Decision 44/2012 (XII. 20.) AB

On a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of Government Decree 358/2008 (XII. 31.) Korm on Certain Productive Activities and Certain Service Activities Subject to a Site Permit and Notification of the Establishment of a Site, and on the Procedure for Site Authorisation and the Rules of Notification

In the matter of a petition seeking an *ex post* review of conformity with the Fundamental Law of certain legislation and a finding of unconstitutionality by omission manifested in non-conformity with the Fundamental Law of a legislative duty, the Constitutional Court, sitting as the Full Court, rendered the following

decision:

1. The Constitutional Court holds that Government Decree 358/2008 (XII. 31.) Korm on Certain Productive Activities and Certain Service Activities Subject to a Site Permit and Notification of the Establishment of a Site, and on the Procedure for Site Authorisation and the Rules of Notification is in conflict with the Fundamental Law and therefore annuls said Decree effective as of 28 February 2013.

2. The Constitutional Court hereby rejects the petition seeking a finding of unconstitutionality by omission manifested in non-conformity with the Fundamental Law of a legislative duty of Government Decree 358/2008 (XII. 31.) Korm on Certain Productive Activities and Certain Service Activities Subject to a Site Permit and Notification of the Establishment of a Site, and on the Procedure for Site Authorisation and the Rules of Notification.

The Constitutional Court shall publish this Decision in the Hungarian Official Gazette.

Reasoning

I

[1] Dr. Sándor Fülöp, acting as the Parliamentary Commissioner for Future Generations (H-1051 Budapest, Nádor u. 22) brought a petition before the Constitutional Court for an *ex post* review of conformity with the Constitution and seeking the elimination of unconstitutionality by omission manifested in non-conformity with the Constitution.

[2] In his petition submitted on 22 September 2009, the Parliamentary Commissioner for Future Generations as the petitioner sought an *ex post* review of conformity with the Constitution and the elimination of unconstitutionality by omission manifested in non-conformity with the Constitution concerning the entirety of Government Decree 358/2008 (XII. 31.) Korm on Certain Productive Activities and Certain Service Activities Subject to a Site Permit and

Notification of the Establishment of a Site, and on the Procedure for Site Authorisation and the Rules of Notification (hereinafter referred to as the "Government Decree"). The petitioner considers that the Government Decree runs counter to Article 18, Article 36 and Article 70/D of the Constitution and fails to comply with the content of Section 43 (1) and (2) as well as Section 44 (1) and (2) of Act LIII of 1995 on the General Rules of Environmental Protection (hereinafter referred to as the "Environmental Protection Act").

[3] In its Order No XX/782-1/2012 dated 18 January 2012 (hereinafter referred to as the "Constitutional Court Order"), the Constitutional Court requested, on the basis of Section 73 (1) of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"), the Commissioner for Fundamental Rights as the legal successor of the petitioner to supplement the petition until 31 March 2012 by stating which provisions of the Fundamental Law are breached by the Government Decree included in the petition and why.

[4] In line with the content of the Constitutional Court Order, the Commissioner for Fundamental Rights supplemented the petition on 21 February 2012, since, in his view, the Government Decree infringes Article XX (1) and (2) as well as Article XXI (1) of the Fundamental Law. In view of the fact that the provision of the Fundamental Law as referred to in the petition are identical as a matter of substance to the normative text of the former Constitution, the petitioner maintained petition together with its reasoning lodged by the parliamentary commissioner as the legal predecessor, with the exception of the argumentation pertaining to the conflict with Article 36 of the Constitution.

[5] The maintained petition raises as a formal constitutional concern that the National Council for the Protection of the Environment (hereinafter referred to as the "Council"), exercising public authority under Section 44 of the Environmental Protection Act, as a body which makes proposals and gives opinions ensures the broad social, scientific and professional basis for environmental protection and one of its main tasks is to actively participate in the legislative process in order to promote a more thorough analysis of the effects of individual proposals on the environment and thus on sustainability, thus ensuring that aspects affecting the conditions of existence of future generations are assessed with due account taken not only by the legislature in the classical sense but also by society. In the petitioner's view, since the Council, as the body expressly and specifically designated by the legislation as having the authority to give its consent and to express its opinion, was not consulted by the legislator when the Government Decree was being drawn up, and the Government Decree was drafted and entered into force by circumventing this guarantee on 31 March 2009; therefore, the legislator, in drawing up the Government Decree, created an unconstitutionality of such gravity as to render the Government Decree invalid under public law.

[6] On the other hand, with reference to Article 18 and Article 70/D of the Constitution as well as Article XX and Article XXI (1) of the Fundamental Law, the maintained petition raises as a substantive constitutional concern that the requirements deriving from the above provisions are not only applicable to nature conservation but also to environmental protection, including, therefore, the built environment. The protection of the built environment also includes the protection of the urban environment, which extends to residential areas In this respect, the constitutional background to the regulation of the site permit is complex, as the activities listed

in the Annex to the Government Decree have an impact on the natural environment, including, in the vast majority of cases, on human health, and the built environment. The formerly applicable Government Decree 80/1999 (VI. 11.) Korm on Industrial and Service Activities Subject to a Site Permit and Notification of the Establishment of a Site, and on the Procedure for Site Authorisation, due to the exclusivity of the legal instrument of authorisation, contained a number of guarantee environmental protection rules that are not included in the provisions of the Government Decree on the notification procedure, but which are also reduced in the current legislation in relation to the authorisation procedure. The deletion of these guarantee provisions from the provisions relating to the notification procedure is conceptually contrary to the principle of prevention. Furthermore, the petitioner relies on Decision 28/1994 (V. 20.) AB, in which the Constitutional Court, in interpreting the environmental protection *status quo*, stated that the enforcement of the right to the environment, while maintaining the level of protection achieved, also requires that the State should not derogate from preventive protection rules to protection by means of sanctions, and that such requirement may be departed from only in cases of unavoidable necessity and only in proportion. In the submission of the petitioner, it is not only a violation of Article 18 of the Constitution, but also a violation of Article 2 (1) of the Constitution, which declares the principle of legal certainty and thus the rule of law, that the legal solution by which the municipal clerk, on the basis of Section 7 (1) to (2) of the Government Decree, shall, in registering the notification, consider compliance with the local building regulations, the regulatory plan, the zoning plan or other requirements of building law, and not, as is laid down by law in the case of activities subject to authorisation, compliance with the legal requirements in general. In the petitioner's opinion, the simplification and acceleration of procedures, the promotion of business and investment and other economic considerations cannot serve as a basis for restricting fundamental constitutional rights. The legislator's solution, whereby, in the case of authorisation, compliance with the legislation, including environmental protection requirements, must be considered in a complex manner, while in the case of notification only the requirements of building law must be assessed, without the legislator providing any legal remedy against registration, also raises the issue of a reduction in the level of protection. Another reason for the reduction in the level of protection is the fact that Government Decree 89/1999 (VI. 11.) Korm specifically mentions the aspects of the law relating to neighbours, the protection of possession and that of the environment among the aspects to be taken into account in a uniform manner.

[7] Moreover, in his unsupplemented petition, the Constitutional Court was requested by the petitioner to find unconstitutionality by omission of a legislative duty on the basis of Section 49 of Act XXXIII of 1989 on account of the violation of the right to a remedy as enshrined in Article 57 (5) of the Constitution, since, in the petitioner's view, the legislator had failed to adopt the rules which should govern the remedies relating to the notification procedure for activities covered by the Government Decree. In his supplement to the petition, the Commissioner for Fundamental Rights did not rely on any provision of the Fundamental Law in this connection; however, he stated the following: "I sustain the petition submitted by the predecessor Commissioner for Regional Planning, together with the grounds for the petition,

with the exception of the argument relating to the infringement of Article 36 of the Constitution".

II

[8] 1. The provisions of the Constitution relevant to the petition and applicable at the time of the adoption of the Government Decree read as follows:

"Section 35 The Government shall

[...]

(b) ensure the implementation of Acts of Parliament; [...]"

"Section 36 In the course of fulfilling its tasks, the Government shall co-operate with the relevant civil society organizations."

[9] 2. The provisions of the Fundamental Law invoked the petition are as follows:

"Article XX (1) Everyone shall have the right to physical and mental health.

Hungary shall promote the effective application of the right referred to in paragraph (1) through agriculture free of genetically modified organisms, by ensuring access to healthy food and drinking water, by organising safety at work and healthcare provision and by supporting sports and regular physical exercise as well as by ensuring the protection of the environment."

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

[10] 3. The provisions of the Environmental Protection Act as relied upon in the petition read as follows:

"Section 43 (1) The drafter of draft Acts and other legal rules related to the protection of the environment as well as the drafter of the conceptual framework of national and regional significance shall, with the exception of plans and programmes under Subsection (4), assess and evaluate the impacts of measures on the environment and shall summarise them in an analysis of assessment (hereinafter: analysis of assessment).

(2) For the purposes of Subsection (1), legal rules related to environmental protection are Acts of Parliament, government decrees, ministerial decrees and decisions that have impacts on

(a) the environmental components,

(b) the quality of the environment or

(c) human health in connection with the environment."

"Section 44 (1) The analysis of assessment shall cover, in particular, the following:

(a) the extent to which the planned regulations and measures influence or may improve the state of the environment;

(b) in case the planned measures were not implemented, what could be the damage caused to the environment or the population;

(c) the extent to which conditions are adequate in Hungary for the introduction of the planned measures;

(d) the extent to which the public administration bodies are prepared for the implementation of the planned measures;

(e) whether the State, financial, organisational and procedural conditions are available for the implementation of the planned measures;

(f) the extent to which the proposal represents deviation from the solutions generally adopted on the international plan.

(2) The National Council for the Protection of the Environment shall be sent for its opinion

(a) the drafts specified in Section 43 (1) and the analysis of assessment before submission to the decision-making body,

(b) the draft plan or programme containing the environmental assessment specified in Section 43 (4), if the drafting body is a central State administration body, before submission to the public administration body entitled to adopt it or, in the case of adoption by the National Assembly, before submission to the Government.

A period of at least thirty days from the date of notification of the draft shall be allowed for the submission of opinions."

"Article 15

[...]

(3) The Government, acting within the scope of its powers, shall issue decrees on matters not regulated by an Act or on the basis of a statutory authorisation."

III

[11] The petition is, in part, well-founded.

[12] 1. In the course of the current procedure, the Constitutional Court has considered the formal deficiencies in the drafting of the legislation before addressing the substantive constitutional aspects of the contested acts.

[13] In a number of decisions, the Constitutional Court has discussed the obligation to consult the legislature under Article 36 of the Constitution in force at the time of the drafting of the Government Decree In the course of this settled case law, the Constitutional Court has considered the obligation of the legislative bodies to consult in the light of the provisions of Act XI of 1987 on Legislation (hereinafter referred to as the "Act on Legislation") in force at the time of the adoption of the Government Decree, since the assessment of formal unconstitutionality requires the legislative act to be compared with the valid constitutional provisions in force at the time of its adoption [The Constitutional Court notes that

Section 19 (1) of the current Act CXXX of 2010 on Legislation also provides, with regard to the drafter of legislation, that where a law expressly grants a State, local government or other body the right to appraisal of draft legislation affecting its legal status or functions, the drafter is obliged to ensure that the body concerned may exercise that right.] "The Constitutional Court has consistently held, in relation to Article 36 of the Constitution, but in the light of the provisions of the Act on Legislation, that »the opinion of bodies representing the interests of society and of interest groups which do not have public authority is not a condition for the validity of a law under public law«. (...)

The Constitutional Court has held that the clarification of the »public authority nature« of the consultative body is necessary in the case of the application of the general obligation of consultation under the Act on Legislation because the institutional and personal scope of the consultation to be included in the scope of consultation is uncertain under the provisions of the Act on Legislation. The »public authority nature« of the consultative body is decisive as to whether the general requirement of consultation and cooperation imposed on the legislator by the Act on Legislation during the preparation of legislation can be used as a basis for determining whether there is a specific legislative obligation to obtain the opinion of that body. Were it to be a formal criterion of constitutionality for legislation that the general obligation to consult under the Act on Legislation should be observed in relation to every single social advocacy organisation, the Government would be unable to draft any decree or draft Act, since there could always be another organisation which would define itself as an advocacy organisation and whose opinion it would have to seek.

In its Decision 16/1998 (V. 8.) AB, the Constitutional Court »classifies the right of consent in the state administration procedure, the participation in an advisory capacity, the performance of public administrative tasks and the drafting of standards as public tasks with an element of public authority.« (ABH 1998, 140, 145)

In the light of the foregoing, the Constitutional Court has taken the view that the bodies expressly and specifically designated by the legislation as having the power to give consent or opinions are, by reason of their role in the democratic decision-making process, public authorities with regard to the duty to consult, and thus cannot be circumvented by the legislature." [Decision 30/2000 (X. 11.) AB (hereinafter referred to as the "2000 Court Decision"), ABH 2000, 202, 205-206]

[14] It was not necessary to examine the public authority nature of the National Council for the Protection of the Environment referred to by the petitioner, since the Constitutional Court had already referred to it in the 2000 Court Decision on the basis of Section 44 (2) of the Environmental Protection Act (ABH 2000, 202, 206).

[15] With regard to the general obligation of the legislative bodies to consult each other, the Constitutional Court in its Decision 39/1999 (XII. 21.) AB reiterated its previous statement that "disregard of the provisions of the Act o Legislation may result in a finding that a legal act is unconstitutional only if the given legal act also violates a provision of the Constitution." (ABH 1999, 325, 349-350) The conclusion to be drawn from the above is that non-compliance with the general obligation of consultation under the Act on Legislation in force at the time of the

adoption of the Government Decree in relation to Article 36 of the Constitution does not in itself result in a violation of the Constitution. The unconstitutionality of a legal act only arises if, in the event of non-compliance with the general obligation to consult, another constitutional provision is also infringed.

[16] In the procedure at hand, the Constitutional Court considered whether the Government's failure to comply with the obligation to consult under the Environmental Protection Act also infringed a provision of the Constitution in force at the time of the drafting of the Government Decree.

[17] A piece of legislation is only valid, and can be distinguished from other, non-legal norms, if it meets what are known as the criteria of validity: without this, there can be no question of validity. "The preparatory legislative process is an indispensable and important stage in the legislative process. The preparatory legislative process and the proper conduct of the consultation procedure, which ensures that the technical aspects are taken into account, play an important role in ensuring that legislation, which is usually essentially identical to the proposal produced by the drafter, is necessary and appropriate to achieve the objective pursued, is consistent with other legislation and fits into the uniform legal system. Therefore, the conduct of the preparatory legislative process in the prescribed order, taking into account the professional aspects, is of guarantee significance for the consolidation of the democratic rule of law." (Decision 1098/B/2006 AB, ABH 2007, 2088, 2109) Based on the preceding considerations, the Constitutional Court's review of the entire Government Decree must include the issue of whether its drafting, and within it the preparatory legislative process, complied with the requirements of Article 2 (1) of the Constitution.

[18] The Constitutional Court pointed out in its Decision 11/1992 (III. 5.) AB that "[p]rocedural guarantees follow from the principles of the rule of law and legal certainty. These are of fundamental importance from the perspectives of predictability of the operation of legal institutions. Only by following the rules of a formalised legal process can a valid law be adopted." (ABH 1992, 77, 85). The Constitutional Court has consistently held that it annuls legislation where a serious procedural irregularity has been committed during the legislative process which has led to the invalidity of the legislation under public law or which cannot be remedied otherwise than by annulling the legislation.

[19] The practice of the Constitutional Court has consistently placed great emphasis on the provision of Article 2 (1) of the Constitution that "the Republic of Hungary shall be an independent, democratic State governed by the rule of law". The Constitutional Court in the 2000 Court Decision has stated in principle that the violation of the "procedural rules of decision-making, which are part of the rule of law, may result in the invalidity of the decision under public law. Otherwise, the democratic system itself loses its legitimacy, since there is no possibility of representing and reconciling the various interests of different parts of society, and it is therefore impossible to achieve consensus. If, on the other hand, a specific and institutionalised obligation to consult is provided for by a specific Act of Parliament, failure to do so may constitute a serious irregularity in the legislative process, which may directly jeopardise the constitutional requirement of the rule of law and result in the invalidity under public law of the legislation which has been adopted in breach of the law. The issue of whether

a breach of a rule of legislative procedure laid down in a special law, by reason of its severity, rises to the level of a constitutional violation in a particular case is a matter for the Constitutional Court to decide on a case-by-case basis." (ABH 2000, 202, 207)

[20] In the present case, the Constitutional Court has reiterated, in accordance with the provisions of the 2000 Court Decision, that the provisions of the Environmental Protection Act referred to clearly define the obligation of the Government to obtain the opinion of the body concerned, the National Council for the Protection of the Environment. A specific statutory provision, namely a provisions in Section 44 (2) of the Environmental Protection Act containing a clearly defined and unambiguous provision lays down the Government's obligation to seek an opinion. The scope of the legislation subject to the obligation to seek an opinion and the procedural rules are clearly set out in the Sections 43 and 44 of the Environmental Protection Act. The obligation to consult is not based on an *ad hoc* decision of the Government but on a provision of an Act of Parliament. Compared to the above general obligation to consult, which covers all legislation, of the Constitution and the Act on Legislation, these provisions of the Environmental Protection Act constitute a special and more stringent requirement of validity for environmental legislation, all the more so as the National Council for the Protection of the Environment is not a social organisation with an interest protection function, but a social organisation intended to ensure the broad social, scientific and professional basis of environmental protection [Section 45 (1) and (2) of the Environmental Protection Act]. The consultation of the National Council for the Protection of the Environment would also have been of guaranteed importance, as was previously the case in the 2000 Court Decision as noted by the Constitutional Court (ABH 2000, 202, 208), since the assessment of compliance with the constitutional requirement of the right to a healthy environment (Article 18 of the Constitution) boils down to a matter of fact: It is necessary to consider whether the level of environmental protection guaranteed by legal acts changes as a result of the act of legislation. The National Council for the Protection of the Environment, which embraces social and professional organisations and representatives of the scientific community and represents environmental expertise, has the statutory task of providing a broad social, scientific and professional basis for environmental protection.

[21] The Constitutional Court points out that, on the basis of the above-mentioned provisions of the Act, the Government is obliged to consult the organisation authorised and specified by the Act in order to obtain its opinion on the draft legislation, in compliance with the statutory provisions, because the exercise of the right to express an opinion on draft proposals for legislation affecting the functions of the body designated by the Act constitutes a function of public authority nature [Decision 16/1998 (V. 8.) AB, ABH 1998, 140, 145]. The body designated by the Act, that is, the National Council for the Protection of the Environment with public authority nature (the 2000 Court Decision, ABH 2000, 202, 206) is obliged to communicate its opinion to the Government within a specified time limit; therefore, the legislative process is not subject to any persistent delay. In the present case, therefore, the Government cannot escape the specific statutory obligation to seek an opinion. In this context, the Constitutional Court emphasises that the observance and enforcement of the law is a general obligation of the Government based on Article 35 (1) (b) of the Constitution in force at the time of the adoption of the Government Decree.

[22] Since the obtaining of the opinion of the social, interest-representing bodies with public powers is a condition for the validity under public law of a statute, and the Government Decree was adopted in disregard of the express provisions of the Environmental Protection Act, and since it is not acceptable from a constitutional point of view that the provisions of the Environmental Protection Act as a higher level statute were not observed by the legislator when the Government Decree as a lower level statute was adopted, the Constitutional Court, in the light of the findings in point III/3 of the 2000 Court Decision (ABH 2000, 202, 208-209), held that the failure to comply with the obligation to consult the legislature as provided for in the Act directly infringes the requirement of the rule of law. Thus, in the light of the requirement of the rule of law [Article 2 (1) of the Constitution], the Constitutional Court annulled the Government Decree *pro futuro*, on 28 February 2013, on the basis of Section 45 (4) of the Constitutional Court Act, on the grounds of its formal unconstitutionality. As the Constitutional Court had emphasised that the in Decision 13/1992 (II. 25.) AB, "The consequences of the unconstitutionality of a statute must be settled in a manner that actually results in legal certainty. The possibility of a prospective annulment serves legal certainty by enabling the legislator to enact a new, now constitutional law within a specified period of time without creating a legal vacuum in the given regulatory area, even temporarily. The constitutional aspect of legal certainty does not suffer a legal vacuum at all in a given case, in a given area of regulation. Therefore, in order to avoid a legal vacuum, the Constitutional Court, by annulling the legislation *pro futuro*, gave the legislature time to draw up new legislation and sought to give it the opportunity to draft new legislation in compliance with its constitutional obligation to consult, ensuring that the aspects affecting the conditions of existence of future generations are assessed with due weight not only by the legislature in the classic sense but also by society through the National Council for the Protection of the Environment.

[23] The Constitutional Court observes that the unconstitutionality of the Government Decree could have been established in accordance with the provisions of the Fundamental Law, taking into account that, following the repeal of the Constitution, the requirement of the rule of law was stated in Article B (1) of the Fundamental Law, the right to a healthy environment in Article XXI of the Fundamental Law, and the general obligation of the Government to comply with and ensure compliance with the law in Article 15 (3) of the Fundamental Law, in a manner corresponding to the provisions of the repealed Constitution.

[24] 2. In view of the consideration that the formal breach of the Constitution justified in itself the annulment of the legislation at issue, the Constitutional Court did not carry out a more in-depth substantive assessment of the relationship of the Government Decree with Article XX and Article XXI (1) of the Fundamental Law.

[25] 3. In his supplement to the petition, the Commissioner for Fundamental Rights also sustained the petition of the predecessor Parliamentary Commissioner for Future Generations seeking a finding of unconstitutionality by omission in relation to the Government Decree.

[26] On the basis of Section 51 (1) of the Constitutional Court Act, the Constitutional Court shall act on the basis of a petition submitted by the person entitled to do so under the Fundamental Law and the Constitution Court Act. A finding of an infringement of the Fundamental Law by omission under the provisions of the Fundamental Law and the Constitutional Court Act cannot

be petitioned, and the Constitutional Court therefore rejected the petition in this respect on the basis of Section 64 (b) of the Constitutional Court Act, on the ground that the petitioner was not entitled to bring the petition.

[27] The publication of this Decision in the Hungarian Official Gazette is based upon Section 44 (1) of the Constitutional Court Act.

Budapest, 17 December 2012

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Dr. Elemér Balogh, sgd., Justice of the Constitutional Court

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