Decision 16/2015 (VI. 5.) AB

on establishing the unconstitutionality by non-conformity with the Fundamental Law of certain provisions of the Act on the Amendment of Certain Laws Relating to the Management of State-Owned Land Assets, adopted by the National Assembly on its sitting day of 28 April 2015 but not yet promulgated

In the matter of a petition seeking an *ex ante* review of conformity with the Fundamental Law of an Act adopted but not yet promulgated, with concurring reasonings by Justices *dr. Egon Dienes-Oehm*, *dr. Imre Juhász* and *dr. István Stumpf* as well as with dissenting opinions by Justices *dr. László Kiss, dr. Miklós Lévay, dr. László Salamon* and *dr. András Varga Zs.,* the Constitutional Court, sitting as the Full Court, rendered the following

decision:

1. The Constitutional Court holds that Section 1 of the Act on the Amendment of Certain Acts Relating to the Management of State-Owned Land Assets, adopted by the National Assembly on 28 April 2015, is contrary to the Fundamental Law, as it infringes Article P (2) and Article 38 (1) of the Fundamental Law.

2. The Constitutional Court further holds that Section 1, Sections 3 to 6, Section 8 (2) and (3) and Section 13 of the Act on the Amendment of Certain Acts Relating to the Management of State-Owned Land Assets, adopted by the National Assembly on 28 April 2015, which lay down the provisions of Section 38 (1) to (2) and (4) of Act LXXXVII of 2010 on the National Land Fund, are contrary to the Fundamental Law, as they infringe Article P (1) and Article XXI of the Fundamental Law.

3. The Constitutional Court finally holds that the parts of Sections 5 and 6 of the Act on the Amendment of Certain Acts Relating to the Management of State-Owned Land Assets, adopted by the National Assembly on 28 April 2015, which establish Section 37 and Section 38 (3) of Act LXXXVII of 2010 on the National Land Fund, are not contrary to the Fundamental Law, on the basis of Article B (1) of the Fundamental Law.

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

Reasoning

I

[1] 1. The President of the Republic, on the basis of Article 6 (4) and Article 9 (3) (i) of the Fundamental Law, has requested the Constitutional Court to carry out an *ex ante* review of conformity with the Fundamental Law of the Act on the Amendment of Certain Acts Relating to the Management of State-Owned Land Assets (hereinafter referred to as the "Act") adopted by the National Assembly on 28 April 2015, submitted as a draft Act under T/3788.

[2] In his petition, the President of the Republic alleged, in particular, that certain provisions of the Act were invalid under public law due to the absence of a qualified majority, since, in his view, by passing Section 1 of the Act by a simple majority, the National Assembly had infringed Article B (1) and Article 38 (1) of the Fundamental Law, and by passing Sections 5 and 6 of the Act, it had infringed Article B (1) and Article P(2).

[3] Pursuant to Section 48 of Act LXXXVII of 2010 on the National Land Fund (hereinafter referred to as the "National Land Fund Act"), Sections 1 to 3, 18 to 23 and 36 thereof are considered to be cardinal rules pursuant to Article 38 (1) of the Fundamental Law. Sections 1-3 of the National Land Fund Act summarise, under the heading General Provisions, *inter alia*, the areas and property rights included in and excluded from the National Land Fund, the concept and method of utilisation, the purpose of the National Land Fund and the exercise of ownership rights. Section 1 of the Act amends Section 15 (5) of Act II of 1992 on the Entry into Force of Act I of 1992 on Cooperatives, and on Transitional Rules (hereinafter referred to as the Cooperatives Act). This provision does not formally amend the National Land Fund Act and, within it, Section 1, which defines the scope of the National Land Fund, but it does include a provision which, in terms of its content, falls within the scope of the National Land Fund Act. The President of the Republic points out that this position is also confirmed by the provision on the amendment of Section 1 (2) of the National Land Fund Act, which was omitted from the text submitted for the final vote due to the absence of support by a two-thirds majority (*see* the Consolidated draft Act T/3788/14). The adoption of Section 1 of the Act will therefore transfer protected land and land intended for protection to the National Land Fund by simple majority vote. In his view, even in an Act adopted by a simple majority, an issue requiring a qualified majority can only be validly adopted by the majority required by the subject matter of the Act, and any solution to the contrary would be at variance with the provisions of the Fundamental Law.

[4] Article P (2) of the Fundamental Law provides, *inter alia*, that the limits and conditions for the acquisition of ownership of arable land and forests and for the use

thereof for the purposes necessary for the attainment of the objectives of paragraph (1), including the protection, maintenance and conservation of nature, shall be determined by a cardinal Act. Sections 5 and 6 of the Act amend the conditions for expropriation of land in protected and specially protected areas of nature as well as areas intended for protection (hereinafter collectively referred to as "protected areas"), which were previously privately owned, as provided for in Act XCIII of 1995 on the Restoration of the Level of Protection of Protected Areas of Nature (the time limit for implementation and the initiating party for expropriation). Given that it concerns the conditions for expropriation ordered for the purpose of restoring the level of protection of protected areas, the legislature could, in the light of the foregoing, have made that change only by qualified majority. In view of the finite nature of land, Act CXXII of 2013 on the Transfer of Agricultural and Forestry Land (Section 71), which lays down general provisions, is also a cornerstone of the specific rules applicable to land enjoying special protection, in comparison with the specific rules applicable to land enjoying special protection.

[5] In his reasoning, the author of the petition also referred to the findings of Decision 1/1999 (II. 24.) AB and Decision 11/1992 (III. 5.) AB in relation to cardinality (qualified majority).

[6] The President of the Republic also requested the Constitutional Court to extend the finding of unconstitutionality by nonconformity with the Fundamental Law to Sections 3, 4, 8 (2) and (3) and 13 of the Act on the grounds of close substantive connection.

[7] 2. In addition, the President of the Republic also alleged that the content of certain provisions of the Act was in breach of the Fundamental Law. In his view, Sections 1, 3 to 6, 8 (2) and (3) and 13 of the Act (transfer of protected land and land intended for protection to the National Land Fund and the settlement of their property management) infringe Article B (1), Article P (1) and (2) and Article XXI (1) of the Fundamental Law.

[8] 2.1 Article P (1) of the Fundamental Law raised the requirement to protect, maintain and conserve nature to the level of the Fundamental Law. In its Decision 28/1994 (V. 20.) AB, the Constitutional Court held that "the right to a healthy environment [...] incorporates, *inter alia*, the obligation of the Republic of Hungary to ensure that the State shall not reduce the degree of the protection of nature as guaranteed by law, unless this is unavoidable in order to enforce any other fundamental right or constitutional value. Even in the latter event, the degree of reduction in the level of protection must not be disproportionate to the objective to be achieved." The tasks of the National Land Fund Management Organisation do not include nature conservation or nature conservation asset management under the National Land Fund Act. However, the National Park Directorates are specifically

responsible for nature conservation asset management under Government Decree 262/2010 (XI. 17.) Korm. There is a significant difference between nature conservation management and the use of land in accordance with the land tenure policy guidelines under Section 15 (2) of the National Land Fund Act, from the point of view of nature conservation. Therefore, the level of nature conservation achieved by the legislation is not sufficiently ensured by the transfer of protected areas and areas intended for protection to the management of the National Land Fund and the management of the assets through the National Land Fund Management Organisation without the introduction of additional guarantee rules. In the light of the foregoing, the President of the Republic considers that Sections 1, 3 to 6, 8 (2) and (3) and 13 of the Act infringe Article P (1) and (2) and Article XXI (1) of the Fundamental Law.

[9] 2.2 The President of the Republic has also raised substantive concerns in relation to Section 13 of the Act. This provision amends leasehold contracts concluded prior to the entry into force of the Act by terminating the pre-emptive leasehold rights established in the contracts, terminates the asset management relationships established prior to 1 September 2010 with effect as of 1 April 2016 and provides for the possibility of extraordinary termination of leasehold contracts established under the latter relationships.

[10] In the view of the President of the Republic, the amendment by law of contracts concluded before the entry into force of the legislation raises the question of the breach of legal certainty arising from the rule of law as declared in Article B (1) of the Fundamental Law. He referred to Decision 8/2014 (III. 20.) AB of the Constitutional Court, which considered the issue of the circumstances and conditions under which the State may use the ex post amendment by law and termination of contracts concluded. In that case, the legislator justified only the termination of the pre-emptive leasehold right in its explanatory memorandum to the draft Act. The State has not provided any further justification for its interference with contracts governed by private law. In his view, the legislative interference with contracts governed by private law, which is not duly justified, is in conflict with the Fundamental Law.

[11] The Minister for Justice and the Deputy Commissioner for Fundamental Rights, who is responsible for safeguarding the interests of future generations, sent the Constitutional Court their observations on the petition.

II

[12] 1. The relevant provisions of the Fundamental Law read as follows:

"Article B (1) Hungary shall be an independent, democratic State governed by the rule of law."

"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.

(2) The limits and conditions for acquisition of ownership and for use of arable land and forests that are necessary for achieving the objectives referred to in paragraph (1), as well as the rules concerning the organisation of integrated agricultural production and concerning family farms and other agricultural holdings, shall be laid down in a cardinal Act."

"Article T (4) Cardinal Acts shall be Acts, the adoption and amendment of which requires the votes of two thirds of the Members of the National Assembly present."

"Article XXI (1) Hungary shall recognise and endorse the right of everyone to a healthy environment."

"Article 38 (1) The property of the State and of local governments shall be national assets. 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. The requirements for preserving and protecting national assets and for the responsible management of national assets shall be laid down in a cardinal Act."

[13] 2. The relevant provisions of the Act read as follows:

[14] "1. Amendment to Act II of 1992 on the Entry into Force of Act I of 1992 on Cooperatives and on Transitional Rules

Section 1: Section 15 (5) of Act II of 1992 on the Entry into Force of Act I of 1992 on Cooperatives, and on Transitional Rules, shall be replaced by the following provision:

»(5) Protected areas of nature and areas intended for protection that cannot be designated in the land funds shall be set aside for land owned by the State and used jointly by the cooperative. The right of joint use of these areas by the cooperative shall cease and these areas shall be transferred to the National Land Fund.«"

[15] "2. Amendment to Act II of 1993 on the Land Settlement and Land Disbursement Committees

Section 3: Section 12/C (2) and (3) of the Land Settlement and Land Disbursement Committees Act shall be replaced by the following provisions: »(2) The ownership rights of the protected and protected land parcels specified in Subsection (1), which cannot be transferred to private ownership for this reason, shall be exercised by the land fund

management body until the land parcel becomes public property, with the exception of disposal of property.

(3) The consideration received for the use of the land parcels shall be distributed by the land fund management body among the beneficiaries in accordance with the final decision of the agricultural administration body pursuant to Subsection (1), in proportion to the entitlement to the land parcels indicated in the decision. Until the amount of compensation for expropriation under Subsections (1) and (5) has been paid, the land fund management body shall pay compensation in advance to the beneficiaries in proportion to the restriction, in respect of the exercise of property rights, on a yearly basis.«

Section 4

(a) in Section 12/C (1) of the Land Settlement and Land Disbursement Committees Act, the words » the body responsible for the nature conservation management of protected natural areas (hereinafter referred to as the "Directorate")« shall be replaced by »the land fund management body«,

(b) in Section 12/D (2) of the Land Settlement and Land Disbursement Committees Act, the words » to the asset management by the Directorate of the protected area of nature or the area of nature intended for protection« shall be replaced by » to the National Land Fund«."

[16] "3. Amendment to Act XCIII of 1995 on the Restoration of the Level of Protection of Protected Areas of Nature

Section 5: Section 4 (1) of Act XCIII of 1995 on the Restoration of the Level of Protection of Protected Areas of Nature (hereinafter referred to as the "Level of Protection Act") shall be replaced by the following provision:

»(1) Except as provided for in Subsections (2) and (3), land subject to the Act and already in private ownership under the Act shall be expropriated for the benefit of the State until 31 December 2018 in accordance with the applicable legislation. Expropriation shall be initiated or requested by the body responsible for the management of the National Land Fund.«

Section 6: Section 5 (2) of the Level of Protection Act is replaced by the following provision:

»(2) The expropriation shall be carried out before the fulfilment of the requirements of Section 4 (1), but no later than 31 December 2018.«"

[17] "4. Amendment to Act LIII of 1996 on the Protection of Nature

Section 8 (2) The following Subsections (6a) and (6b) shall be inserted in Section 68 of the Protection of Nature Act:

»(6a) In the event of the sale of a protected area of nature which is land as defined in the Act on the Transfer of Agricultural and Forestry Land, the right of pre-emption to which the State is entitled shall be exercised by the land fund management body, provided that if the Directorate submits a claim for the exercise of the right of pre-emption in respect of the protected area of nature, the land fund management body shall be obliged to exercise the right of pre-emption. The Directorate shall give written notice of its professionally justified request within eight days of the starting date of the period for exercising the right of pre-emption.

(6b) In the case of the sale of a protected area of nature of local importance which does not qualify as land as defined in the Act on the Transfer of Agricultural and Forestry Land, the right of pre-emption shall be granted to the municipal government in the order following the right of pre-emption granted to the State.«

(3) Section 68 (7) of the Protection of Nature Act shall be replaced by the following provision:

»(7) In civil law matters relating to the exercise of the right of pre-emption, the State shall be represented by the Directorate in the cases specified in Subsection (6) and by the land fund management body in the case specified in Subsection (6a).«"

[18] "5. Amendment to Act LXXXVII of 2010 on the National Land Fund

Section 13 The following Sections 37 and 38 shall be added to the National Land Fund Act:

»Section 37 The contractual clause under which the body acting on behalf of the State establishes a right of pre-emption in favour of the lessee in a lease contract for land belonging to the National Land Fund concluded before the entry into force of Act No. ... of 2015 amending certain Acts relating to the management of State land assets (hereinafter referred to as the "Amendment Act No 2") and existing at the time of the entry into force of the Amendment Act No 2 shall be repealed.

Section 38 (1) With regard to land included in the National Land Fund prior to the entry into force of the Amendment Act No 2, with the exception of contracts concluded by the National Land Fund following 1 September 2010 on the basis of asset management, the asset management relationship existing on the date of entry into force of the Amendment Act No 2 and not terminated by 1 April 2016 shall terminate on 1 April 2016.

(2) Where the use of the land covered by an asset management right terminated pursuant to Subsection (1) is directly for the performance of the core functions of a

body or an economic entity specified in the articles of association, statutes or legislation of the body or entity specified in Section 20 (1) and (2), and the body or economic entity submits a written application for the acquisition of the asset management right, the National Land Fund shall conclude an asset management contract for the land covered by the application.

(3) In respect of the areas covered by an asset management right terminated pursuant to Subsection (1) which was granted to a third party before 1 April 2016, the National Land Fund may terminate the existing lease contract for the land to which the asset management right has been granted by the third party by 31 December 2016 at the latest, but at least 60 days before the end of the relevant marketing year, by giving 60 days' notice to the end of the marketing year.

(4) The National Land Fund shall transfer to the body responsible for the nature conservation management of protected areas of nature the amount of the lease fee paid under the lease contracts concluded by the body responsible for the nature conservation management of protected areas, including in the case of amendment of existing lease contracts or conclusion of new lease contracts for the area concerned, where the asset management right concerned by the lease contract terminates pursuant to Subsection (1).«"

III

[19] 1. First of all, the Constitutional Court found that the preliminary norm control petition received from the entitled party fulfils the requirement of being explicit pursuant to Section 52 (1b) of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"). The request (a) contains the provision of the Fundamental Law that establishes the competence of the Constitutional Court to consider the petition [Article 24 (2) (a) of the Fundamental Law] and the provision that establishes the petitioner's right to file the petition [Article 6 (4) of the Fundamental Law]; (b) the grounds for initiating the procedure; (c) the legal provision to be reviewed by the Constitutional Court [certain provisions of the Act on the Amendment of Certain Laws Relating to the Management of State-Owned Land Assets, adopted by the National Assembly on 28 April 2015]; (d) the provisions of the Fundamental Law that have been infringed [Article B (1), Article P, Article XXI (1) and Article 38 (1)]; (e) a statement of reasons as to why the provisions of the legislation at issue are contrary to the provisions of the Fundamental Law; and (f) an express request that the Constitutional Court hold that the provisions of the legislation at issue are contrary to the Fundamental Law.

[20] 2. The Constitutional Court first addressed the part of the President of the Republic's petition alleging that the Act is invalid under public law.

[21] On 28 April 2015, during the final vote on draft Act No T/3788 on the Amendment of Certain Acts Relating to the Management Of State-Owned Land Assets, the National Assembly adopted the "amended and revised consolidated proposal No T/3788/16" by 110 votes in favour, 57 against and no abstention. The draft Act was adopted by a simple majority.

[22] Pursuant to Article P (2), Article 38 (1) [and Article T (4)] of the Fundamental Law, a cardinal Act is an Act which requires the vote of two-thirds of the Members of Parliament present to be passed and amended.

[23] The Constitutional Court, acting within its competence under Section 23 (1) of the Constitutional Court Act, was therefore required to ascertain whether the provisions of the adopted Act which the President of the Republic had indicated as amending other Acts by virtue of their content required a qualified majority.

[24] 3. With regard to Section 1 of the adopted Act, the petitioner argued that that Section amends the content of Section 1 of the National Land Fund Act, which determines the scope of the National Land Fund. The latter provision, however, is a cardinal provision under Article 38 (1) of the Fundamental Law and, in accordance with this, Section 48 of the National Land Fund Act, and can therefore only be amended by qualified majority.

[25] The Constitutional Court's examination consisted of: (1) an overview of the subject-matter of the regulation affected by the legislative amendment, (2) an assessment of whether the amendment seeks to amend the content of the provision(s) of the National Land Fund Act defining the scope of the land parcels covered by the National Land Fund, and if so, (3) whether it constitutes an amendment of a cardinal Act.

[26] 3.1 Section 1 of the Act amends Section 15 (5) of the Cooperatives Act. Section 1 of the Act amends Section 15 (5) of the Cooperatives Act. This provision, which was inserted into the Act with effect as of 3 July 1992 under the provisions of the subheading "Specific rules relating to arable land", concerns protected areas of nature and areas of nature intended for protection (that is, subject to a procedure for the preparation of a declaration of protection) which cannot be designated in the land funds under Section 13 (3) (a), (b) and (d) of the Act [*cf*. Section 15 (1) (i) and Section 15 (3) of the Cooperatives Act]. Pursuant to the Act, these must be "set aside for land owned by the Hungarian State and used jointly by the cooperative". This means that these pieces of land were primarily set aside for the benefit of the State-owned land fund [Section 13 (3) (c) of the Cooperatives Act]. The cooperative's right of joint use of these areas is terminated pursuant to Section 15 (5) of the Cooperatives Act and they are to be transferred to the "competent national park or nature conservation directorate", as originally defined in the same Act, and to the "body responsible for the conservation management of protected areas of nature", as amended on

1 January 2007. [Pursuant to Section 24 of Government Decree 71/2015 (III. 30.) Korm on the Designation of Bodies Responsible for Environmental Protection and Nature Conservation Authorities and Administration, the body responsible for the nature conservation management of protected areas of nature is the National Park Directorate, hereinafter referred to as the "Directorate".] Following Section 1 of the Act, the wording of Section 15 (5) of the Cooperatives Act on the transfer of protected areas of nature to the management of assets would be replaced by the wording "these areas shall be transferred to the National Land Fund".

[27] By Section 19 of the Act, which was in force until 25 November 1995, the legislature also wished to settle the fate of all other protected areas of nature and provided that the protected areas of nature defined in Section 15 (1) (i), with the exception of the agricultural land belonging to inhabited farms, were also to be transferred to the Hungarian State and administered by the nature conservation bodies, with compensation for the cooperative. This provision was repealed by Section 13 (7) (4) of Act II of 1993 on Land Settlement and Land Disbursement Committees, as it had been ruled unconstitutional by Decision 28/1994 (V. 20.) AB. The subsequently adopted Act XCIII of 1995 on the Restoration of the Level of Protection of Protected Areas of Nature (hereinafter referred to as the "Level of Protection Act") which, as set out in its preamble, was adopted in order to fully guarantee the fundamental constitutional right to the environment, to fulfil the State's constitutional obligations in this respect and to restore the original level of nature conservation provided by law, was intended to provide a uniform solution for the situation of protected or highly protected arable land and arable land planned for protection which had not been transferred to State ownership during the cooperative asset allocation (*see* Section 1 of the Cooperatives Act on the scope of the same Act). The Level of Protection Act provided for the expropriation of such land, with certain narrow exceptions, and its transfer to the management of the body responsible for the conservation management of protected areas of nature (now also the Directorate). Section 19 of the Cooperatives Act was deemed unnecessary in the light of the detailed expropriation provisions of the Level of Protection Act and was therefore repealed by the Level of Protection Act. The time limit for expropriation has been extended several times by the legislator, but no such expropriation has taken place to date.

[28] This means that, on the basis of the above-mentioned provisions of the Cooperatives Act, some protected land was transferred to State ownership and nature conservation (property) management, that is, already at the time of the asset allocation of the cooperative, while other land subject to the Level of Protection Act will only be expropriated in the future.

[29] 3.2 State-owned parcels of land belong to the National Land Fund under the National Land Fund Act [Section 1 (1) to (2f) and Section 16 of the National Land Fund

Act]. Section 16 generally provides that a parcel of land acquired by the State under any legal title is transferred to the National Land Fund, except in the case of expropriation (or sale in lieu of expropriation). Pursuant to Section 16 (2), the land to be expropriated under the Level of Protection Act will also be transferred to the National Land Fund [and to the Directorate under Section 21 (3c) of the National Land Fund Act, which is a cardinal provision of law under Section 48], since it is an expropriation for nature conservation purposes.

[30] The significance of the legislative amendment contested by the President of the Republic, on the basis of the legislation at issue, is that the land parcels which had already been transferred to the State in the course of the asset allocation under Section 15 (5) of the Cooperatives Act are now transferred to the National Land Fund. This amendment, correctly interpreted, does not in itself affect the asset management contracts already concluded and the Directorate's current asset management rights. Asset management contracts concluded before 1 September 2010 are terminated by Section 13 of the Act, with effect as of 1 April 2016.

[31] It follows, therefore, from Section 1 of the Act that, in the case of the protected areas in question, which are already State property under the Cooperatives Act and are currently administered by the Directorate, it is stated *expressis verbis* that those areas are now to be transferred to the National Land Fund.

[32] 3.3 The scope of the parcels of land included in the National Land Fund is defined in the National Land fund Act. Section 1 of the Act, although not formally amending the National Land Fund Act, undoubtedly introduces a relevant provision by inserting the phrase "shall be included in the National Land Fund" into the Cooperatives Act.

[33] The National Land Fund Act provides for the subject-matter of the regulation in question in several places, such as Section 1 and Section 16. The relationship between the two provisions is as follows: (a) Section 16(1) lays down as a general rule that "by virtue of this Act, land acquired by the State by any legal title shall be transferred to the National Land Fund"; (b) this is made more specific in Section 1 (1) to (2f). Consequently, Section 1 (1) to (2f) and Section 16 together define the scope of the National Land Fund.

[34] In the light of the foregoing, it does not follow from Section 16 (1) per se that the State-owned parcels of land covered by Section 15 (5) of the Cooperatives Act, which are held by the Directorate, have undoubtedly already been part of the National Land Fund, a fact which the amendment to Section 1 of the Act merely declares. This is confirmed by the fact that the amendment to the Act states that "these areas shall be included in the National Land Fund". In accordance with the grammatical interpretation of the wording, it is also stated that the land will be transferred to the National Land Fund as a result of the amendment.

[35] This is further supported, as a supplementary but not conclusive argument, by the fact that, as the President of the Republic pointed out in his petition, the original wording of draft Act T/3788 would have inserted the following provision in Section 1 (2) of the National Land Fund Act: "(2) In addition to the provisions of Subsection (1), the National Land Fund shall include [...] (b) protected areas or nature and areas of nature intended for protection which, pursuant to Act I of 1992 on the Entry into Force of Act I of 1992 on Cooperatives, and Transitional Rules, shall be set aside for land owned by the State at the time of designation of the land funds." If these areas had already been part of the National Land Fund [under other provisions of the National Land Fund Act], the detailed provision of the National Land Fund Act defining the scope of the National Land Fund, that is, Section 1, which is considered to be a cardinal provision under Section 48, would not have needed to be expressly amended.

[36] On the basis of the foregoing, the Constitutional Court finds that Section 1 of the Act is intended, in substance, to expressly broaden the scope of the National Land Fund.

[37] 3.4 In his petition, the President of the Republic also refers to the fact that Section 1 of the National Land Fund Act defines the scope of the land parcels included in the National Land Fund, which, pursuant to Article 38 (1) of the Fundamental Law, must be regulated by a cardinal Act. He raises two further arguments in support of his concerns about the adoption of the Act. Firstly, Section 1, which defines the scope of the land parcels included in the National Land Fund, is expressly classified as a cardinal provision by Section 48 of the National Land Fund Act. Furthermore, when the Act was drafted, the legislature originally intended to amend Section 1 of the National Land Act, and that amendment would have been made in accordance with the amendment of Section 15 (5) of the Cooperatives Act; therefore, the legislature would have expressly inserted a similar provision in the National Land Fund Act [see Section 11 (2) of the consolidated draft Act T/3788/14, source: http://www.parlament.hu/irom40/03788/03788-0014.pdf], and only abandoned this provision because the amendment did not obtain a qualified majority in the vote.

[38] Thus, the President of the Republic did not claim that the Cooperatives Act itself was a cardinal Act, but that Section 1 of the Act fell within the scope of cardinal regulatory subjects.

[39] In agreement with this, the Constitutional Court also points out the following. The scope of the cardinal Acts is defined by the Fundamental Law in two forms: (a) in the case of certain regulatory subjects, the Fundamental Law states, as a general rule, that these subjects, or possibly their "detailed rules", are defined by a cardinal Act [e.g. Article G (4), Article I (4), Article L (3), Article P (1), Article VII (5), Article VIII (4), Article IX (6), Article XXIX (3), Article XXXI (3), Article 2 (1), Article 4 (5), Article 24 (9),

Article 31 (3), etc.]; on the other hand, (b) in some cases the Fundamental Law also specifically mentions some of the cardinal regulatory subjects [e.g. Article G (1) (cases of the establishment and termination of Hungarian citizenship), Article T (1) (rules for the promulgation of certain Acts), Article VII (2) (form of organisation of religious communities), Article XXIII (4) (making the full exercise of the right to vote conditional on residence in Hungary), Article XXIX (3) (making recognition as a nationality a condition), Article 4 (2) (certain cases of conflict of interest of Members of Parliament).

[40] The requirement of cardinality [which, under Article T(4), requires a two-thirds majority of the votes of the Members of Parliament present] therefore applies not to specific Acts but specifically to regulatory (legislative) subjects. The legislator has opted for a solution whereby, in the case of a cardinal Act or an Act containing cardinal provisions, it states in the final provisions which provisions of the Act it considers to be cardinal.

[41] Accordingly, the problem of cardinality, and the related invalidity under public law, can be approached from several angles: (a) on the one hand, if it can be established beyond doubt on the basis of the Fundamental Law that a regulatory subject matter can only be regulated by a cardinal Act, then the regulation adopted by a simple majority results in invalidity under public law; and (b) on the other hand, it is also a question whether, if the legislator (that is, no longer the constituent power) has classified a regulatory subject matter as cardinal in a given Act, then this Act can only be amended by a two-thirds majority. In the present case, the Constitutional Court must determine the case concerning the first issue, since the President of the Republic has submitted in his petition that a legislative subject matter which is, in substance, a cornerstone has been amended by a simple majority.

[42] The concept of a "cardinal Act" was introduced by the Fundamental Law, but the previous Constitution also provided for the requirement of a two-thirds, that is, qualified, majority for the adoption of certain Acts. Accordingly, the Constitutional Court held that, on the basis of Decision 13/2013 (VI. 17.) AB {Reasoning [27] to [35]}, there is no impediment to the use of the arguments, legal principles and constitutional contexts developed in its relevant previous decisions on the interpretation of the subject matter of the cardinal legislation.

[43] Pursuant to Article P (1) of the Fundamental Law, arable land is the common heritage of the nation, the protection, maintenance and preservation of which for future generations is the duty of the State. Paragraph (2) provides that the limits and conditions necessary to achieve this objective shall be determined by a cardinal Act. Pursuant to Article 38 (1) of the Fundamental Law, "[t]he property of the State and of local governments shall be national assets. 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. The requirements for preserving and protecting national assets and for the responsible management of national assets shall be laid down in a cardinal Act." Given the general nature of the wording, it can only be determined by interpretation on a case-by-case basis whether the requirement of cardinality exists and which elements of the subject matter of the regulation in question are covered {*cf*. Decision 13/2013 (VI. 17.) AB, Reasoning [104]}.

[44] In the course of the review of the present case, it has already been established that Section 1 of the Act at issue, by the proposed amendment to the Cooperatives Act, would amend the content of Section 1 of the National Land Fund Act, which defines the land parcels covered by the National Land Fund. Section 48 of the National Land Fund Act clearly states that Section 1 is a cardinal provision under Article 38 (1) of the Fundamental Law.

[45] In this context, the Constitutional Court recalls the following findings of Decision 1/1999 (II. 24.) AB: "The requirement of a qualified majority applies not only to the enactment of an Act of Parliament issued as a direct implementation of a given constitutional provision, but also to the amendment (amendment to its provisions, supplementation) and repeal of this Act. No Act of Parliament passed constitutionally by a qualified majority may be amended or repealed by an Act of Parliament passed by a simple majority.. [...] In the opinion of the Constitutional Court, the direct (itemised) amendment of two-thirds Acts cannot be circumvented constitutionally by amending another independent simple-majority act which covers a subject close to the regulatory field of the two-thirds act or which covers a certain part thereof, or by passing a new act. All that would lead to a situation where, with the formal power of two-thirds acts left intact, the act regulating the fundamental right or institution would lose its constitutionally definitive power as compared to the amended or newly enacted acts formally demanding a simple majority." (ABH 1999, 25, 40-41)

[46] On the basis of the foregoing, the Constitutional Court finds that Section 1 of the Act adopted by a simple majority is aimed at amending a cardinal statutory provision, the adoption of which would have required a qualified majority. The provision therefore infringes Article P (2) and Article 38 (1) of the Fundamental Law. Having found that these provisions of the Fundamental Law had been infringed, the Constitutional Court did not consider the infringement of Article B (1) alleged in the petition. In view of the finding of a violation of the Constitution, the Act shall not be promulgated pursuant to Section 40 (1) of the Constitutional Court Act.

[47] 4. The petitioner challenged Sections 5 and 6 of the adopted Act amending Sections 4 (1) and 5 (2) of the Level of Protection Act on the grounds of invalidity under public law because, in its opinion, the conditions for expropriation of protected and

specially protected areas of nature and areas of nature intended for protection (hereinafter jointly referred to as "protected areas of nature") subject to the Level of Protection Act (the time limit for expropriation and the initiator of expropriation) could only have been amended by a qualified majority pursuant to Article P (2) of the Fundamental Law. The petitioner therefore submitted that the provisions of the Level of Protection Act which were to be amended fall within the scope of the legislation implementing Article P (2) and therefore constitute a cardinal legislative subject.

[48] 4.1 The main reason for the drafting of the Level of Protection Act was, as explained above, that the legislator had not taken sufficient account of the constitutional requirements of the conservation of nature in drafting the rules on the asset allocation of cooperative property, as found in Decision 28/1994 (V. 20) AB. The scope of the Act extends, on the one hand, to protected areas of nature which have been designated in land funds pursuant to Section 13 (3) (a), (b) and (d) of the Cooperatives Act and, on the other hand, to areas which, although not designated with regard to their protection, have not been set aside from the State-owned land fund pursuant to Section 15 (5) of the Cooperatives Act. If these areas have become private property, they must be expropriated by applying the rules of the Level of Protection Act (expropriation may be waived only in exceptional cases provided for by law, Sections 4 and 5 of the Level of Protection Act). The time limit for the implementation of the expropriation originally set by law has been amended by the legislator in several stages, and the current rules in this area currently set 31 December 2015 as the final date. Sections 5 and 6 of the Act would set this time limit at 31 December 2018 and, in the event of the entry into force of the amending provisions, expropriation would have to be initiated or requested by the body responsible for the management of the National Land Fund, instead of the body responsible for the conservation of protected natural areas (currently the Directorate).

[49] 4.2 In accordance with Article P (2), "[t]he limits and conditions for acquisition of ownership and for use of arable land and forests that are necessary for achieving the objectives referred to in paragraph (1) […] shall be laid down in a cardinal Act." Paragraph 1 as referred to provides that "[n]atural resources, in particular arable land, forests [...] 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."

[50] The relationship of the relevant provisions of the Level of Protection Act with Article P is based on the fact that the land to be expropriated, which is affected by the Level of Protection Act, is arable land under the relevant provisions of the Cooperatives Act, since those provisions of the Cooperatives Act are included in the Act under the heading "specific rules relating to arable land".

[51] Protected areas of nature are not exclusively State property, neither the Fundamental Law nor any other legislation provides for this. Section 68 of Act LIII of 1996 on the Conservation of Nature (hereinafter referred to as the "Conservation of Nature Act") merely provides that, with the exception of the cave, which is the exclusive property of the State and is non-marketable, protected areas of nature are marketable to a limited extent and that, with certain exceptions, the sale of a protected area of nature owned by the State is not possible. The legislator therefore ensures the priority protection of areas of nature in general and of protected (specially protected) areas of nature (in addition to the fact that Section 4 (1) (j) of Act CXXIII of 2007 on Expropriation allows expropriation for the purpose of nature conservation) not only by means of State ownership, but also by means of statutory provisions (in particular Act LIII of 1996 on the Conservation of Nature), which are binding on all, irrespective of the owner.

[52] In Decision 28/1994 (V. 20.) AB, the Court also held that the "existence of legal grounds for the expropriation of property for nature conservation purposes does not mean that the State cannot fulfil its duty otherwise. [...] Theoretically, the use of the protected areas could be re-transferred from the management of nature conservation authorities to private owners, just as protected areas and areas intended for protection could be privately owned or managed by private owners; the severity of the obligations imposed on the users must be increased in all of the above cases so that there will be no decrease in the level and efficiency of protection." (ABH 1994, 134, 142.)

[53] The objective of Article P is to ensure a high level of protection of national resources (including arable land), and the limits and conditions for the acquisition of ownership of land and forests must be designed to achieve this objective. The "limits" and "conditions" for the acquisition of ownership are explicitly land-marketability in nature, and are intended to guarantee the protection described in paragraph (1). It should be stressed that the legislator did not include the entire regulation of the protection of natural resources in the cardinal legislative field, but only certain issues (provisions containing limits and conditions) relating to the acquisition (and use) of ownership, as defined in Article P (2). The forms of agricultural management listed in this paragraph were also included by the legislator in the cardinal regulatory field only in the context of the requirements for the protection of natural resources, in particular of arable land, but this does not mean that the entire agricultural sector is included in this field.

[54] The Level of Protection Act and the provisions thereof which the Act seeks to amend are related to the subject-matter of the regulation described in Article P, since the purpose of the Level of Protection Act was, according to its title, to restore the level of protection of protected areas of nature. However, in the Constitutional Court's view, the provisions of the Level of Protection Act which the Act seeks to amend cannot be

regarded as a barrier to or a condition for acquisition within the meaning of Article P (2).

[55] The time limit for the implementation of the expropriation does not constitute a barrier to or a condition for the acquisition of property at all; on the contrary, the imposition of an expropriation is rather an "obligation to acquire" on the part of the State. It is therefore not a restriction on land marketability, but a nature conservation objective (based on the fact that the legislator may have considered that the level of nature conservation achieved by legislation on privately owned land was less assured than that achieved by legislation on State-owned land).

[56] The change of the body requesting (initiating) the expropriation does affect the acquisition of the land covered by the Level of Protection Act (since expropriation can only take place on condition that it is requested / initiated by the body entitled to do so under the Level of Protection Act). However, in accordance with the proper interpretation of the purpose of Article P of the Fundamental Law, it is clearly not a condition for acquisition which would be a cardinal condition within the meaning of paragraph (2).

[57] On the basis of the foregoing, the Constitutional Court concluded that Articles 5 and 6 of the Act do not regulate a subject-matter which is considered to be a cardinal subject-matter under Article P (2) and are therefore not contrary to the Fundamental Law.

[58] 5. The President of the Republic did not allege that Sections 3 and 4, Section 8 (2) to (3) and Section 13 of the Act were incompatible with the Fundamental Law on the ground of invalidity under public law. However, in his view, those sections are so closely connected with the statutory provisions which he considers to be invalid under public law that, in the event of a declaration of their unconstitutionality by non-conformity with the Fundamental Law, such provisions are rendered devoid of purpose. He therefore requested the Constitutional Court, in the event of a declaration that the contested provisions (Section 1 and Sections 5 to 6) are invalid under public law, to declare that they are also contrary to the Fundamental Law as a legal consequence in respect of Sections 3 to 4, Section 8 (2) to (3) and Section 13 of the Act. Article 24 (4) of the Fundamental Law allows the Constitutional Court to review a provision of law even if it is closely connected in substance with the provision of law sought to be reviewed. The Constitutional Court makes use of this possibility where (a) the review of the constitutionality of the challenged legal provision cannot be carried out without considering the related provision {for its application, *see* e.g. Decision 33/2013 (XI. 22.) AB, Reasoning [10]; Decision 20/2014 (VII. 3.) AB, Reasoning [204]; Decision 3057/2015 (III. 31.) AB, Reasoning [28]}, or (b) if, as a result of the finding of a possible breach of Fundamental Law and the annulment of the provision, the related

rule remaining in force would be inapplicable per se or would be uninterpretable in the application of the law, which would violate legal certainty [*see* e.g. Decision 127/2009 (XII. 17.) AB, ABH 2009, 1056, 1072].

[59] On the basis of the above, the Constitutional Court points out the following.

[60] (a) First, the element of the petition challenging Section 1 and Sections 5 to 6 of the Act and alleging invalidity under public law has been addressed by the Constitutional Court in the present decision. In order to determine whether or not the adoption of the provisions of the Act challenged by the President of the Republic required a qualified majority, it was not necessary to review the other provisions of the Act [Sections 3 and 4, Section 8 (2) and (3) and Section 13].

[61] (b) On the other hand, as a legal consequence of the decision, the Act cannot be signed by the President of the Republic; thus, it cannot be promulgated and it does not enter into force and, therefore, none of its provisions become part of the legal system. Consequently, there is currently no risk that a finding that Section 1 is inconsistent with the Fundamental Law would leave rules in the legal system that are in themselves uninterpretable or inapplicable.

[62] In the light of the foregoing, the Constitutional Court considers that, in the present case, it is not necessary to apply Article 24 (4) of the Fundamental Law by extending the legal consequence of the incompatibility with the Fundamental Law to Sections 3 and 4, Section 8 (2) to (3) and Section 13 of the Act.

IV

[63] Subsequently, it was necessary to ascertain whether the Constitutional Court could proceed to the assessment of the other substantive elements of the President of the Republic's petition for ex ante review of the content of the Act, after having found that Section 1 of the Act was contrary to Fundamental Law.

[64] The right of the President of the Republic to submit a petition for an ex ante norm control is laid down in Article 6 (4) of the Fundamental Law. Under that provision, if the President of the Republic considers a law or a provision of a law to be contrary to the Fundamental Law, he shall refer the law to the Constitutional Court for a review of its conformity with the Fundamental Law.

[65] In the present case, the petition by the President of the Republic contains an alternative request as regards form: It essentially seeks a declaration of invalidity under public law, but it also raises substantive constitutional concerns before the Constitutional Court. The Constitutional Court points out that, from the point of view of the treatment of petitions, *ex ante* review of legislation cannot be compared to *ex post* review of legislation: the function of the *ex ante* review of legislation is broader. Therefore, a request in the alternative does not preclude the review to be carried out

with regard to secondary / tertiary requests. Indeed, the President of the Republic has a primary duty under the Fundamental Law to be the guardian of the democratic functioning of the State [Article 9 (1)]. In addition, under Article 9(3)(i), the President of the Republic may refer the adopted Act to the Constitutional Court for a review of its conformity with the Fundamental Law. Obviously, the sole means by which the President can fully exercise this function is to refer the matter to the Constitutional Court, stating his concerns about the form and, if any, the substance of the Act in its entirety.

[66] The Constitutional Court is responsible, pursuant to Article 24 (2) (a) of the Fundamental Law, for scrutinising, on the basis of a petition to that effect, Acts of Parliament which have been adopted but not yet promulgated for their conformity with the Fundamental Law. The Constitutional Court is the principal body for the protection of the Fundamental Law [Article 24 (1) of the Fundamental Law] and can only fully discharge its constitutional duty in the present case if it conducts an exhaustive review of the petition, that is, if its proceedings are not limited to a formal examination of the Act. This is particularly true in the present case, which affects a wide range of society and, through the use of natural resources, also affects the living conditions of future generations [*cf*. the National Avowal and Article P (1) of the Fundamental Law].

[67] The Constitutional Court also points out that the part of the petition of the President of the Republic alleging invalidity under public law was only partially upheld and that it could not therefore refrain from considering the part of the petition alleging that other provisions of the Act were contrary to the Fundamental Law from a substantive point of view.

V

[68] As set out in point IV (Reasoning [63] et seq.), the Constitutional Court, having proceeded to assess the invalidity under public law, also reviewed the objections raised in the petition by the President of the Republic concerning the level of protection. To this end, the Court first reviewed the relevant developmental junctures and the current situation of environmental protection and environmental legislation.

[69] 1. Although the legal protection of certain elements of the natural environment (forests, waters, fishing and hunting), which are important for the economy or subsistence, dates back thousands of years, the comprehensive approach, thinking and values of environmental protection in the present sense have only been in existence since the 1970s. The root causes include: population explosion, rapid industrial expansion and consumption growth, pollutant emissions and waste production, use of chemicals that are not natural, irreversible damage to or depletion of natural resources. In summary, the natural foundations of life in the biological sense (the living world), including human life, are being threatened and damaged.

[70] The importance of protecting the environment was first expressed by civil movements and independent intellectual (scientific) societies. On 22 April 1970, Earth Day was held in the United States, and is now a global movement.

[71] In 1972, the Club of Rome was founded and its report "The Limits to Growth" shook the world. The report warned of the danger of a global environmental catastrophe by the middle of the 21st century, but it also developed a concept of balance.

[72] On 5 June 1972 (now World Environment Day), the UN Conference on the Human Environment met in Stockholm. The content and recommendations of the Stockholm Declaration led to a wave of national legislation, which later reached the level of constitutional law. In Hungary, Act II of 1976 was exemplary and modern. In addition to the basic principles and general rules of environmental protection, it treated air, water, soil, wildlife, landscape and settlements (the natural and built environment) as separate protected objects.

[73] In 1984, the UN General Assembly established the World Commission on Environment and Development, chaired by Gro Harlem Brundtland, Madame Prime Minister of Norway. In 1987, the World Commission issued its report "Our Common Future", which gave new impetus to the civil movements and paved the way for the UN World Conference on the Environment.

[74] The Declaration of the 1992 Rio de Janeiro Conference on Environment and Development already contained 27 principles and tasks for the 21st century (AGENDA-21). During the conference a Framework Convention on Climate Change and Biodiversity was adopted, which is legally binding on signatory countries to reduce greenhouse gas emissions and conserve biodiversity.

[75] However, few of the Rio commitments were implemented, and the UN convened another World Conference in Johannesburg in 2002, which adopted the Declaration on Sustainable Development (32 points) and the Plan of Implementation (153 points), but these failed to deliver further successes.

[76] While the lack of a breakthrough is not in itself a failure, the reasons for the slowdown in progress need to be explored. This is what the Rio 20+ Conference (2012) did, reviewing 40 years of progress. At this stage, a new balance needs to be found between the environmental (1972), plus economic (1992), plus social (2002) dimensions, a balance that meets the requirements of sustainable development.

[77] Development is sustainable if economic development leads to continuous social improvement within the limits of ecological carrying capacity, while preserving natural resources for future generations. [*See* in summary: Parliamentary Resolution 29/2008 (III. 20.) OGY on the National Climate Change Strategy, the scientific basis of which was provided by the research project "Global Climate Change: domestic impacts

and responses" known as VAHAVA (VÁltozás - HAtás – Válaszok *English*: Change – Effect - Answers) (The main coordinator of the VAHAVA project is academician István Láng.)]

[78] 2. The necessity and difficulty of finding a balance between the objectives of "green economy + sustainable development + poverty eradication" is also a given within the law: freedom of property, enterprise, capital flows and trade on the one hand, and the maintenance of social security and large social solidarity institutions on the other, are guaranteed (or at least promised) by international human rights documents and national constitutions, as well as the protection of a healthy environment and the conservation of natural resources. Economic, social and environmental struggles of interest (reconciliation, consensus building) must therefore also be fought within the law.

[79] Hungarian legislation and the development of constitutional law also fitted into this development in an organic, even pioneering manner. The influence of the strong civil society environmental movements and organisations (e.g. the Danube Circle) was also felt. Article 18 of the Provisional Constitution, adopted by Act XXXI of 1989, not only declared but also guaranteed the right to a healthy environment ("The Republic of Hungary shall recognise and enforce the right of everyone to a healthy environment.") In accordance with Article 70/D of the Constitution, "[e]veryone living in the territory of the Republic of Hungary shall have the right to the highest possible level of physical and mental health". Pursuant to paragraph (2), "[t]he Republic of Hungary shall implement this right through the organization of labour safety, health care institutions, medical care, through securing the opportunities for regular physical activity, as well as through the protection of the built and natural environment". The Constitutional Court has interpreted and developed the content of the articles of the Constitution in a number of decisions.

[80] 3. In one of its most important and frequently cited decisions, in Decision 28/1994 (V. 20.) AB (hereinafter referred to as the "1994 Court Decision"), the Court held that the "right to environmental protection [...] is primarily an independent and inherent institutional protection, that is, a specific fundamental right whose objective institutional protection side is predominant and decisive. The right to the environment raises the guarantees of the fulfilment of the State's obligations regarding the protection of the environment to the level of fundamental rights, including the conditions for the limitation of the protection of the environment achieved. Due to the specificities of this right, the tasks that the State performs elsewhere by protecting individual rights must be performed here by providing legal and organisational guarantees." (ABH 1994, 134, 138) In the 1994 Court Decision, the Constitutional Court also held that the right to the environment is a duty of the State to protect the environment and to maintain the natural basis for life. In this respect, "[t]he 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 emphasised that the degree of institutional protection of the right to the environment is not arbitrary. "It follows from both the object and the dogmatic specificities of the right to the environment that the State must not lower the legislatively ensured level of environmental protection unless necessary to implement other constitutional rights or values. Even in the latter event, the degree of reduction in the level of protection must not be disproportionate to the objective to be achieved." (ABH 1994, 134, 140). It has also stated that the enforcement of the right to the environment also "compels the State not to regress from preventive rules of protection to the protection ensured by sanctions. This requirement may also be waived only in cases of unavoidable necessity and only in proportion." (ABH 1994, 134, 141).

[81] The Constitutional Court has thus concluded from Article 18 of the Constitution, inter alia, that "the level of protection already achieved is not to be reduced" (this is what is most commonly referred to as the principle of "non-derogation"), which won great national and international recognition. The Constitutional Court has also pointed out that "the increased severity of prohibitions and sanctions does not suffice; preventive guarantees are needed that exclude the possibility of damage with the same probability as if the area were owned by the State and managed by nature conservation authorities" (ABH 1994, 134, 142). In this context, he stressed the significant limitation of property, referring back to Decision 64/1993 (XII. 22.) AB.

[82] In this decision, which examined the content of the right to property, the Constitutional Court held that "the content of property protected as a fundamental right must be understood in conjunction with the (constitutional) public and private law limits in force at the time. The scope of constitutional property protection is always specific; it depends on the subject, object and function of the property, as well as on the type of restriction. From the other point of view, the constitutional possibility of a particular type of interference by public authorities with the right to property varies according to the same criteria". (ABH 1993, 373, 380) This decision provided a broad mandate for restriction with regard to both private and public property, which the legislature has made use of. The general principles of environmental law (requirements, prohibitions and restrictions) were extended and the legislation was differentiated according to the objects protected (land, water, air, wildlife, etc.). The development of environmental law has been accompanied by the establishment and operation of public institutions (authorities, inspectorates, asset management). The development of the legal and institutional level of protection has also been promoted by decisions of the Constitutional Court.

[83] In its subsequent practice, the Constitutional Court has extended the right to a healthy environment, declared in its 1994 decision cited above, to the protection of the

built environment. In Decision 27/1995 (V. 15.) AB, considering the regulations on the construction of natural gas distribution pipelines, the Constitutional Court proceeded from the premise that the enforcement of the right to a healthy environment is a State duty. It also held 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". The Decision also pointed out that "the mere economic interest of the builder or developer is not, for example, sufficient justification for the public authority to grant a derogation from the extent of the safety zone laid down by law and from the prohibitions and restrictions provided for by law". (ABH 1995, 129, 134)

[84] A similar finding was made in Decision 14/1998 (V. 8.) AB, which stated in its operative part as a constitutional requirement that "in the context of spatial planning, environmental objectives on the one hand and development objectives on the other must be weighed equally in decision-making". The Constitutional Court referred to the fact that the wording of the Regional Development Act "in accordance with sectoral concepts" "cannot be interpreted as meaning that sectoral concepts have any priority over environmental interests in the order of importance" (ABH 1998, 126) The Constitutional Court stressed that "[n]o developed country is capable of guaranteeing a minimum level of environmental pollution throughout the country without differentiation. The improvement or even the maintenance of human living conditions is unthinkable without productive investment or the development of infrastructure, and whether it is the construction of roads, railways or the development of settlements, it inevitably increases the previous environmental burden in the area concerned." The Constitutional Court argued that the provision of the Regional Development Act at issue "entails a risk of unconstitutional legislative practice. Indeed, the wording which refers to the determination of the burden on the environment solely in accordance with sectoral concepts could easily create the impression in the minds of those applying the law that sectoral concepts have absolute priority over environmental interests." (ABH 1998, 126, 130)

[85] In its Decision 48/1998 (XI. 23.) AB, the Constitutional Court stated in connection with the right to a healthy environment that it is "not a subjective fundamental right in its present form; still, it is more than a mere constitutional mission (or state objective) as it is part of the objective institutional protection side of the right to life, specifically mentioning the State's duty to maintain the natural foundations of human life as an independent constitutional "right". Even in the absence of Article 18 of the Constitution, the same constitutional duties of the State could be deduced from Article 54 (1) of the Constitution." (ABH 1998, 333, 343)

[86] These and identical or similar decisions of the Constitutional Court have consolidated and clarified the content of the fundamental constitutional right to a

healthy environment and the level of protection it had previously achieved, while at the same time emphasising the importance of the balance (harmony) between economic development and environmental interests.

[87] 4. Having presented the main decisions on the protection of the environment and nature adopted on the basis of the Constitution, the Constitutional Court reviewed the provisions of the Fundamental Law on the protection of the environment and the conservation of nature.

[88] Pursuant to the National Avowal of the Fundamental Law, "[w]e commit ourselves to promoting and safeguarding [...] all man-made and natural assets of the Carpathian Basin. We bear responsibility for our descendants and therefore we shall protect the living conditions of future generations by making prudent use of our material, intellectual and natural resources."

[89] In accordance with Article P (1) of the Fundamental Law, in its Foundation Chapter, "[n]atural 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." Pursuant to paragraph (2) of the same Article, "[t]he limits and conditions for acquisition of ownership and for use of arable land and forests that are necessary for achieving the objectives referred to in paragraph (1), as well as the rules concerning the organisation of integrated agricultural production and concerning family farms and other agricultural holdings, shall be laid down in a cardinal Act."

[90] Article XX (1) of the Fundamental Law provides that "[e]veryone shall have the right to physical and mental health", and Article XXI (1) (taking over Article 18 of the Constitution) provides that "Hungary shall recognise and endorse the right of everyone to a healthy environment." In its Decision 3068/2013 (III. 14.) AB, the Constitutional Court held that "[t]he text of the Fundamental Law is identical to the text of the Constitution with regard to the right to a healthy environment, and therefore the findings made in previous decisions of the Constitutional Court may be considered as authoritative in interpreting the right to a healthy environment" {Reasoning [46]}. On this basis, taking into account Decision 13/2013 (VI. 17.) AB {Reasoning [32]}, the Constitutional Court may use the arguments, legal principles and constitutional context developed in its previous decisions.

[91] The cited provisions show that the Fundamental Law not only preserved the level of protection of the fundamental constitutional right to a healthy environment, but also contains significantly more extensive provisions in this area than the Constitution. The Fundamental Law thus further developed the environmental set of values and approach of the Constitution and the Constitutional Court. It is the task of the Constitutional

Court to interpret the provisions of the Fundamental Law in today's circumstances and to explain their content.

[92] In the present case, the Constitutional Court considered it necessary to interpret the three provisions of the Fundamental Law together and in conjunction with each other. Although Article P(1) does not define the scope of the natural values to be protected (*see* the phrase "in particular"), it does define what environmental protection as a state and citizen obligation actually means: 1. protection; 2. maintenance; and 3. conservation for future generations. The State's obligation is therefore regulated and emphasised in Article P (1) of the Fundamental Law. The extension of the scope of persons subject to the obligation is a significant step forward in the Fundamental Law. Whereas under the Constitution only state obligations were emphasised in environmental protection, the Fundamental Law also speaks of the obligations of "everyone", including civil society and every citizen.

[93] 5. As stated in the President of the Republic's petition for preliminary norm control, the Constitutional Court was required to ascertain whether or not certain provisions of the contested Act [Sections 3 to 6, Section 8 (2) and (3) and Section 13] constitute a derogation from the level of protection of nature conservation achieved to date under the legislation. However, in order to decide this issue, it is not sufficient to analyse the contested law (especially in view of the fact that the law was submitted to the National Assembly as a package of amendments to several other Acts), but the Constitutional Court needed to consider the regulatory environment in order to reach an informed decision. In doing so, it took into account the position of principle of the Deputy Commissioner for Fundamental Rights for the Protection of the Interests of Future Generations, the Advocate of Future Generations, (1) in his statement of principle entitled "National Parks as Guardians of Natural and Cultural Values for Future Generations" (16 December 2014) and (2) in his position on the petition.

[94] Section 13 of the Act amends Section 38 (1) of the National Land Fund Act to the effect that, in respect of land belonging to the National Land Fund prior to the entry into force of the Act, with the exception of contracts of trust concluded by the National Land Fund after 1 September 2010, the asset management relationship existing on the date of entry into force of the Act and not terminated by 1 April 2016 shall terminate on 1 April 2016. The other provisions of the Act under challenge contain related provisions affecting the administration of the assets of the National Land Fund Management Organisation.

[95] The Directorate's nature conservation asset management rights would therefore be terminated by the Act with effect as of 1 April 2016 in respect of the land parcels transferred to the National Land Fund. In that context, the Constitutional Court examined the changes which the abolition of that asset management right would bring

about in relation to the specific nature conservation management of the land parcels. To this end, it was necessary to consider what functions and powers the National Land Fund Management Organisation has.

[96] Section 1 (3) of the National Land Fund Act defines the purpose of the National Land Fund. This list, consisting of points (a) to (n), sets out in detail the tasks and priorities of the Land Fund, which are essentially and primarily land-policy and utilisation-economic objectives. This is in fact a form of essentially economic objective, in line with the general explanatory memorandum to the amendment, which states that the Government's objective is to ensure that State-owned land is used "in accordance with uniform utilisation principles" and that the uniform exercise of ownership rights and the uniform use of state-owned land are achieved. In the detailed explanatory memorandum to the draft Act, the legislator also refers to this issue and points out that "the maintenance of exclusive management of the assets of the National Park Directorate under certain separate laws is not justified, since a significant part of the land is used on the basis of uniform principles, under the same conditions and under the same lease". In line with this, Section 15 (2) of the National Land Fund Act provides that the use of the National Land Fund's land parcels shall be in accordance with the land tenure policy guidelines set out in Subsection (3). The essential element of the land tenure policy guidelines listed in Subsection (3) is the utilisation of arable land, including the stabilisation of the situation of land users, the promotion of their development, the establishment and strengthening of family farms, and the promotion of environmentally friendly production for sustainable farming from the land utilisation side, stimulating and regulating the land market, laying the foundations for quality land exchanges, encouraging and influencing changes in the structure of production, supporting land rotation, making land suitable for EU subsidies, or supporting the social land programme and public employment.

[97] From the above-mentioned land tenure policy guidelines of an economic nature, it can be concluded that the National Land Fund Management Organisation does not specifically perform any nature conservation tasks, and is not obliged to enforce nature conservation aspects of this kind under the legislation in force (environmental protection is only mentioned as a factor to be taken into account in one place in the declarative legal list of its tasks, but this is not an independent competence and thus not a guarantee rule). In addition, nature conservation and environmental protection are also included in the list of the National Land Fund's tasks [Section 1 (3) (h) of the National Land Fund Act], but here again they are only one of the aspects to be taken into account.

[98] Pursuant to Government Decree 71/2015 (III. 30.) Korm, the National Inspectorate for Environment and Nature Protection, the National Environmental Institute and the National Park Directorates are obliged to perform the tasks of environmental

protection and nature conservation authorities. Under the provisions of Section 24 of this Decree, the Government designates the National Park Directorates (hereinafter referred to as the "Directorate") as the body responsible for the nature conservation management of protected natural areas. Pursuant to Section 37 of the Decree, the core state activity of the Directorate includes, *inter alia*, the tasks related to the nature conservation management of protected and specially protected natural values, protected and specially protected areas of nature, Natura 2000 sites and sites of community importance, and sites and values covered by international conventions on nature conservation, except for those tasks that are to be performed by another body or natural person (nature conservation management). In addition, the Directorate performs asset management functions in respect of State-owned assets under its management (nature conservation asset management). The terms "nature conservation management" and "nature conservation asset management" are therefore not exactly synonymous [s*ee* Section 36 of the Nature Conservation Act, Sections 43/A-43/D of Government Decree 262/2010 (XI. 17.) Korm. as well as Ministerial Directions 12/2012 (VI. 8.) VM of the Minister of Regional Development].

[99] Government Decree 262/2010 (XI. 17.) Korm on the Detailed Rules for the Utilisation of Land Parcels of the National Land Fund (hereinafter referred to as the "Government Decree") provides that the management of property for nature conservation purposes is carried out by the National Park Directorates. Under Section 43/A (1) of this Decree, the primary objective of property management for nature conservation purposes is to achieve public nature conservation objectives on State-owned land, to preserve living and inanimate natural values, to conserve landscape and cultural-historical values, to preserve and protect the condition and value of natural assets and to increase their value in a sustainable manner. Subsection (2) further provides that, in the course of the asset management for nature conservation purposes, the management of fields and forests in protected areas (hereinafter referred to as: farming) may be carried out with regard to nature conservation objectives, preference shall be given to the use of traditional (landscape), nature-friendly and nature-friendly farming methods, the maintenance of native and long-established domestic animal populations as genetic reserves, and the maintenance of the protected area in accordance with nature conservation interests through livestock (in appropriate numbers, species and breed composition).

[100] A detailed list of the tasks of the Directorate, broken down by type of cultivation, is contained in Ministerial Instructions 12/2012 (VI. 8.) VM of the Minister of Regional Development on the performance of the nature conservation management activities of the national park directorates according to uniform professional principles (hereinafter referred to as the "Ministerial Directions").

[101] Pursuant to the Government Decree, the directorates carry out special conservation management activities other than general asset management. The nature conservation asset manager either exploits the area himself or by leasing it out, in the latter case the Government Decree [*see* § Section 37 and Section 43/C (3)] and the Ministerial Directions (Annex 2.2.4) impose additional requirements on the manager, compliance with which is monitored by the nature conservation guard service (Section 59 of the Nature Conservation Act). The common feature of both types of utilisation is the priority given to nature conservation aspects, which the nature conservation trustee has strong powers to enforce. Accordingly, the directorates are also provided with the possibility to terminate leases as a direct sanction (*see* Appendix 1: Model Lease Agreement to the Ministerial Directions).

[102] Compared to nature management, the essential additional power is the adaptability potential of the asset manager's procedure. Accordingly, through the guard service, the nature conservation priorities can be immediately and directly enforced by the nature conservation body in the protected area of nature when necessary.

[103] Compared to the flexibility of conservation management and the possibility to act in a manner that takes account of the prevailing conditions at a given time, conservation management implies weaker powers. The nature conservation manager can initiate ad hoc restrictions with the authorities. This is a possible and time-consuming interference option, but also carries the risk of delay. The nature conservation manager can only enforce the management methods, restrictions and prohibitions laid down in what are known as nature conservation management plans, which are published in ministerial or municipal decrees, on the area under his management. These management plans must be reviewed at least every 10 years, so that it is generally impossible to directly enforce changes to them that contain specific provisions for the particular natural conditions of a given year or season.

[104] Accordingly, it can be concluded that, in comparison with the direct and immediate action of the nature conservation asset manager, the nature conservation manager has indirect powers to enforce nature conservation aspects, which can only be exercised in a reactive and ex post manner.

[105] The conclusion may be drawn from the amendment of the Act impugned by the President of the Republic and its legislative context that, under the legislation currently in force, the National Land Fund does not provide for the management of protected natural areas for nature conservation purposes by the National Asset Management Organisation as the embodiment of the State's ownership. The contested legislative provisions provide *expressis verbis* only that the asset management right for nature conservation purposes under contracts concluded before 1 September 2010 which are

still in existence is extinguished. The Act does not, however, provide which of the bodies of the State will henceforth carry out the functions of the national park directorates which have ceased to exist, or whether they will be carried out by a body of the State at all. In the case of State-owned land that is transferred to the National Land Fund, the Land Fund is the asset manager, but this is not (or not specifically) a type of nature conservation asset management, as described above. The only place where the legislation challenged by the President of the Republic mentions that the management of such land for nature conservation purposes may also be carried out is in Section 13 of the Act, which provides, in the context of the amendment to Section 38 (2) of the National Land Fund Act, that "if the use of the land concerning which the right of asset management has ceased is directly related to the performance of the basic tasks of the body or economic organisation defined in Section 20 (1) and (2), articles of association or by law, and the body or economic organisation submits a written application for the acquisition of the right of asset management, the National Land Fund shall conclude an asset management contract for the part of the land to which the application relates". However, this provision is the reverse of the system previously in force. The nature conservation asset management right previously vested by operation of law in the national park directorates will now only be "revived" if the Directorate decides that it sees a need to "restore" this type of nature conservation supervision and control for certain areas. However, neither the Act nor the explanatory memorandum to the draft Act provides any further guidance as to which areas are considered to be "directly serving" the performance of core functions. There is also a lack of legal safeguards to exclude the possibility of withdrawing leasable protected areas of nature simply on the grounds that they do not directly serve the core functions. In the light of the above, it can be concluded that the entry into force of the Act entails the risk that certain areas will not be returned to the management of the nature conservation by the Directorate and will therefore no longer be subject to nature conservation management, which, as explained above, will constitute a derogation from the level of protection achieved.

[106] On the basis of the constitutional court practice described above, which is also applicable in the present constitutional context, it is clear that the level of nature conservation guaranteed by legislation may not be reduced by the State unless this is unavoidable for the enforcement of another constitutional right or value.

[107] In the view of the President of the Republic, the level of protection already guaranteed by the National Land Fund is reduced by replacing the Directorates in certain cases with the National Land Fund, since the special expertise and infrastructure of the Directorates is lacking in the National Land Fund Management Organisation. As an administrative body, the competences of the National Land Fund Management Organisation should have been extended by defining this function, since it can achieve its social purpose and institutional responsibility through the competences of any

administrative body (as the means to this end). Nevertheless, the contested Act does not provide at all for the extension of the powers of the National Land Fund, and therefore the suitability of the National Land Fund in its present form to guarantee nature conservation aspects at the same level as nature conservation asset management is fundamentally questionable, especially in view of the fact that the National Land Fund does not have the necessary expertise or the resources and specialists to perform nature conservation asset management tasks in the current regulatory environment.

[108] In the course of nature conservation asset management, the professional aspects of environmental protection could be enforced in the previous position of asset manager, but at present they cannot be enforced within the National Land Fund Management Organisation due to a lack of competence. The obligation to ensure that nature conservation management and asset management are carried out jointly by the same body cannot be derived from Article P(1) of the Fundamental Law, but the obligation to provide organisational and institutional guarantees can. In this respect, it is therefore necessary to examine whether the new legislation, in comparison with the unified nature conservation management and asset management, counterbalances the derogation entailed by the organisational changes with guarantee elements.

[109] It follows from the State's obligation to protect the institutions that a change in the organisational system for environmental protection must not lead to a reduction in the level of protection. The obligation of institutional protection does not mean that the State cannot lay down different rules for the holder of the right to manage the land forming part of the National Land Fund, but it can do so only with sufficient guarantees. Article P (1) of the Fundamental Law sets out the objective of the State, which is to be achieved by guaranteeing and enforcing the fundamental right derived from Article XXI (1). The fulfilment of this State objective and the enforcement of the fundamental right to a healthy environment are ensured by the maintenance of the level of protection of the healthy environment already achieved as a result. A change in the nature conservation institutional framework may in itself, even if the nature conservation standards remain unchanged, justify a reduction in the level of protection, if the change in the institutional framework results in less effective implementation of nature conservation aspects. In the 1994 Court Decision, it was held that "the State does not enjoy the freedom to allow the state of the environment to deteriorate or to allow the risk of deterioration." Furthermore, "prevention is a priority among the means of protecting the right to the environment, as the subsequent sanctioning of irreversible damage cannot restore the original situation. The enforcement of the right to the environment constitutionally requires that the state, as long as legal protection is necessary at all, may withdraw from the achieved level of protection only under conditions when it would be appropriate to restrict a fundamental right. The

enforcement of the right to the environment by upholding the level of protection also compels the State not to derogate from preventive rules of protection to the protection ensured by sanctions. This requirement may also be waived only in cases of unavoidable necessity and only in proportion." (ABH 1994, 134, 140-141).

[110] Given that the Fundamental Law has not only preserved the level of protection of the fundamental constitutional right to a healthy environment, but also contains considerably more extensive provisions in this area than the Constitution, it can be concluded that a regulation on the formation of organisations which results in less effective protection creates a situation contrary to the Fundamental Law. In the present case, the fact that the management of nature conservation assets, the primary objective of which is to achieve nature conservation objectives and to preserve and sustainably enhance the condition of natural assets [Section 43/A (1) of Government Decree 262/2010 (XI. 17.) Korm], is now carried out by an organisation which is essentially concerned with land tenure policy, raises a real risk of a reduction in the level of protection. The activities of the National Land Fund, which pursues a land tenure policy objective, are primarily determined by profit considerations, whereas the primary objective of asset management for nature conservation is not the realisation of income. Nature conservation and economic considerations are necessarily competing aspects, since the implementation of nature conservation always implies a degree of self-limitation from the point of view of the State, which is hardly to be expected from an economically oriented and profit-oriented body. Inadequate implementation of nature conservation aspects, and their possible secondary status, may result in long-term negative externalities, social costs and damage which are contrary to the obligation to preserve biodiversity, in particular native plant and animal species, for future generations, as laid down in Article P (1) of the Fundamental Law, and to the right to a healthy environment, as laid down in Article XXI (1). If the legislator nevertheless decides to entrust nature conservation tasks to a body with an economic approach, it is only by means of specific material and procedural guarantees that it can be ensured that nature conservation objectives are not subordinated to primarily profit-oriented economic activity. Given the absence of such guarantees in the current legislation, there is a risk that the aspect of efficient management will become paramount at the expense of nature conservation. On the basis of the foregoing, the Constitutional Court has concluded that the legislature did not provide, in the Act sent to the President of the Republic for signature, for the guarantees derivable from Article P (1) of the Fundamental Law which would ensure that the level of nature conservation guaranteed by the legislation would not be reduced as a result of the amendment. The fact that certain pre-existing and clearly identifiable powers conferred by legislation are absent from the regulatory environment, leaving certain tasks unperformed, results in a reduction in the level of protection provided by legislation, even if this results in "merely" a risk of actual deterioration of the state of nature. In adopting a legislative

act of such a comprehensive nature, which is the subject of a constitutional review and which, as in the present case, involves the amendment of several legislative acts, the legislature must pay particular attention to the completeness of the legislation and to the extent to which it is not incomplete. Care must also be taken to ensure that the effectiveness of the guarantees previously contained in the legislation, and the level of protection itself, is not reduced, but at least maintained at the level it had before the amendment, or even increased.

[111] In the light of the above, the Constitutional Court states, that the part of Section 13 of the Act relating to Section 38 (1) to (2) and (4) of the National Land Fund Act, and in close connection with the content of Sections 3 to 6 and Section 8 (2) and (3) infringe Article P (1) and Article XXI (1) of the Fundamental Law. In view of the finding that the Act is contrary to the Fundamental Law, it shall not be promulgated on the basis of Section 40 (1) of the Constitutional Court Act for this reason, in addition to the reasons set out in point III.3 of the reasoning for this Decision (Reasons [24] et seq.).

VI

[112] Finally, the Constitutional Court considered whether the legislator had created a situation contrary to the Fundamental Law by amending leases concluded before the entry into force of the Act, by terminating the asset management relationship and by terminating the pre-emptive leasehold rights.

[113] 1. Section 13 of the Act supplements the National Land Fund Act with Sections 37 and 38. The essential content of Section 37 provides that a lease contract relating to land belonging to the National Land Fund concluded before the entry into force of the Act and existing on the date of its entry into force "shall cease to have effect if the contractual clause under which the body acting on behalf of the State establishes a pre-emptive leasehold right in favour of the lessee".

[114] The proposed Section 38 (3) of the National Land Fund Act introduces a new ground for termination of leases, pursuant to which certain leases may be terminated by 31 December 2016 at the latest, but at least 60 days before the end of the marketing year with 60 days' notice to the end of the marketing year.

[115] The conformity of the two provisions with the Fundamental Law may be assessed from different points of view.

[116] 2. First, the Constitutional Court considered the conflict with the Fundamental Law of the rule introducing a new statutory termination option for leases already concluded [draft Section 38 (3) of the National Land Fund Act].

[117] Constitutional Court Decision 3298/2014 (XI. 11.) AB examined the unconstitutionality by non-conformity with the Fundamental Law of Section 18/A (2) of Act LV of 1994 on Arable Land (hereinafter referred to as the "Arable Land Act"), in

force on 16 December 2013, on judicial initiative. The judicial initiative cited Section 18/A (2) of the Arable Land Act of 16 December 2013, pursuant to which “[i]n the event of a change in the person of the lessor, not including the case of legal succession, the successor of the lessor may terminate the lease by giving 60 days’ notice to the end of the marketing year, provided that, at the same time as giving notice, the successor undertakes not to dispose of the land to which it has acquired title within five years and to use it for its own purposes. On termination of the contract, unless otherwise agreed, the successor of the lessor and the lessee shall be bound to settle accounts.” (Reasoning [4]) The petitioner, relying on Articles B (1) and M (1) of the Fundamental Law, submitted that the contested provision of the Tftv. is contrary to the constitutional requirement of legal certainty and freedom of contract, because it has created, by altering a contract freely concluded by the parties, a termination condition unforeseeable at the time of conclusion of the contract, which infringes the freedom of the contracting parties and the confidence placed in a validly concluded contract.

[118] The Constitutional Court dismissed the judicial initiative. The Court held that legal certainty means relative stability of the law, which is not absolute. The farming of arable land, the legal environment in which the objectives of land tenure policy are pursued may need to be reviewed from time to time, and certain elements of contractual arrangements may need to be amended. The Constitutional Court held that it was not possible to conclude that the rule under consideration imposed an obligation prior to the date of its promulgation, nor that there was insufficient time for its application in existing legal relationships. The reasoning also states that 'an assessment of the contested rule of the Arable Land Act shows that it was not intended to make an exceptional change to the content of leases as a result of a material change in circumstances and that it was not intended to redistribute the contractual burden. By this provision, the legislator has introduced a possibility of termination of contracts which have not yet been performed, with the possibility of termination by the successor in title in the event of a change in the identity of the lessor, which is subject to several conditions. It is the responsibility of the successor of the lessor to consider whether the conditions laid down by this law can be fulfilled and, on that basis, to decide, within a given time limit, whether or not to exercise the right of termination." (Reasoning [21] to [24], [30]).

[119] In the present as well, it can be stated that the new Section 38 (3) of the National Land Fund Act does not amend the wording or content of the contracts concluded. The new Section 38 (3) of the National Land Fund Act is a revision of the legal environment for farming on arable land in the light of the abolition of the asset management right. In view of the arguments of the petition challenging the constitutionality of the said provision in relation to the conditions for the amendment of contracts, the

Constitutional Court, due to its different legal position, did not need to further review the National Land Fund Act as regards the constitutionality of Section 38 (3).

[120] The Constitutional Court therefore held that the rule in Section 13 of the Act supplementing Section 38 (3) of the National Land fund Act does not infringe Article B (1) of the Fundamental Law and is therefore not contrary to the Fundamental Law.

[121] 3. The addition of Section 37 of the National Land Fund Act by Section 13 of the Act states that a contractual clause in an existing lease contract for land belonging to the National Land Fund which provides that the body acting on behalf of the State shall establish a right of pre-emptive leasehold right in favour of the lessee shall be repealed.

[122] This provision is a statutory variation of an element of an existing contract. This provision is a statutory variation of an element of an existing contract. It is therefore necessary to determine to what extent the clause at issue reflects the parties' freedom to conclude contracts and to what extent it is the consequence of a change in the legislation on land tenure policy.

[123] 3.1. The Constitutional Court has held that freedom of contract is protected under Article M of the Fundamental Law {Decision 3192/2012 (VII. 26.) AB, Reasoning [18]}. The Constitutional Court, in a case in which a law reacting to a significant, exceptional and serious situation in Hungary as a result of an international crisis was the subject of scrutiny, also explained that the State may, by means of legislation, exceptionally, change the content of contracts on the basis of the principle of *clausula rebus sic stantibus*, but only if the same conditions are met as those required for a judicial amendment of a contract {Decision 3048/2013 (II. 28.) AB, Reasoning [33], [36]}.

[124] The reasoning for Decision 8/2014 (III. 20.) AB, cited in the petition, which, inter alia, interpreted Article II, Article B (1) and Article M (2) of the Fundamental Law from the point of view of how a statute may change the content of contracts concluded before its entry into force, proceeded from the premise that the legislature, similarly to the court, is then entitled to amend existing and long-standing contractual relationships, if, as a result of a circumstance arising after the conclusion of the contract, the maintenance of the contract in its unchanged form would be prejudicial to the substantial legitimate interest of one of the parties, the change in circumstances was not reasonably foreseeable and goes beyond the risk of a normal variation. A further condition for legislative interference is that the material change of circumstances must be of a social nature, that is to say, that it must affect a large number of contracts (Reasoning [90]). The reasoning for the Decision also states that the requirements of legal certainty, freedom of contract and confidence in the performance of the contract are satisfied in assessing State interference in contracts if the legislature cannot depart from the conditions for judicial amendment of individual contracts even in the case of

amendments to a large number of contracts. Lasting legal relations under private law can be shaped by legislation by applying the principle of *clausula rebus sic stantibus*. Judicial amendment to contracts is a means of striking a new balance between the divergent interests of private parties, taking account of all the circumstances of the case. A statutory amendment to a contract must also, as far as possible, take the equitable interests of each party into account, that is to say, such a contract amendment must also seek to achieve a balance of interests in the changed circumstances (Reasoning [91]).

[125] 3.2 The practice of the Constitutional Court described above can be traced back to the interpretation of the Constitution contained in Decision 32/1991 (VI. 6.) AB (ABH 1991, 146) (this interpretation concerned the rule of law clause and freedom of contract). In the case considered by the decision, the argumentation was about the legislation in connection with housing loans, which interfered to a considerable extent in the contracts, and the argumentation was related to this (the relatively high degree of State interference). It was established in the Decision that the social changes that had taken place, the change of regime, posed an exceptional risk for long-term housing loan contracts with preferential interest rates, that housing expenditure, which accounted for 16.3% of budget expenditure, had become unsustainable and unbearable for the State budget, and that the interest margin to be reimbursed to financial institutions had increased significantly (from 1 to 3.5% to 28 to 32%).

[126] Decision 8/2014 (III. 20.) AB set out the framework for the legislator's treatment of the consequences of exchange rate risk, exchange rate margin and unilateral contract amendment in the context of the deterioration of consumer loan contracts of financial institutions, especially in connection with what are known as "foreign currency loans".

[127] Both decisions by the Constitutional Court are concerned with the statutory amendment of contracts (or the possibility of such an amendment) which, in the exceptional and serious situation in Hungary resulting from the crisis, significantly reorganises the parties' rights and the main contractual services. Such an amendment directly affects freedom of contract and the autonomy of the parties.

[128] In the present case, the Act, in the part now under consideration, was not enacted as a legislative response to a crisis situation, but addresses the expiry of a clause in a lease (the "creation" of a pre-emptive leasehold right in favour of the lessee). Therefore, the principles set out in the decision of the Constitutional Court cited in the petition concerning the protection of freedom of contract cannot be directly applied to the constitutional assessment of the relevant provisions of the Act. The pre-emptive leasehold right is not an essential element of a lease (the new Civil Code grants such a statutory right to a co-owner against a third party, Section 5:81). The pre-emptive

leasehold right cannot be considered as consideration, but is generally a possible ancillary element of the contract. As a general rule, a pre-emptive leasehold right is not a necessary conceptual element of a lease. The lessee is not typically influenced by this element of the contract in a decisive way, either in its formation or in its maintenance. His legal position is not fundamentally affected by the conclusion, existence or even termination of the pre-emptive leasehold right; the exercise of the pre-emptive leasehold right depends on the decision to sublease (the lessor's decision) and on the acceptance of an offer by a third party (the new lessee) as conditions.

[129] 3.3 The previous Civil Code did not provide for a pre-emptive lease among its provisions on leases, but contained provisions on agricultural leases, and Section 461 (2) of the Civil Code established an authorisation to the effect that the rules of agricultural leases may be laid down by law in derogation of this Act. Further detailed rules on the leasehold of arable land were laid down in the Arable Land Act (Sections 12 to 25). The Arable Land Act did not provide for the concept of pre-emptive leasehold, but Section 21 (unless otherwise provided by law) established a pre-emptive leasehold right for the former tenant. This pre-emptive leasehold right was based on a mandatory statutory provision. The pre-emptive leasehold right applied equally to State, municipal and private arable land and to all former tenants. As of 22 February 2002, the Arable Land Act changed the group of entitled persons with regard to the pre-emptive leasehold right, with the family farmer being placed first and the former tenant sixth; as of 2 September 2002, the former tenant was the first to enjoy this right. As of 15 December 2013, this provision of the Arable Land Act was repealed pursuant to Section 126 (1) (i) of Act CCXII of 2013 on Certain Provisions and Transitional Rules in Connection with Act CXXII of 2013 on the Transactions in Agricultural and Forestry Land (hereinafter referred to as the "Land Transactions Act"). Currently, the pre-emptive leasehold right is governed by Sections 45 and 46 of Act CXXII of 2013 on the Transactions in Agricultural and Forestry Land. The essence of the change is that the pre-emptive leasehold right is not granted to all former tenants, but only to those with close local ties. As of 15 December 2013, Section 18 (1a) of the National Land Fund Act states that the pre-emptive leasehold right under the law may not be exercised in the case of a lease of land or a farm.

[130] 3.4 The rule in Section 13 of the Act, which supplements the National Land Fund Act, with Section 37, on the termination of the pre-emptive leasehold right, relates to a contractual clause which, prior to 15 December 2013, in fact constituted the inclusion in the contract of a mandatory provision of the Arable Land Act as a statutory provision and was not included in the lease by agreement of the parties. The statutory right of pre-emptive leasehold for an indefinite period of time is seen from a constitutional point of view as being different from that based on the free will of the parties.

[131] Where certain elements of the content of a contract are prescribed by law, the parties must normally take account of changes in the law both at the time the contract is concluded and during its duration. The principle of freedom of contract has not been applied to the "creation" of the clause at issue in the present case; therefore, the amendment does not relate to the contract as such, but to the content of the law.

[132] The Constitutional Court therefore held that the rule in Section 13 of the Act supplementing the National Land Fund Act with Section 37 does not infringe Article B (1) of the Fundamental Law and is therefore not inconsistent with the Fundamental Law.

[133] 4. The Constitutional Court ordered the publication of this Decision in the Hungarian Official Gazette on the basis of the second sentence of Section 44 (1) of the Constitutional Court Act, with regard to the finding of the infringement of the Fundamental Law.

Budapest, 1 June 2015

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