitutional Court in relation to the right to a healthy environment, the State is entitled and obliged to a kind of primacy within this general responsibility, since the coordinated enforcement of this responsibility through institutional protection guarantees, the creation, correction and enforcement of institutional protection is a direct and primary task of the State. The specific content of the constitutional responsibility for the common heritage of the nation will therefore be shaped and developed by case-law, the practice of the

Constitutional Court and future legal developments, in addition to the institutional guarantees of the fundamental right to a healthy environment and the requirement of legal certainty." (Reasoning [39])

[64] In addition to the guarantees of institutional protection, the Constitutional Court has also declared the requirement of sustainability under Article P (1), within which it also addressed in its Decision 16/2015 (VI.5.) AB the constitutional requirements for the possible changing of the ownership structure of properties falling under the safety net of Article P (1). Referring back to CCDec1, the Constitutional Court confirmed that "the existence of a legal basis for expropriation for nature conservation purposes does not mean that the State cannot fulfil its duty of protection in other ways. [...] In principle, it is also possible to return protected areas from the management of nature conservation bodies to the use of private owners, just as it is possible to leave protected areas and areas planned for protection in private ownership or management by private owners; in all these cases, however, the obligations of users must be tightened in a way that the level and effectiveness of protection is not reduced." (CCDec1, ABH 1994, 134, 142; Decision 16/2015. (VI. 5.) AB, Reasoning [52])

[65] The prohibition of derogation was thus declared by the Constitutional Court at the beginning of its operation, deriving it from the right to the environment. Article P (1) of the Fundamental Law now includes the obligation to protect cultural values in the scope of the State's protection obligations. The principle of the non-derogation of the right to the environment and its guarantees for the protection of institutions have been applied by the Constitutional Court in its case-law to the built elements of the environment which are of special value

[66] The Constitutional Court has expanded the doctrine of the prohibition of derogation in the context of nature protection, deriving it from the right to a healthy environment (cf. point III/2 of the reasoning of the decision, Reasoning [47] et seq.), but the subject of the present case – in line with the material scope of the Act – is the examination of the existence of State guarantees for the protection of national heritage forming part of the built environment, therefore, in enforcing the prohibition of derogation, the Constitutional Court – taking into account the fundamental environmental law doctrine – also addressed which fundamental right declared in the Fundamental Law is linked to the State's obligation of "preservation for future generations". In its case-law, pursuant to Article XXI (1) of the Fundamental Law, the Constitutional Court has given substance to the fundamental rights aspect of the State's obligation to protect the environment under Article P (1) of the Fundamental Law. Furthermore, with regard to the protection of national heritage, the Constitutional Court emphasised that the main purpose of the State's obligation to preserve cultural heritage is to make it accessible to the present and to preserve it for future generations. On this basis, the fundamental rights' mirror image of the above obligation in relation to the elements falling within the concept of cultural heritage can also be described as the "right to culture", the right to education declared in Article XI (1) of the Fundamental Law. While the State is obliged [under Articles P (1) and XI (2) of the Fundamental Law] to develop the necessary set of conditions for the exercise of

cultural rights, citizens are entitled to use them. In other words, when examining whether there has been a step-back in the level of protection of a national heritage, it must be assessed whether the fundamental right to access cultural heritage, as enshrined in Article XI (1) of the Fundamental Law, and the State guarantee under Article P (1) are guaranteed.

[67] The Constitutional Court then examined whether the State's obligation to protect and preserve cultural values, which derives from Article P (1) of the Fundamental Law, is fully fulfilled in the context of the challenged provisions of the Act.

[68] 3 On the basis of the above, the Constitutional Court examined whether the provisions of the Law challenged by the petition constituted a step-back in the level of protection of the national heritage concerned.

[69] 3.1 The Constitutional Court first referred to the scope of the Act, which helps to determine whether the principle of non-derogation should apply in this context.

[70] The elements of cultural heritage are not primarily important for their utility or economic value, but rather for their uniqueness, originality, irreplaceability and, in most cases, artistic value. Based on this concept, the object of cultural heritage is usually a work of art. They qualify as special things regarding the determining of their value. They are special, because they have dual nature: on the one hand, they are public property and, on the other hand, they are usable objects owned by someone. As a consequence, they are characterised by many forms of value other than the so-called market value. The most prominent of these is the so-called incorporal value, which expresses a specific combination of historical, artistic and moral values, since society attaches importance to the goods included in the concept of cultural heritage, expressed by the State through the legal institution of protection. Incorporal value is therefore a form of expression of the public interest, emphasising the character of public property and expressing society's appreciation.

[71] The concept of incorporal value is defined and described in section 7 item 10 of the Act on Cultural Heritage defining national heritage value, by using the phrase "of outstanding importance": national heritage value is any building, historic garden, historic burial place or special area, as well as their remains, and their functionally coherent group or system, which is of national importance in the context of the past of our country and the sense of belonging to the Hungarian nation or other community, together with its historical, artistic, scientific and technical heritage components, accessories and built-in furnishings. In the case of World Heritage Sites, the outstanding value is to be found in the outstanding universal value, which is the value embodied by the World Heritage Site, according to section 2 (1) of the Act. Due to its exceptional and unique nature, it is of outstanding and unique cultural heritage or natural significance also from an international point of view, and its continued preservation and protection is therefore of paramount importance for all humanity, present and future generations. The existence of universal value embodied in World Heritage Sites is recognised and reflected in the institution of protection by the UNESCO World Heritage Committee.

[72] The law-maker has incorporated – in a way almost unique in the world – the category of World Heritage into the Hungarian legal system. This incorporation was not carried by placing it into the system of the Act on Cultural Heritage, but by creating a specific Act to formulate the guarantees that should apply to the management of properties of larger geographical extent, protected for their cultural or natural value. The specificity of World Heritage Sites is that the built and natural elements of the environment are protected at the same time, for example in the case of the cultural landscape category.

[73] The Constitutional Court also evaluated that the provisions of the present Act apply not only to the real properties enjoying national protection, but also to cultural elements that represent universal value.

[74] UNESCO's World Heritage movement aims to facilitate and promote the preservation of the values of the past for the future; its action is particularly relevant when protected cultural or natural assets are threatened by environmental disaster, destruction or deterioration, as it aims to protect not only cultural heritage but also the natural environment. World Heritage Site designation focuses increased attention on the relevant built heritage, landscape and their conservation. The countries that have adopted the World Heritage Convention, in accordance with their obligations under the World Heritage Convention, give priority to the issues of conservation, preservation, research and restoration. These obligations fall primarily on the State Party to the Convention on whose territory the protected element is located. The Convention requires States to do their utmost to make full use of their own resources and, where necessary, to make use of all international assistance and cooperation, in particular financial, artistic, scientific and technical assistance and cooperation that they have access to. In order to ensure the most effective and active protection, conservation and presentation of the natural and cultural heritage on their territory, States should, to the greatest extent possible – by measures which they take in accordance with their own circumstances – pursue the following: (1) develop a general policy that treats natural and cultural heritage in accordance with its importance in the life of the community and integrates the protection of this heritage into the overall planning programmes; (2) set up in their territory – where they do not already exist – one or more organisations for the protection, conservation and presentation of the natural and cultural heritage, with staff and resources to carry out the tasks assigned to them; (3) develop scientific and technical studies and research and operational methods to enable the State to avert threats to the cultural and natural heritage; (4) take the appropriate legal, scientific, technical, administrative and financial measures necessary for the designation, protection, conservation, restoration and rehabilitation of this heritage; (5) promote the establishment and development of national or regional training centres for the protection, conservation and presentation of natural and cultural heritage and encourage research in this field.

[75] The relevant provisions of the Act apply to the purchase option related to the flats located in the World Heritage Site under national heritage protection. Since the requirement of non-derogation in environmental protection based on Article P (1) of the Fundamental Law is a

constitutional principle also applicable to the protection of national heritage, the Constitutional Court has applied the principle of non-derogation to the subject matter of the Act under challenge, in accordance with its previous case-law.

[76] 3.2 In CCDec2, the Constitutional Court linked the principle of non-derogation to the existence of State protection derived from Article P (1) of the Fundamental Law, by stating that: "Once something has been placed under protection, there must be an exceptional reason to exclude it" (CCDec2., Reasoning [40]). In this context, the Constitutional Court in the present case also assessed whether the Act concerns the exercise of the fundamental right derived from Article XI (1) of the Fundamental Law. Since the provisions of the Act under examination do not affect the national heritage protection of the properties in question and do not apply to the change of the level of national heritage protection, they do not affect the provisions on the general protection and sustainable use of national heritage provided for in the Act on Cultural Heritage and the Heritage Protection Decree. Accordingly, the State obligations listed in section 28 of the Act concerning the general (State) tasks of national heritage protection shall continue to apply in the future as well. This way, among other things, the promotion of basic scientific research and education, vocational training and the dissemination of knowledge related to national heritage should be granted.

[77] Furthermore, even after the purchase option has been exercised, the special building regulations resulting from the nature of the building must be complied with, the exercise and supervision of which fall within the competence of the specialised administrative authorities (operating in the field of the protection of national heritage) within the administrative organisation system, since the classification of the building concerned (and not the identity of the owner) is the basis for the activation of the applicable substantive and formal procedures for national heritage protection that exist in the legal system

[78] When introducing the purchase option, the consent of the authority specified in section 55 (4) of the Act on Flats is the appropriate form for the State to verify, through its administrative bodies, whether the beneficiary of the purchase option will preserve the national heritage in the future in accordance with its character. In itself, therefore, a purchase option introduced with respect to flats protected as national heritage does not result in a step-back in the level of protection under Article P (1) of the Fundamental Law {c.p. Decision 16/2015. (VI.5.) AB, Reasoning [52]}.

[79] The Constitutional Court, therefore, rejected the petition.

[80] 3.3 However, in its examination, the Constitutional Court – as in its previous case-law – has always kept in mind the precautionary and preventive principles following from Article P (1) of the Fundamental Law {CCDec1, ABH 1994, 134, 140 to 141; Decision 4/2019. (III. 7.) AB, Reasoning [74]}.

[81] "The Fundamental Law explicitly mentions in Article P (1) the obligation of preserving for the future generations the common heritage of the nation, raises a general expectation

regarding the legislation that in the course of adopting the laws, not only the individual and common needs of the present generations should be weighed, but also securing the living conditions for future generations should be taken into account." {Decision 13/2018. (IX. 4.) AB, Reasoning [14]}

[82] The obligation of the State to protect institutions based on Article P (1) of the Fundamental Law also applies to the utilisation of national heritage. It is a constitutional requirement resulting from obligations under the Fundamental Law as well as an international treaty that, in the case of the sale (utilisation) of national heritage buildings, the State should provide appropriate guarantees to ensure that the relevant building is managed after the change of ownership in accordance with its level of national heritage protection. This is a particularly important guarantee in the case of the flats concerned, most of which are being taken out of State/ municipality ownership for the first time.

[83] When maintaining the level of protection for national heritage, it is a constitutional requirement – especially if international, World Heritage protection is linked to it – that the regulation should not only apply to conservation (preservation) and the bodies controlling and authorising it, but also to other legal transactions outside the realm of public law.

[84] The Act on Cultural Heritage contains an individual chapter on the general protection (maintenance, use) of national heritage, while the Heritage Protection Decree details the material and formal rules necessary to guarantee professional protection, and also refers to the designation of national heritage authorities.

[85] As regards maintenance and use, the Act on Cultural Heritage provides for additional rules compared to the Civil Code. This additional rule is not an addition to the partial rights of ownership, but contains rules on compliance with the obligations arising from ownership. For example, in the case of national heritage, it is not enough to simply comply with the well-known, generally prescribed requirements of intended use. Among the partial rights of ownership, the Act on Cultural Heritage emphasises the right of use, and mentions maintenance obligation as a related obligation. This also indicates that the owners of national heritage face, and may face, more obligations as a result of this right.

[86] In line with the general rules on the maintenance of the built environment, the basic obligation of maintenance falls on the owner of the national heritage. However, it is not always possible to be satisfied with maintaining the existing state, since an essential element of the protection of national heritage is the preservation of their national heritage values. According to section 41 of the Act on Cultural Heritage, the owner or the person exercising the ownership rights is obliged to take care of the maintenance and upkeep of national heritage. Objects of national heritage shall be preserved intact without altering their character. This maintenance and upkeep obligation also extends to the architectural, artistic and decorative elements and their accessories which constitute the special values of the national heritage The requirement under Article P (1) of the Fundamental Law is to seek to guarantee compliance with the statutory obligation of maintenance by enforcing the conditions laid down by law which can

be assessed individually. According to section 42 (1) of the Act, if the identity, residence or domicile of the owner of the national heritage is unknown, the authority shall ensure the preservation or maintenance of the national heritage at the expense of the owner, i.e. the State's obligation to preserve the value of the national heritage also exists in the case of privately owned objects of national heritage.

[87] 3.4 It is therefore an obligation under Article P (1) of the Fundamental Law that the State must incorporate guarantees that contribute to maintaining the level of protection in legal transactions affecting national heritage (concerning their utilisation, including alienation). In the present case, the form of the above is set out in section 55 (4) of the Act of Flats by declaring the legal institution of "consent", the content of which is subject to the constitutional requirement – following from Article P (1) of the Fundamental Law – that, in the enforcement of the purchase option established by the Act under examination, the heritage authority shall examine the aspects of the protection of cultural heritage as a condition exercising the purchase option

[88] According to the constitutional requirement, when making a decision on the exercise of the purchase option related to building or a flat protected as national heritage and World Heritage, the authority should not subordinate the aspects of cultural heritage protection to other aspects, but should examine individually whether the exercise of the purchase option affects the sustainable use of the national heritage while preserving it for future generations.

[89] It is a requirement under Article P (1) of the Fundamental Law that, in applying the rules on the exercise of purchase option regarding national heritage flats, the State will guarantee by the joint application of the Act and section 55 (4) of the Act on Flats that the level and the effectiveness of protection shall not be reduced.

[90] On the basis of the above, the Constitutional Court established the above constitutional requirement stemming from Article P (1) of the Fundamental Law.

IV

[91] 1 In his petition, the President of the Republic also invoked a violation of Article XIII of the Fundamental Law, based on the fact – on the one hand – that the public interest and the necessity of the statutory purchase option burdening the property of the municipality are not justified. On the other hand, he also claimed a violation of Article XIII of the Fundamental Law on the grounds of an injury of the proportionality of the restriction on property, and thus, in substance, of the proportionality of value under Article 38 (3) of the Fundamental Law

[92] 2 In examining these circumstances, the Constitutional Court cannot disregard the historical antecedents, which determine the purpose of the legislation and are also referred to by the law-maker in the reasoning of the Act, and also cannot ignore the fact – due to the

similarity of the subject – that in the CCDec (the applicability of which after 2012 has been confirmed by a number of decisions of the Constitutional Court {Decision 18/2015. (VI. 15.) AB, Reasoning [26]; Decision 25/2015. (VII. 21.) AB, Reasoning [59]; Decision 4/2018. (IV. 27.) AB, Reasoning [34]}) it has dealt with the issue of the constitutionality of the purchase option burdening the real property owned by local governments.

[93] 2.1 In the CCDec, the Constitutional Court stated in a summary way the following: "The transfer of ownership to the municipalities has taken place within the framework of a legislative process closed with the entry into force of the Act on Flats. […]

The process of property acquisition by the municipalities started with the Act LXV of 1990 on Local Governments [hereinafter: "Local Government Act"]. Section 107 (1) of the Local Government Act provided for the scope of State-owned assets that became the property of local governments. For the purposes of item (e) of this paragraph, State-owned flats for rent managed by the councils or the property management agencies of the councils qualified as such property. Of these flats, the ones managed by the councils became the property of the municipality by virtue of the Act (*ex lege*) on the day of its entry into force (30 September 1990), pursuant to section 107 (2) of the Local Government Act.

It can be concluded that the scope of flats and premises owned by local governments is wider than that defined in section 107 (2) of the Local Government Act. In order to transfer additional assets into municipality ownership, it was necessary to enact a specific Act pursuant to section 107 (3) of the Local Government Act. One of these specific Acts is Act XXXIII of 1991 on the Transfer of Certain State-owned Assets to Municipalities (hereinafter: Act on the Transfer of Assets), which provides in section 1 (1) that residential buildings as well as mixed-use and non-residential buildings managed by the property management company founded by the terminated council, including the State-owned flats for rent and other State-owned premises located in such buildings, together with the connected State-owned land – with the exception of the parts of the building managed by another State agency –, are transferred to the ownership of the municipality local government. […]

According to section 2 (7) of the Act on the Transfer of Assets, the rules on the allocation, rent, rental fee and alienation of flats and premises for non-residential purposes transferred into municipality ownership shall be laid down by a specific Act. Pursuant to paragraph (8), the local government may, within the framework of the Act referred to in paragraph (7), issue a decree on the allocation, alienation as well as the rent and the rental fee of flats and premises, in order to take account of local characteristics. The specific Act mentioned in section 2 (7) of the Act on the Transfer of Assets is the Act on Flats. […]

The provisions of the Act on Flats concerning the alienation of flats and non-residential premises – parts three and four of the Act – seek, according to the legislative intent, to conclude the »change of regime in the field of property« with respect to real property, thereby creating the legal conditions for the management of housing in line with the market and terminating the contradictions of the system of flats for rent. (See the preamble to the Act.

The Constitutional Court has already emphasised in its decisions on compensation that it can only rule on the constitutionality of certain provisions of the Act under review, and cannot assess the regulatory concept independently of the text of the Act. [Decision 28/1991 (VI. 3.) AB, Decision 15/1993 (III. 12.) AB] Of the housing policy and property transfer objectives embodied in the Act on Flats, only the constitutionality of their statutory implementation can be the subject of the Constitutional Court's examination. […]

Under the Local Government Act and the Act on the Transfer of Assets, former State-owned flats were transferred into municipality ownership. Both Acts are clear on the transfer of ownership: »by virtue of the Act, on the date of its entry into force, [the assets listed] shall become the property of the local governments«. [Section 107 (2) of the Local Government Act and section 2 (2) of the Act on the Transfer of Assets.]

The local governments acquired the flats and non-residential premises transferred by the Act on the Transfer of Assets with the encumbrances specified in section 2 (7), (8) and (9) of the Act on the Transfer of Assets – with the survival of the rules on alienation in force at that time.

The local governments did not and do not have a right to acquire specified assets, or to obtain certain objects under specified conditions (1582/B/1990 AB). The provision of the local governments with property from state property was a gratuitous acquisition to which the rules developed in the Decision 16/1991 (IV.20) AB, concerning the encumbrances on such property, apply. […]

The Act on Flats made the burdens of the alienation of flats greater for the local governments compared to those existing at the time of acquisition of the property by them.

The purchase option under the Act on Flats is a greater burdening of local government property than the »right of purchase« regulated by the Decree No. 32/1969 (IX.2) Korm.. Although there have been judgements interpreting the right of purchase as requiring the municipality to designate the property for alienation if the beneficiary had initiated its alienation, this interpretation has remained case-by-case and controversial. By contrast, the purchase option granted in the Act on Flats is clear and indisputable.

The Act on Flats is also more onerous in terms of the consideration for the alienation. According to Government Decree 32/1969 (IX. 30.), the maximum purchase price of flats could be 25-70% of the market value, i.e. the upper limit was 70%, compared to the maximum of 50% under the Act on Flats. (In the case of non-residential premises, the previous purchase price ceiling of 80% has been replaced by 60% under the Act on Flats.) Under the Decree, the authorisation of instalment payments was not compulsory, but it is under the Act on Flats.

[94] Purchase option is different in nature from expropriation regulated in Article 13 (2) of the Constitution. According to Decisions 16/1991 (IV. 20.) AB and 28/1991 (VI. 3.) AB, the purchase option – whether based on contract or an Act – is not a deprivation of property, but a burdening, i.e. a restriction of the property right. The change in ownership depends on whether or not the holder of the purchase option exercises this right. The statutory creation of a

purchase option is a very serious encumbrance on the property of the obliged party, since if the holder exercises the purchase option, the property is transferred to it. Ownership is therefore not lost by the obliged party by virtue of operation of the law (as in the case of statutory expropriation), but there is no judicial review of the unilateral act of the holder of the right to transfer ownership, comparable to that of an individual expropriation by administrative decision (also based on law). The lawfulness of the exercise of the purchase option cannot therefore be challenged in court, and only the application of the principle of a significant change of circumstances can provide relief to the owner in exceptional cases. The lack of a judicial way to protect property can be remedied by the Constitutional Court's examination of the statutory establishment of the purchase option; and this justifies the constitutional examination of the purchase option introduced by the Act on Flats even if the situation of the municipalities has not been made more burdensome." (CCDec, ABH 1993, 373, 376 to 379)

[95] 2.2 Based on the above findings, in the CCDec, the Constitutional Court carried out a constitutional review of the provisions of the Act on Flats challenged by the relevant petitions and made the following main findings: "Thus, the law-maker is entitled to regulate the alienation of flats; at the outset, local governments, to which the flats were transferred pursuant to the Act on the Transfer of Assets have acquired the right of disposition with this restriction. [...] The specific characteristics of municipality housing property – its origin, subject, object, function, the way in which it is regulated by law – may constitutionally justify the recognition of the lawfulness of the obligation to alienate, but only with compensation appropriate to the case.

The fact that the law-maker reserved to itself the right to regulate alienation also means conceptually that the State transferred the property to the local government with the burden imposed that the State could not guarantee the protection of the condition of the property transferred. On the basis of the legislative reservation, the local governments had to anticipate a State housing policy which would compel them to alienate the flats. Granting the purchase option is undoubtedly a direct, grave and legally conceivable manifestation of this policy. Leaving in force the previous rules concerning the alienation of flats – with the express retention of the possibility of amendments – was another indisputable sign of the State's policy of the privatization of flats. [...]

The statutory purchase option applicable to flats and the protection of property rights may be constitutionally harmonised in the Act on Flats by a significant reduction in the duration of the purchase option and by giving effect to the value guarantee.

The law-maker has a relatively wide discretion to regulate housing management issues. It is the duty and competence of the law-maker to establish housing policy, to set the conditions for access to housing and renting housing. Regulating the conditions of home ownership and tenancy is also a fundamental social issue. In doing so, it must be borne in mind that for the tenant, the rental dwelling performs essentially the same function as residential property; and accordingly, the tenant's interest in the secure and permanent existence of the rental may,

where appropriate, constitute a property right under constitutional protection. It is a matter of the State's housing policy what proportion of the solution to the housing problem is based on privately owned housing and the rental of housing in public ownership. The change of this proportion is also an issue of the State's housing policy. However, in the case of a change of tenancy into ownership, the property rights of the former owner must also be protected, and only the circumstances of the specific situation may determine the constitutional possibility of this.

The use of a statutory purchase option to change ownership is not inherently and in all circumstances unconstitutional, but neither is it inherently constitutional. […]

The part of the task of providing housing that was previously handled by the State's rental housing system was transferred to the municipalities through the transfer of ownership of these flats to municipalities, while housing policy remained a matter for the government and the law-maker. Housing occupies a special place among the assets of the municipality by virtue of its function of providing the most basic necessities of life for the people living in the municipality, namely shelter. In order to ensure adequate housing for citizens, the law-maker may restrict the freedom of property of the local government more severely than in the case of other property.

Accordingly, additional considerations justify the need for the restriction in the case of the Act on Flats. […]

The marketisation of the housing system, the privatisation of housing assets, is part of the economic regime-change. […]

However, the necessity or the mere public interest of the restriction on property is not sufficient for the constitutionality of the heavy burden imposed by the purchase option. The municipalities became the owners of the former State-owned rental flats, and the fact that the ultimate goal of the housing policy was to privatise the flats should not diminish the importance of this. This goal can only be achieved by taking into account the constitutional constraints arising from the transfer of ownership. […]

Therefore, even if it is constitutionally permissible to restrict the property rights of the municipalities by means of the purchase option in relation to residential property, it is necessary to examine in detail whether the restriction meets the requirements of proportionality.

Purchase option is a serious burden in itself. Even if the beneficiary does not exercise his or her purchase option, this right constitutes a prohibition of alienation concerning the flat. The uncertainty that tenants have five years to apply for the purchase makes it very difficult for the municipality to manage housing. If the beneficiary exercises his or her purchase option, the municipality loses ownership of the flat. Purchase option is therefore a restriction on property which may lead to the termination of ownership. Because of the weight of this burden, the five-year time limit opened up by the Act on Flats is disproportionately long. This is one of the

reasons for the unconstitutionality of the purchase option regulated in the Act on Flats

Since the purchase option, if exercised, leads to the loss of property, proportionality between the public interest and the intervention with the right to property demands compensation. Purchase option may only be constitutional if accompanied by the enforcement of a value guarantee. For this reason, the compensation foreseen by the Act on Flats must approximate to the constitutionally-demanded full compensation applied in the classic case of expropriation. Other conditions, such as the immediacy of compensation, is to be regulated in accordance with the nature of the case at hand. For the loss of the flats inflicted by the exercise of the purchase option, local governments must receive such consideration or compensation so as to ensure that they retain in their possession the value represented by the flats transferred to them under the Act on the Transfer of Assets.

The way of providing value guarantee is for the law-maker to establish. In so doing, attention must be paid to all of the provisions of the Act. On Flats It is, however, not required that all burdens be borne by the tenants. Any variation or amendment to the existing provisions satisfying the constitutional condition that the principle of value guarantee is respected is possible." (CCDec, ABH 1993, 373, 384 to 387)

[96] 3. In the present case, just as in the case of the CCDec, the Constitutional Court has to decide whether the purchase option burdening the flats owned by the municipality under the Act on Flats is in conformity with the Fundamental Law from the point of view of the right to property, also taking into account the specific historical background. Therefore, the Constitutional Court has provided an overview of its case-law after the entry into force of the Fundamental Law related to municipal property, which is relevant to the present case.

[97] 3.1. In its Decision 3009/2012 (21.VI.) AB (hereinafter: CCDec3), the Constitutional Court held that "the right to property was also contained in Article 13 (1) of the Constitution in a formulation identical in content. According to Article 24 (1) of the Fundamental Law, the Constitutional Court is responsible for the protection of the Fundamental Law. In newer cases, the Constitutional Court may use the arguments contained in its previous decisions before the entry into force of the Fundamental Law in connection with the constitutional issue considered at that time, provided that this is possible on the basis of the specific provisions and rules of interpretation of the Fundamental Law, which are identical or similar in content to those contained in the Constitution. The statements of principle expressed in the decisions of the Constitutional Court based on the Constitution are, by analogy, also applicable to the decisions of the Constitutional Court interpreting the Fundamental Law. However, this does not mean an unquestioning, mechanical adoption of the decisions based on the Constitution, but requires a comparison of the relevant rules of the Constitution and the Fundamental Law and careful consideration. In the present case, it can be concluded that the right to property, as a fundamental right, is guaranteed by the Fundamental Law, as it was by the Constitution, therefore the findings of the Constitutional Court can still be considered as authoritative in the interpretation of the right to property." (Reasoning [49])

[98] In CCDec3, the Constitutional Court, citing the provisions of the CCDec, pointed out the following: "The right to property […] is a fundamental right. The sphere and means of constitutional protection of property does not necessarily follow the legal concepts of civil law. [...] The »deprivation« of property in the constitutional sense is not necessarily a loss of civil property rights under civil law. [...] The content of property as a fundamental right must always be understood within the framework of (constitutional) restrictions under public and private law. (ABH 1993, 373, 379 to 380) Examining the fundamental rights character of the right to property, the Constitutional Court also stated in AB 481/B/1999 that it "does not guarantee the actual acquisition of property, the right to access to property, the permanent retention of property free of depreciation, but imposes a two-way obligation on the State. On the one hand, the State must refrain from interfering in the sphere of ownership of private or legal persons, subject to the possibility of constitutional exceptions, and on the other hand, it must create the legal environment, the institutional guarantee which makes the right to property operational without discrimination (ABH 2002, 998, 1002)." (Reasoning [50]) "As explained, the right to property, as a fundamental right, guarantees the State a public claim on the basis of which the State is obliged – in principle, as a general rule, subject to the exceptions arising from the Fundamental Law – to refrain from interfering with the owner's position of the subject of the fundamental right." (Reasoning [51])

[99] 3.2. With regard to the right to property, which is also vested in local governments, as provided for in Article XIII (1) of the Fundamental Law, the Constitutional Court, in its Decision 8/2021 (III.2.) AB (hereinafter: CCDec4), also referring to its previous case-law, explained that "the provision provided for in Article XIII (1) of the Fundamental Law confers fundamental legal protection on property. In the view of the Constitutional Court, the constitutional protection of property is primarily a safeguard against interference by the State in the exercise of public authority, based on the criteria of value guarantee and restriction in the public interest. The Constitutional Court recalls its consistent case-law developed in the area of the right to property recognised in Article XIII (1) of the Fundamental Law, according to which the scope and manner of constitutional protection of property do not necessarily follow the concepts of civil law and cannot be identified with the protection of abstract civil law property, nor with the partial rights of possession, use and disposal, nor with its definition as a negative and absolute right. The content of the right to property, protected as a fundamental right, shall be interpreted at all times together with the applicable limitations of public law and the (constitutional) limitations under private law. The extent of the constitutional protection of property is always concrete; it depends upon the subject-matter, the object and the function of property, as well as the nature of the restriction. The fundamental right to property protects the property already acquired and, in exceptional cases, the expectations of property." (Reasoning [126]) "The Constitutional Court emphasized also in the present case that the right to property does not constitute an unrestricted fundamental right: State intervention is not ruled out in the case of respect for the appropriate guarantees enshrined in the Fundamental

Law. Of particular relevance in this context is the fact that, as declared in the second sentence of Article XIII (1) of the Fundamental Law, »property shall entail social responsibility«." (Reasoning [126])

[100] 3.3. "The protection of property is subject to the test for the restriction of fundamental rights (the so-called necessity-proportionality test) laid down in Article I (3) of the Fundamental Law, but in the case of the right to property the test of necessity is based on the mere public interest: if the restriction of property is made for a public interest purpose, the restriction must be considered necessary for that reason alone. However, the necessary restriction of property must also be proportionate, which imposes on the law-maker the obligation to ensure compensation proportionate to the restriction in the case of expropriation and other restrictions similar in their actual effects to expropriation, in particular in the case of legal restrictions on certain partial rights of property under civil law (possession, use and enjoyment, disposal). In the case of expropriation, or in other cases involving a significant restriction of the partial rights of ownership under civil law, the guarantee of preservation is therefore replaced by a guarantee of value, which is nothing more than compensation for the depreciation of the property.

It follows from the above that, in the case of constitutional provisions of the law that make the owner's position more detrimental and cause the owner an actual, monetary disadvantage, the law-maker is obliged to provide a guarantee of value, i.e. to provide for compensation proportional to the restriction." {Decision 23/2017. (X. 10.) AB, Reasoning [16] to [17], see most recently: Decision 5/2021. (II. 9.) AB, Reasoning [21]}

[101] 3.4. "The current Fundamental Law (like the previous Constitution) regulates the property of local governments also beyond Article XIII (1), and therefore the examination of the conformity of the legislation on the property of local governments with the Fundamental Law is based on the totality of these provisions (and not only on a single element). According to Article 32 (6) of the Fundamental Law, the property of local governments is public property which serves the performance of their functions, and according to Article 38 (1), the property of the State and local governments is national property, the management and protection of which is intended (among others) to serve the public interest." (CCDec4, Reasoning [130])

[102] 3.5. In examining the constitutionality of the transfer of national property, the Constitutional Court also takes into account the constitutional limits on the transfer of national property under Article 38 (3) of the Fundamental Law, including the requirement of proportionality of value {Decision 36/2015. (XII. 16.) AB, Reasoning [56]}.

[103] 4. Pursuant to Article 32 (1) (e) of the Fundamental Law, local governments are guaranteed the status of owners, which is coupled with the fullness of the property rights that they may enforce against the State {see for example: Decision 3311/2019 (XI. 21.) AB, Reasoning [47] to [54]}, other local governments (see for example: CCDec4, Reasoning [124] to [157]) and (private) persons. Municipal property is therefore also constitutionally protected against the former, even though municipalities do not enjoy special protection as owners. The enforcement

of the proprietary status of municipalities is dually bound. On the one hand, they can only exercise their property rights within the framework of the law in order to manage local public affairs, therefore this implies a local level of bonding, which applies in relation to the local community. On the other hand, the Fundamental Law – compared to the previous Constitution – provides increased protection for national assets and guarantees for its responsible and transparent management. Given that the property of local governments is also part of the national assets, in addition to the fact that the autonomy of local governments to act is statutorily limited, the basic constitutional rules for the management of property owned by the State and local governments must also apply.

[104] According to Article 38 (1) of the Fundamental Law, the management and protection of national assets shall aim at serving the public interest, meeting common needs and preserving natural resources, as well as at taking into account the needs of future generations." Article 38 (3) of the Fundamental Law provides that national assets may be transferred only for the purposes specified by an Act of Parliament, subject to exceptions provided for by an Act, and subject to the requirement of proportionality of value. This provision is to guarantee that the property of the local government, as national asset, may not be disposed of without any restrictions, but only for the purposes defined by an Act, and in principle in accordance with the requirement of proportionality of value. An exception to this requirement may be made by an Act, but in such a case it must be verified that the transfer of the property is in the public interest, comparable to its retention and use within national assets. Both the law-maker and the municipalities can therefore dispose of national assets with this double limit in mind. These constitutional limits set in the public interest are the guarantees for responsible management by the municipalities, within which they may exercise their property rights.

[105] On the basis of the above, when the Constitutional Court reviews the constitutionality of the law on the purchase option justifying the transfer of national assets belonging to municipality property, it cannot ignore the fact that this restriction of property may be imposed, above all, for the exceptional purpose formulated by the law-maker. When drafting legislation on the transfer of national assets, however, the law-maker must take into account the exceptional nature of this possibility and the fact that the legislative purpose behind the legislation must justify this exception while fully complying with the requirements of the Fundamental Law on national assets.

[106] 4.1. In order to carry out this examination, the Constitutional Court had to consider the legislative purpose of the Act. According to the general reasoning of the Act, the law-maker, on the one hand, has in mind the public interest of enabling Hungarian citizens and families to acquire home ownership as widely as possible. The new rules introduced by the amendment will make it possible for people who would otherwise not have the opportunity to own their own home to do so, given the extraordinary price rises in the housing market in recent years. In addition to a lower purchase price compared to the market value, tenants who have been renting for several years are entitled to an additional discount. When determining the purchase price, the law-maker set the discount in proportion to the length of the tenancy, in order to

reflect the fact that the longer the tenant has been renting the flat, the less chance he or she has of obtaining a property of his or her own in the current market conditions. The Act also continues to provide with additional guarantee rules for the possibility for citizens in financial difficulty to rent a home if they are unable to exercise their purchase option.

[107] On the other hand, with the Act, the law-maker also intends to remedy a situation that has arisen historically. Under the rules adopted after the regime-change, a narrow group of tenants living in municipality- and State-owned flats were not allowed to buy the property they lived in. The rules introduced by the amendment aim, among other things, to ensure that those who were unable to exercise their purchase option because of restrictions adopted in the 1990s can now do so on similar terms to those previously enjoyed by similarly-situated tenants across the country.

[108] In order to achieve these objectives, section 1 of the Act defines three categories of subjects as the beneficiaries of the purchase option: (a) those whose tenancy at the time of the unilateral declaration concerning the purchase option is between 5 years and 15 years, (b) those whose tenancy at the time of the unilateral declaration concerning the purchase option is between 15 years and 25 years, (c) those whose tenancy at the time of the unilateral declaration concerning purchase option is more than 25 years. It makes a further distinction between these categories as regards the purchase price of the flat to which the purchase option applies. According to the detailed reasoning of the Act, the law-maker considered the conditions under which tenants – who had previously acquired a purchase option – in a similar situation to the tenants concerned now, could exercise it under the statutory and municipal rules established in the 1990s, to be the relevant conditions. For tenants who already had a tenancy before 1996, the Act considers 15% of the market value to be the basis for determining the purchase price. For tenants who have acquired the right to rent the flats concerned later on, the Act allows them to exercise their purchase option at a higher purchase price. In their case, the reason for the reduced purchase price is the recognition of the costs incurred for the flat during the significant period of occupancy.

[109] The Minister of Justice, confirming the above points in the reasoning of the Act, also stressed in her information sent to the Constitutional Court that those previously excluded from exercising the purchase option are in a disadvantageous situation with regard to their housing. Those who remain tenants take care of their homes with the diligence of the owner, typically for decades, spending considerable sums on renovation, while the security of being the owner of their flat has not been granted to them due to their exclusion from the previous settlement of the property status. The Minister of Justice also referred to the regulatory solutions adopted by some cities of county rank regarding the alienation of municipal rental flats, where discounts on purchase prices similar to those provided for in the Act were established.

[110] 4.2. In his petition, the President of the Republic referred to the inadequacy of the reasons given by the law-maker to justify the exception required by the Fundamental Law for the

transfer of national assets. One the one hand, according to his position, after more than twenty-five years, making a reference to the public interest of, and the need to establish purchase option is unfounded, in particular since the passage of time presumably involves different beneficiaries and flats originally excluded from privatisation anyway. According to the opinion of the President of the Republic, taking into account of the longer term of tenancy as a criterion for determining the amount of the purchase price, or more precisely, for reducing it, is in itself questionable, since the tenants who paid a significantly lower rent than the market price for a longer period of time did not incur any costs related to the maintenance and renovation of the flats, as these were borne by the owner – the State or the municipality – managing public funds. If indeed, these costs were paid by the tenant, he or she was reimbursed or could set it off as rent reduction. In its view, therefore, there is no reasonable justification for a reduction of the purchase price in line with the duration of the lease. Similarly, an exchange of ownership to tenancy cannot justify a discount of 65% of the market value.

[111] 4.3. On the basis of the above, the Constitutional Court found that the arguments put forward by the law-maker to justify the regulatory solution of the Act are partly contradictory and only partly suitable to support the exceptional nature of the transfer of national assets, as required by Article 38 (3) of the Fundamental Law, linked to the purpose of the transfer.

[112] 4.4. The Act justifies the exception regarding the transfer of national assets on the one hand by addressing the situation of those who were left out of the privatisation of housing in the 1990s. Before the Act on Flats, under Government Decree No. 1/1971 (II. 8.) on the Allocation of Flats and Tenancy of Flats, the tenancy of State- or municipality-owned flats provided the tenants with rights close to ownership, at the expense of the municipalities. This situation was shifted by the Act on Flats in the direction of creating a different balance between the rights of tenants and the rights of the lessors of former council flats by rendering a shift from a system of distribution and price control in the planned economy to market control, i.e. typically to the disadvantage of tenants and to the advantage of lessors, especially in the determination of rents or after the opening of the alienation of the rented flats to non-tenants. Prior to that, the central legislation was the MT Decree 45/1982 (X. 7.) on rents for housing, sublets and beds, which was part of the price-setting system at the time. In the longer term, the tenants not exercising the purchase option or the tenants of flats exempted from the purchase option could expect their tenancy to be converted into a right similar to a tenancy on market terms.

[113] In order to remedy this situation, which has arisen historically and has resulted in unjustified differences between tenants, the Act provides for the possibility of acquiring property under conditions similar to those applied in the 1990s, but the Act is consistent with the law-maker's objective only in the case of one category of subjects, namely those whose tenancy is more than 25 years old at the time of the unilateral declaration related to the purchase option. With regard to this subject-matter, the law-maker has defined the exceptional purpose of the transfer of national assets, and in the context of the enforcement of proportionality of value – as the Minister of Justice also pointed out in her information – it took

account of the rules governing the sale of State-owned and municipally-owned flats applicable prior to the entry into force of the Act on Flats on 1 January 1994, in order to eliminate the unjustified disparities arising from historical precedents..

[114] 4.5. However, the law-maker did not justify in the reasoning of the Act the exceptional nature of the regulatory solution concerning the other two categories of subjects required under Article 38 (3) of the Fundamental Law. On the one hand, in the case of tenants with a tenancy of less than 25 years at the date of the unilateral declaration regarding the purchase option, there is no situation which results in unjustified discrimination compared to those who acquired the property earlier and, on the other hand, the law-maker has relied on criteria in the exceptions to the proportionality of value which, as also referred to by the applicant, are not sufficiently substantiated. Actually it would create an unjustifiable difference between Hungarian citizens living in a tenancy relationship if the law-maker were to allow some tenants to acquire property on the basis of a preferential purchase option on the sole ground that they are tenants of flats covered by the Act. The general arguments formulated in the reasoning, according to which the longer a person has been a tenant, the less likely he or she is to be able to obtain owner-occupied housing under current market conditions, and that in view of the extraordinary price increases on the housing market, tenants would otherwise not be able to obtain owner-occupied housing, are statements that could be true for the situation of all Hungarian citizens who have a tenancy contract with the State or with other private parties.

[115] The regulatory solutions of some cities with county rank – referred to in the information sent by the Minister of Justice – do not in themselves mean that the requirements of exceptionality regarding the transfer of national assets and the value guarantee have been complied with.

[116] 4.6. Since the law-maker has not justified the exceptional purpose of the transfer of municipality flats belonging to the national assets in the case of tenants who have been renting for not more than 25 years, and neither can the criteria taken into account regarding the value proportionality requirement be justified, compliance with the constitutional requirement of value proportionality cannot be neglected with respect to the provisions of the Act affecting this category of subjects.

[117] If the law-maker intends to allow the possibility of alienation of municipality-owned flats belonging to the national assets on the basis of a purchase option also for these categories of subjects, the consideration under the Act must comply with the requirement of proportionality of value required by Article 38 (3) of the Fundamental Law, which is nothing else but a consideration proportional to the value of the national asset. The municipality must receive a consideration for the flats lost due to the purchase option that keeps in its assets a value commensurate with the value of the flats it had owned. The way of providing value guarantee is for the law-maker to establish. It is not required that all burdens should be borne by the tenants. Any variation and amendment to the existing provisions satisfying the constitutional condition that the principle of value proportionality is respected is possible.

[118] In the case of tenants who have obtained the right to rent the property by means of an exchange, i.e. by exchanging the ownership of their former property for the right to rent, the law-maker may also take this aspect into account in order to avoid unjustified differentiation in order to enforce the requirement of proportionality of value. In this case, however, it must be demonstrated on an individual basis whether a disadvantage actually exists. The mere fact that the law-maker regulates the purchase price of the property in case of exchange within certain limits is not in itself contrary to the Fundamental Law, but at the same time, in order to enforce the prohibition of discrimination, the market value of the property exchanged by the tenant may also be taken into account as a social aspect.

[119] 4.7. On the basis of the above, the Constitutional Court held that section 47 (3) (a) and (b), as well as section 47 (4) incorporated in section 1 of the Act are contrary to the Fundamental Law and therefore may not enter into force.

[120] 5. According to the petitioner, also the unilateral right of the beneficiary of the purchase option to schedule the payment in instalments infringes the principles of immediacy and value guarantee because of the delay in compensation.

[121] 5.1. Pursuant to the new section 48 (2) (e) of the Act on Flats, introduced by section 1 of the Act, the declaration on exercising the purchase option must include the schedule of payment of the purchase price, specifying that payment may be made in equal monthly instalments over a period of not more than twenty-five years and that at least ten per cent of the purchase price shall be paid in one lump sum within eight days of the date of the notice of exercise of the purchase option. The regulation does not provide for an obligation to pay interest.

[122] In the CCDec, the Constitutional Court laid down that "since the purchase option, if exercised, leads to the loss of property, proportionality between the public interest and the intervention with the right to property demands compensation. Purchase option may only be constitutional if accompanied by the enforcement of a value guarantee. For this reason, the compensation foreseen by the Act on Flats must approximate to the constitutionally-demanded full compensation applied in the classic case of expropriation. Other conditions, such as the immediacy of compensation, is to be regulated in accordance with the nature of the case at hand. For the loss of the flats inflicted by the exercise of the purchase option, local governments must receive such consideration or compensation so as to ensure that they retain in their possession the value represented by the flats transferred to them under the Act on the Transfer of Assets." (CCDec, ABH 1993, 373, 387)

[123] 5.2. In its examination of the present case, the Constitutional Court has also taken into account the provisions of the Act of Flats in force and related to the content of the issue under examination. Section 49 of the Act on Flats provides that beneficiaries similar to the regulation under review in the present case shall be granted purchase option prior to any other person in the case of State- or municipality-owned flats transferred from State ownership into municipality ownership. According to the current section 53 (1) of the Act on Flats, if the flat is

purchased by the person entitled to it under this Act, he/she shall be granted, upon request, an instalment facility of at least fifteen years. If the beneficiary so requests, payment of up to twenty percent of the agreed purchase price may be made in one lump sum at the time of conclusion of the contract. For any arrears remaining after the first part of the purchase price has been paid, the monthly instalments shall be assessed in equal instalments. However, section 53 (3) of the Act on Flats adds that the seller may charge interest on the purchase price arrears at the time of the conclusion of the contract. The possibility of payment in instalments with interest was originally introduced by the Act XVII of 1994 amending the Act LXXVIII of 1993 on certain rules related to the Rent and the Sale of Flats and Premises, which was adopted in the wake of the CCDec. and defined the new rules for alienation taking into account the principles contained in the CCDec. The reasoning of the Act stated that "payment in instalments should not, however, reduce the value of the property which must remain in the ownership of the municipality after alienation. In order to preserve the value of the assets, the proposal leaves it up to the municipality to decide on charging interest and setting the rate of interest."

[124] 5.3. Considering that the current legislation does not unconditionally require the immediate payment of the purchase price in the case of the purchase of flats by the beneficiaries of the statutory purchase option, the mere fact that the possibility of payment in instalments is also provided for by the Act under review in the present case does not in itself entail a breach of the requirement of the value guarantee under Article 38 (3) of the Fundamental Law. At the same time, the introduction of an interest-free instalment payment option of up to twenty-five years – in the context where the proportionality of value resulting from Article 38 (3) of the Fundamental Law must prevail – does not meet the requirement. The unilateral granting of the right to interest-free instalments is in itself a breach of the requirement of value guarantee, because the present value of the instalments received by the seller during the long payment period is not insignificantly lower than the purchase price of the residential property at the time of exercising the purchase option.

[125] 5.4. However, in the view of the Constitutional Court, this does not mean that there is no constitutional solution to achieve the objectives set by the Act. It is inherent in the nature of home-purchases that, due to their significant resource requirements, buyers are typically unable to pay from own sources the purchase price of the property in one lump sum at the time of sale. However, the difference between the own share and the purchase price – both in the case of home-purchase in general and in the area covered by this legislation – can be bridged by a market-based housing loan, even by one subsidised also by the State. In such a case, the seller of the flat subject to the purchase option will receive the full amount of the (discounted) purchase price at the time of the transfer of the property, and the requirement of immediacy is formally fulfilled (therefore, there is no need to register a statutory mortgage in favour of the seller). On the other hand, the requirement of proportionality can also be ensured if the law-maker – as in the regulation in force – allows for payment in instalments, while providing for interest payment rules that ensure the preservation of the seller's asset value.

[126] 5.5. On the basis of the above, the Constitutional Court held that section 48 (2) (e) incorporated in section 1 of the Act is contrary to the Fundamental Law and therefore may not enter into force.

V.

[127] In view of the foregoing, the Constitutional Court has ruled as stated in the operative part, therefore the Act may not be promulgated pursuant to section 40 (1) of the Act on the Constitutional Court.

[128] The publication of the Decision of the Constitutional Court in the Hungarian Official Gazette is based upon the second sentence of section 44 (1) of the Act on the Constitutional Court.

Budapest, 20 July 2021.

Dr. Tamás Sulyok President of the Constitutional Court Rapporteur Justice of the Contitutional Court

Dr. Tamás Sulyok President of the Constitutional Court on behalf of Dr. Ágnes Czine Justice of the Constitutional Court, unable to sign

Dr. Tamás Sulyok President of the Constitutional Court on behalf of Dr. Imre Juhász Justice of the Constitutional Court, unable to sign

Dr. Tamás Sulyok President of the Constitutional Court on behalf of Dr. Egon Dienes-Oehm Justice of the Constitutional Court, unable to sign

Dr. Tamás Sulyok President of the Constitutional Court on behalf of Dr. Miklós Juhász Justice of the Constitutional Court, unable to sign

Dr. Tamás Sulyok President of the Constitutional Court on behalf of Dr. Tünde Handó Justice of the Constitutional Court, unable to sign

Dr. Tamás Sulyok President of the Constitutional Court on behalf of Dr. Zoltán Márki Justice of the Constitutional Court, unable to sign

Dr. Tamás Sulyok President of the Constitutional Court on behalf of Dr. Attila Horváth Justice of the Constitutional Court, unable to sign

Dr. Tamás Sulyok President of the Constitutional Court on behalf of Dr. Béla Pokol Justice of the Constitutional Court, unable to sign

Dr. Tamás Sulyok President of the Constitutional Court on behalf of Dr. Ildikó Hörcherné dr. Marosi Justice of the Constitutional Court, unable to sign

Dr. Tamás Sulyok President of the Constitutional Court on behalf of Dr. Mária Szívós Justice of the Constitutional Court, unable to sign

Dr. Tamás Sulyok President of the Constitutional Court on behalf of Dr. Péter Szalay Justice of the Constitutional Court, unable to sign

Dr. Tamás Sulyok President of the Constitutional Court on behalf of Dr. Balázs Schanda Justice of the Constitutional Court, unable to sign