Decision 5/2021 (II. 9.) AB

Regarding a finding of unconstitutionality by non-conformity with the Fundamental Law of Section 49 (1) of an Act amending certain Acts on energy and waste management as adopted by the National Assembly on its sitting day of 15 December 2020

In the matter of a preliminary review of an Act of Parliament passed by the National Assembly but not yet promulgated, with concurring reasonings by Justices *dr. Marcel Szabó, dr. Balázs Schanda* and *dr. Péter Szalay*, as well as dissenting opinions by Justices *dr. Tünde Handó* and *dr. Mária Szívós*, the Constitutional Court, sitting as the full court, rendered the following

decision:

1. The Constitutional Court holds that Section 49 (1) of the Act on the Amendment to Certain Energy and Waste Management Acts, passed by the National Assembly on its sitting day of 15 December 2020, is contrary to the Fundamental Law due to its violation of Article XIII of the Fundamental Law.

2. The Constitutional Court hereby dismisses the petition seeking a finding to establish the unconstitutionality by non-conformity with the Fundamental Law of Section 38 (2) and Section 62 of Act on the Amendment to Certain Energy and Waste Management Acts, as adopted by the National Assembly on its sitting day of 15 December 2020.

The Constitutional shall order publication of its Decision in the Hungarian Official Gazette.

Reasoning

I

[1] 1. By virtue of his powers under Article 6 (4) and Article 9 (3) (i) of the Fundamental Law, the President of the Republic requested the Constitutional Court to declare unconstitutional by conflict with the Fundamental Law of Section 49 (1), Section 38 (2) and Section 62 of the Chapter 19 titled “Amendment to Act CLXXXV of 2012 on Waste” of the Act on the Amendment to Certain Energy and Waste Management Acts, adopted on the sitting day of the National Assembly on 15 December 2020 (Draft Act No. T/13958, hereinafter referred to as the “Act of Parliament”).

[2] As an introduction to the petition of the President of the Republic, he states that the efficiency, operational process and organisation of waste management in Hungary undoubtedly need significant transformation. The petitioner also supports the legislative objective of creating a new system with greater State involvement in a way that ensures security of supply, efficiency gains and preserves the achievements of overheads reduction. In his view, many provisions of the law represent a particularly positive change, such as the enforcement of the principle of waste prevention, the transition to a circular economy, and the provisions to be introduced in relation to illegal waste.

[3] The petition describes that the Act of Parliament establishes the transfer of a significant part of waste management to the State. Thus, in addition to the entire municipal public service, the Act of Parliament assigns the reception, collection, removal, pre-treatment, trade and transfer for treatment of municipal waste not currently covered by the public service, the waste of products covered by the extended producer responsibility scheme, the waste of products subject to the environmental product fee and the waste of the return fee system to the State by defining institutional partial participation, including the maintenance and operation of the waste management facilities concerned, performing the organisational task of the entity performing the producer responsibility obligation on behalf of the producer and the operation of a mandatory return fee system to supplement and replace the deposit fee system.

[4] However, in addition to the fact that the regulatory scheme was considered to be fundamentally correct, the President of the Republic indicated constitutional concerns regarding some provisions of the Act Parliament amending Act CLXXXV of 2012 on Waste (hereinafter referred to as the "Act on Waste"), on the basis of which he formulated his petition.

[5] Pursuant to Section 31 (2) and (2a) of the Act of Parliament, as amended by Section 49 (1) of the Act on Waste, the holder of the waste may dispose of the waste only by handing it over to the State, the concessionaire or the concessionaire's subcontractor, which waste thus becomes the property of the State, the concessionaire or the concessionaire's subcontractor. Thus, in line with the above, the ownership of production and industrial waste is withdrawn by the Act of Parliament. Such waste represents value, but the Act of Parliament does not provide for the related compensation in any way, and even envisages that the original waste holder shall be obliged to pay for such waste, which will cause double damage to the producer in respect of the waste that can be sold.

[6] As put forth by the petitioner, the restriction of ownership implemented by the contested regulation affects local governments and the producers generating waste,

the waste producers, and the waste collectors who are involved in institutional sub-activities as well as the collectors, the traders, the pre-treatment personnel, the supplier and waste holder involved in waste management. In the case of the latter, which now constitutes a significant group of private owners in Hungary, the restriction according to the Act of Parliament would mean that the waste generated in the course of their activities, which also qualifies as a product, could not be freely disposed of despite the fact that the range of waste covered by the institutional sub-activity, in accordance with the relevant rules of Community law, is currently received, collected and recovered in an efficient and market-based manner, independently of the public service system. In the opinion of the President of the Republic, the amendment violates Article XIII (2) of the Fundamental Law by ordering the withdrawal of ownership of production and industrial waste without full, unconditional and immediate compensation. Under Community law, waste is a product; therefore, restrictions on ownership by the Act of Parliament also infringe Article 28 of the Treaty on the Functioning of the European Union on the free movement of goods.

[7] In the opinion of the President of the Republic, the new Section 18/D (1) of the Act on Waste contained in Section 38 (2) of the Act of Parliament violates fundamental rights because although the recovery of waste will not be granted a concession, as a result of the amendment both certain incinerators and certain waste recovery operators will be restricted by the fact that they may not refuse the use of their assets by the concessionaire, the concession company or the concessionaire's subcontractors. In the opinion of the President of the Republic, this amendment violates Article M) (2) of the Fundamental Law. Under the Fundamental Law, the State has a duty to create the legal environment necessary for free competition. In connection with behaviour or acts that infringe competition, the Fundamental Law specifically mentions a single factor separately, namely the abuse of a dominant position, which Hungary opposes. The petitioner considers that such provision of the Act of Parliament creates a unilateral dominant position for the concessionaire, the concession company or the concessionaire's subcontractor. In the opinion of the President of the Republic, it is irrelevant for the violation of Article M) (2) of the Fundamental Law that the victim of forced use receives an official fee for all this.

[8] The new Section 53/C of the Act on Waste, as established by Section 62 of the Act of Parliament, regulates the content of the concession contract and the cases of termination of the contract. However, these provisions do not provide guarantees in the event that the concessionaire ceases to operate or is unable to do so. Pursuant to Article XXI (1) of the Fundamental Law, Hungary shall recognise and endorse the right of everyone to a healthy environment. The fundamental right to a healthy environment requires, in addition to obligation of institutional protection by the State, that the regulation does not constitute a retrograde step and thus does not cause irreversible

damage. However, the above-mentioned lack of regulation may result in the failure of the State to perform waste management tasks, which endangers the enforcement of the fundamental right to a healthy environment.

[9] 2. Pursuant to Section 57 (1b) of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"), the Minister responsible for innovation and technology sent his legal opinion related to the legal provision challenged by the petition (hereinafter referred to as the "Ministerial Opinion") to the Constitutional Court.

II

[10] 1. The provisions of the Constitution relevant in respect of the petition are as follows:

"Article M) (1) The economy of Hungary shall be based on work which creates value, and on freedom of enterprise.

(2) Hungary shall ensure the conditions for fair economic competition. Hungary shall act against any abuse of a dominant position, and shall protect the rights of consumers.

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

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

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

[11] 2. The contested provisions of the Act of Parliament are as follows:

"Section 38 (2) Subchapter 12 of the Act on Waste shall be supplemented with the following Sections 18/A to 18/D:

»[...]

Section 18/D (1) Non-hazardous mixed municipal waste incineration plant put into operation before the date of the public tender for the transfer of the waste management concession right,

the waste management permit of which contains the maximum annual amount of combustible waste that can be accepted in the concession area, and the operator of

the waste management facility necessary for the performance of the public waste management public task (for the purposes of this Section hereinafter referred to as the "facility") shall not, to the extent of its spare capacity, refuse the use of the facility by the concessionaire, the concession company or the concessionaire's subcontractor in connection with the performance of a public waste management task, for a fee specified in a decree of the President of the Office issued for the implementation of this Act.

(2) At the request of the concessionaire, the concession company or the concessionaire's subcontractor, the waste management authority shall provide information on the available capacities for the facilities concerned.

(3) If the operator of the facility concerned does not allow the use of the device despite the conclusion of a contract no later than one month before the date specified in Section 53/H (1) or, in the case of the construction of a new facility, within one month of the expiry of the relevant waste management permit, at the request of the concessionaire, the concession company or the concessionaire's subcontractor, the waste management authority shall oblige the operator to do so.

(4) The provisions of Section 18/B and 18/C shall apply to the fee applicable in this Section, the legal consequences of the violation of the provisions concerning the fee, the fine and the fee supervision procedure.

(5) For the purposes of this Section, the facility used for the provision of public waste management services from 1 July 2023 until 30 June 2023 shall be deemed to be of free capacity.«"

"Section 49 (1) Section 31 (2) and (2a) of the Act on Waste shall be replaced by the following provisions and the following Subsection (2b) shall be added to Section 31 of the Act on Waste:

»(2) The waste holder shall ensure

(a) the management of waste falling within the scope of the public service waste management activity and the waste management institutional sub-activity through

(aa) transfer to the concession company,

(ab) transfer to a waste manager included in the concessionaire's subcontracting register, transfer to a supplier, transfer to a collector, transfer to an intermediary or transfer to a trader,

(ac) transfer of waste through a collection point, a collection yard or a return facility operated by those under (aa) or (ab),

(ad) transfer of the waste to the place of collection or to the person responsible for acceptance, or

(ae) in the absence of a concession contract, transfer to a legal person designated by the State instead of points (aa) to (ad),

(b) the management of waste not covered by point (a) through

(ba) the pre-treatment, recovery or disposal process at the waste facility or equipment it operates,

(bb) transfer of waste to a waste manager,

(bc) transfer of waste to a supplier,

(bd) transfer of waste to a collector,

(be) transfer of waste to an intermediary, or

(bd) transfer of waste to a trader

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(2a) Waste transferred by a waste holder in accordance with Subsection (2) (a) shall become the property of the State upon receipt by the State or, if the State has entrusted the public waste management task to the concessionaire, it shall become the property of the concession company. With regard to waste that become the property of the State, the coordination body established by the State (hereinafter referred to as the "Coordinating Body") shall be entitled to exercise the ownership rights and perform the tasks set forth in Subsection (4e).

(2b) An original waste producer whose total primary waste generated by its activities exceeds fifty thousand tonnes on the basis of the data provided by the waste management authority for the year preceding the year in question and has a waste management plan with waste management objectives as part of its corporate governance system, sets out in a separate agreement with the concession company the expectations which must be complied with in respect of waste transferred in accordance with Subsection (2) (a). The costs related to the fulfilment of individual requirements shall be reimbursed by the waste holder to the concession company.«"

"Section 62 The following Chapter V/A shall be added to the Acton Waste:

»CHAPTER V/A

SECTORAL RULES APPLICABLE TO THE WASTE MANAGEMENT CONCESSION

22/A Content of the waste management concession

[...]

§ 53 / C (1) The concession contract may be concluded for the period specified in the invitation to tender.

(2) The concession contract shall contain, in particular, a definition of the public service sub-activity for waste management, the guarantee for its fulfilment and the target value specified in the legislation for certain waste streams falling within the scope of the given State waste management public task in the waste management legislation to be met on an annual basis.

(3) The concession contract shall stipulate that the changes resulting from the amendment of legislation following its conclusion shall become part of the contract.

(4) The concessionaire may terminate the concession contract with 6 months' notice if

(a) the legislative changes referred to in Subsection (3) are to the detriment of the concessionaire to such an extent that the maintenance of the concession contract can no longer be expected;

(b) the State fails to fulfil its obligation to reimburse as specified in Section 53/E (2) related to the State waste management public task; or

(c) the State fails to make available to the concessionaire the waste management facilities owned or managed by the Coordinating Body and required by the concessionaire for a maximum rent in accordance with market conditions.

(5) The grounds for termination set out in Subsection (4) shall be set out in the concession contract.

(6) The termination shall be real, reasonable and detailed.

(7) The concessionaire may initiate the renegotiation of the content of the concession contract with the Minister, taking into account the rules of the Public Procurement Act concerning the amendment to the contract, if

(a) changes in the economic environment or operating conditions cause significant economic disadvantage or damage to the legal interests of the concessionaire or the concession company, as a result of which the concessionaire or the concession company can no longer be expected to maintain the concession contract, or

(b) a change in the legal terms of the concession causes a significant economic disadvantage or damage to the legal interests of the concessionaire or the concession company, as a result of which the maintenance of the concession contract with its original content can no longer be expected.

(8) The central government administrative body or the minister appointed in the government decree issued for the implementation of the Concessions Act may terminate the concession contract with 6 months' notice if the concession company

(a) has seriously infringed the provisions of environmental protection legislation or an official decision relating to it in the performance of a public waste management task, and this fact has been established by a court of law or by a decision of a public authority, or

(b) has been declared to be in serious breach of his obligations under the concession contract.

(9) In addition to the grounds for termination set out in Subsection (8), the concession contract may provide for additional grounds for termination. [...]«"

III

[12] 1. First of all, the Constitutional Court has established that the preliminary norm control petition received from the entitled party meets the requirement of explicitness pursuant to Section 52 (1b) of the Constitutional Court Act. The petition contains a provision of the Fundamental Law which establishes the competence of the Constitutional Court to adjudicate the petition [Article 24 (2) (a) of the Fundamental Law], and that which establishes the right of the President of the Republic to petition [Article 6 (4) of the Fundamental Law]; the reasons for initiating the procedure; a legal provision to be reviewed by the Constitutional Court [Section 49 (1), Section 38 (2) and Section 62 of the Act of Parliament]; the infringed provisions of the Fundamental Law [Article M) (2), Article XIII (2), Article XXI (1)]; a statement of reasons as to why the infringed legal provisions are in conflict with the indicated provisions of the Fundamental Law, and an express request that the Constitutional Court should find the designated statutory sections to contrary to the Fundamental Law.

[13] The Constitutional Court emphasises that the President of the Republic did not in general complain of the transformation of the waste management system or the regulatory scheme under the Act of Parliament; therefore, in adjudicating the petition, the Constitutional Court carried out the review, in accordance with Section 52 (2) of the Civil Procedure Act, in strict accordance with the indicated constitutional request.

[14] 2. The Constitutional Court first reviewed the element of the petition of the President of the Republic alleging a violation of Article XIII (2) of the Fundamental Law.

[15] 2.1 Based on Article XIII (2) of the Fundamental Law, property may only be expropriated exceptionally, in the public interest and in those cases and ways provided for by an Act, subject to full, unconditional and immediate compensation.

[16] As put forth in the petition, the contested rules of the Act of Parliament deprive a wide range of waste holders of private property, in particular production and industrial

waste. Such waste represents value, but the Act of Parliament does not provide for the related compensation in any way, and even envisages that the original waste holder shall, in specific cases, be obliged to pay for such waste, which will cause double damage to the producer in respect of the waste that can be sold. In the opinion of the President of the Republic, the amendment violates Article XIII (2) of the Fundamental Law by ordering the withdrawal of ownership of certain waste without full, unconditional and immediate compensation.

[17] In order to adjudicate the petition, the Constitutional Court first had to assess the connections between waste, its possession and the protection of constitutional property protection; second, the Court had to determine the scope of subjects and subject-matter affected by the contested legislation; and, thirdly, the Court had to examine whether the contested provisions constituted expropriation and, if so, whether full, unconditional and immediate compensation was provided.

[18] 2.2 With regard to the scope of protection of the right to property, the Constitutional Court made the following findings in its previous Decisions relevant to the present case. "In line with the consistent practice of the Constitutional Court regarding the violation of the right to property {*see* Decision 3051/2016 (III. 22.) AB, Reasoning [20] and [21]}, Article XIII of the Fundamental Law basically »guarantees the right to property in two respects. On the one hand, it protects the acquired property against deprivation, and on the other hand, it protects the already acquired property against its restriction«{Decision 3115/2013 (VI. 4.) AB, Reasoning [34]}. However, in this regard, the Constitutional Court also explained that »the scope and the method of the constitutional protection of property shall not necessarily follow the concepts of civil law, and it cannot be identified with the protection of the abstract property under civil law. [...]« {Decision 3209/2015 (XII. 10.) AB, Reasoning [64]} [...] »The protection of property [...] may extend not only to property in the sense of civil law but also to other property rights; therefore, Article XIII of the Fundamental Law also ensures the protection of other quasi property rights with an asset value in the field of property protection«{Decision 3199/2013 (X. 31.) AB, Reasoning [13]}." {Decision 3090/2019 (V. 7.) AB, Reasoning [41]}.

[19] As the impugned regulation also concerns income from waste management, the Constitutional Court also recalls its case law on the relationship between income-generating activities and the right to property. "[T]he Constitutional Court has consistently held that economic or regular income-generating activities alone, the hope of future profits from entrepreneurial activity cannot be considered a future entitlement of property recognised and protected by constitutional property law, in other words, it is not protected by Article XIII of the Future entitlements of property {Decision 3030/2014 (II. 9.) AB, Reasoning [43] and [44]}. In line with the case law of the Constitutional Court, the market value stability of investments necessary for the

performance of economic activity or the continuation of entrepreneurial activity are not protected by constitutional property, either, {Decision 3194/2014 (VII. 15.) AB, Reasoning [23]}, nor shall the expected or hoped for income and profit from the economic activity be considered a future entitlement of property. An economic activity carried out on the basis of a long-term or indefinite operating licence and the regular income derived therefrom do not in themselves mean that the given economic activity can be considered as acquired property or a constitutionally protected future entitlement of property {Decision 3131/2014 (VII. 15.) AB, Reasoning [19] and [24]}. This argument is reinforced by the fact that, in line with the case law of the Constitutional Court, neither an economic activity in itself, nor the return and market value of the expenses and assets necessary for the performance of an economic activity by businesses and entrepreneurs are protected by Article XIII of the Fundamental Law {Decision 3024/2015 (II. 9.) AB, Reasoning [44] and [45]}." {Decision 3076/2017 (XII. 28.) AB, Reasoning [50]}.

[20] In the present case, the Constitutional Court also emphasises that the right to property does not constitute an unrestricted fundamental right: State interference is not excluded if the appropriate guarantees of fundamental rights enshrined in the Fundamental Law are respected. Of particular importance in this context is the fact that, as stated in the second sentence of Article XIII (1) of the Fundamental Law, "property shall entail social responsibility" {*Cf.* Decision 20/2014 (VII. 3.) AB, Reasoning [155]}.

[21] In the case of a restriction of rights falling within the scope of protection of the right to property or expropriation, its constitutionality can be assessed pursuant to the following criteria. "The protection of property is subject to the test of restriction (consideration) of fundamental rights provided for in Article I (3) of the Fundamental Law, the test known as the necessity and proportionality test; however, in the case of the right to property, the standard of necessity is based on the mere public interest: If the restriction of property is for a purpose in the public interest, that restriction must be considered necessary for that reason and that reason alone. However, the necessary restriction of ownership must also be proportionate, which in the case of expropriation or other restrictions similar to expropriation in its actual effects, in particular in the case of legal restrictions on certain sub-rights of civil property (possession, use and collection of benefits and disposition) imposes an obligation on the legislature to provide compensation commensurate with the restriction. In the event of expropriation or in other cases involving a significant restriction of civil rights, therefore, guaranteeing the physical integrity of the property is replaced by guaranteeing the value of the property, which is nothing more than compensation commensurate with the depreciation. It follows from all the foregoing that in the case of legal regulations which constitutionally disadvantage the owner's position of ownership and cause actual monetary disadvantage to the owner, the legislator is obliged to provide a guarantee

for the value of the property, that is, to provide compensation commensurate with the restriction.” {Decision 23/2017 (X. 10.) AB, Reasoning [16] and [17]}

[22] 2.3 Section 31 (2) (a) of the Act on Waste, established by Section 49 of the Act of Parliament, which is challenged by the petitioner, applies to the management of waste falling within the scope of the waste management public service sub-activity and the waste management institutional sub-activity.

[23] The above sub-activities included in the scope of waste management activities are defined by the interpretative provisions of Section 2 (1) (26a) to (26d) of the Act on Waste, as supplemented by Section 29 (9) of the Act of Parliament. The waste management public service sub-activity comprises the reception, collection, removal, pre-treatment, trade and transfer for treatment, including the maintenance and operation of a waste facility subject to a public waste management service, of the municipal real estate user’s municipal mixed and separately collected waste, excluding separately collected waste of the enterprise real estate user similar to household waste as well as that of waste from a clear-out of a natural person real estate user. The institutional sub-activity in waste management comprises the reception, collection, removal, pre-treatment, trade and transfer for treatment, including the maintenance and operation of a waste facility subject to a public waste management service, of the municipal waste of the real estate user not included in the scope of the waste management public service sub-activity, of waste from products covered by the extended producer responsibility scheme, of waste products with an environmental product fee and of waste from the return fee system, as well as the performance of organisational tasks fulfilling the extended producer responsibility obligation specified in Section 53/A (4) of the Act on Waste of the extended producer responsibility schemes established for such waste on behalf of the producer. Under the Act, both sub-activities of waste management are obligatory.

[24] Pursuant to the contested Section 31 (2) (a) of the Act on Waste, the waste holder shall ensure the management of the waste falling within the scope of the foregoing two sub-activities through (aa) the transfer to the concession company, (ab) the transfer to a waste manager listed in the concessionaire's subcontractor register, transfer to a supplier, transfer to a collector, transfer to an intermediary or delivery to a trader, (ac) the transfer of waste through a collection point, a collection yard or a return facility operated by those specified in (aa) or (ab), (ad) the transfer of the waste at the place of collection or to the person responsible for acceptance, or (ae) in the absence of a concession contract, by transfer to a legal person designated by the State instead of points (aa) to (ad); the waste thus transferred becomes the property of the State or the concession company pursuant to the contested Section 31 (2a) of the Act on Waste.

[25] Pursuant to the contested Section 31 (2b) of the Act on Waste, the original waste producer under the conditions specified in the provision sets out in a separate agreement with the concession company the expectations which must be fulfilled in respect of waste transferred under a waste management institutional or public waste management service sub-activity, and the costs related to their fulfilment shall be reimbursed by the waste holder to the concession company.

[26] 2.4 The Constitutional Court first reviewed the relationship between the right of the waste holder to waste and the right to property. The current Act on Waste deals with the ownership of waste in only a few respects, including the concept of waste itself in the context of possession: Pursuant to Section 2 (1) (23), "waste shall mean any substance or object which the holder discards or intends to discard or is required to discard". Municipal waste placed in a receptacle shall remain the property of the waste producer until it is in the possession of the public service operator, unless the receptacle has been placed in a public place in order to ensure the provision of a public waste management service, in this case, the waste is placed in the receptacle in the ownership of the Coordinating Body established for the performance of the public waste management task and in the possession of the public service operator [Section 32/A (1) and (2), Section 40 (1), Section 43 (1) of the Act on Waste]. Waste placed on public land during clear-out becomes the property of the Coordinating Body, and at the same time becomes the property of the public service operator; waste falling within the scope of the above-mentioned public waste management service becomes the property of the Coordinating Body through the taking possession by the public service provider or the public service subcontractor [Section 43 (2) and (2a) of the Act on Waste].

[27] Thus, pursuant to the current provisions of the Act on waste, the holder of the waste (the producer of the waste and any entity holding the waste) is not always identical to the owner of the waste; however, among the waste holders, the original waste producer (whose activities generate waste) is considered to be the owner [*cf.* Section 2 (1) (32) of the Act on Waste], a natural or legal person who produces waste by using (processing) their own property, even before disposing of the waste thus generated and another person acquiring property thereon. Under the current regulations, the holder of waste may fulfil his obligation to recover or dispose of the waste himself, but may also transfer it to another person by means of a transfer to a waste manager, trader, intermediary or public service operator [Section 2 (1) (24) and Section 31 of the Act on Waste].

[28] The Ministerial Opinion also describes that a market-based waste management activity can generate profits; there was strong competition between traders and processors for high-quality waste that could be recovered adequately concerning the materials in the waste (p. 12). The Ministerial Opinion also reports that the majority of

service providers and producers in waste management are Hungarian-owned and typically small and medium-sized enterprises; among the 500 companies with the highest turnover in Hungary, there are 2 or 3 economic actors engaged in waste management; the number of enterprises engaged in the collection, mediation and treatment of waste from priority waste streams can be estimated at 750 (page 12). In view of the above, the petition rightly states that some of the waste will be received, collected and recovered on a market basis, independently of the public service system, and that certain types of waste are commercially traded and have asset value. The right of the owner of the waste, including the (original) waste producer, to provide for the treatment of waste on a market basis through the transfer of waste for consideration, constitutes a right with an asset value that forms part of the owner's right of disposal, covered by the protection of Article XIII of the Fundamental Law. However, in order to protect and ensure, in particular, the right to health under Article XX of the Fundamental Law and the right to a healthy environment under Article XXI of the Fundamental Law, the right of ownership of the waste and, consequently, the right to dispose of the waste may be restricted in accordance with Article I (3) of the Fundamental Law and Article XIII (2) of the Fundamental Law.

[29] As put forth in the petition, the contested rules of the Act of Parliament deprive the property of a wide range of waste holders of privately owned waste; and among these, the petitioner highlights "production and industrial" waste. In the new Section 31 (2) of the Act on waste established by the Act of Parliament, similarly to the current regulation of the Act on Waste, the holder of the waste is listed as the entity affected by the challenged regulation, not specifically the owner of the waste. However, since, as explained above, the holder of the waste is, in specific cases, also the owner of the waste, the new Subsections (2), (2a) and (2b) of Section 31 of the Act on Waste may also apply to the latter. The term "industrial waste" does not appear in either the current Act on Waste or the Act of Parliament; the rules for "production waste" are laid down in Section 54 of the Act on Waste in force, the latter is not affected by the Act of Parliament. In this regard, the Ministerial Opinion stated that EU regulators provide for waste or municipal waste, and that the category of "industrial or industrial waste" indicated in the Opinion does not appear in the new conceptual system (p. 19). In the light of all the foregoing, including the statements of the Ministerial Opinion described above, the Constitutional Court concluded that the scope of the impugned regulation also extends to waste, whether from industrial or other activities, which is privately owned, have asset value and which the owner is entitled to sell under the current regulations.

[30] The Constitutional Court then examined the relationship between the restriction imposed by the impugned regulation and the expropriation. Compared to the current legislation, the impugned provision of the Act of Parliament makes a significant change

pursuant to which the waste holder, in the context of the institutional sub-activity of waste management and the public service sub-activity of waste management, cannot provide for the treatment of waste through pre-treatment, recovery or disposal process at the waste facility or equipment it operates, but is obliged transfer the waste; namely to the concession company (or, in the absence of a concession contract, to a legal person designated by the State) or to a waste manager, supplier, collector, intermediary or trader listed in the concessionaire's subcontracting register. The contested provision does not preclude the transfer of waste for monetary consideration, but neither does it expressly provide for it or expressly allows it. As a result of the Act of Parliament, a legal environment is created on the basis of which the waste holder (who in several cases coincides with the owner) is obliged to transfer the waste to the State provider in the spheres of activity covered by the rule, either free of charge or in return for a monetary consideration unilaterally determined by the other party, which may be less favourable than the price available in the current market competition. Although the Act of Parliament does not refer to the legal institution of expropriation when regulating waste management, this is not decisive for the protection provided by the Fundamental Law. The civil law or statutory concept of expropriation is specifically related to the deprivation of ownership of real estate, whereas, in accordance with the case-law of the Constitutional Court cited above, the Fundamental Law covers, on the one hand, a wider range of rights falling within the scope of protection of the right to property and, on the other hand, it requires the provision of guaranteeing the value of the property not only in cases of actual and total deprivation of property, but also in other cases involving a significant restriction of partial rights of ownership under civil law.

[31] In addition to the above, the Constitutional Court also draws attention to the fact that, pursuant to Article XIII (1) of the Fundamental Law, property, including property on waste, is subject to social responsibility. Under current legislation, the costs of waste management are borne by the original waste producer or the actual or former holder of the waste, in accordance with the "polluter pays" principle, for the fulfilment of which legislation (in part or in full) may also oblige the manufacturer or distributor of the product resulting in the waste [Section 32 (1) of the Act on Waste]. The holder of the waste can therefore, on the one hand, manage the waste in such a way that the holder derives a benefit and, on the other hand, ultimately, in the case of waste that is without value on a market basis or costly to be treated, the holder must bear the burden of waste management.

[32] In connection with the problem of deprivation of property, the President of the Republic complained of the new Section 31 (2b) of the Act on Waste, as supplemented by Section 49 (1) of the Act of Parliament on the grounds in his view, the companies affected by the provision currently typically sell their potential waste; therefore, in addition to the above, they will be burdened with the additional cost of achieving more

environmentally friendly objectives; thus, the provision doubles the damage to the producer in terms of marketable waste. In line with the professional position expressed in the Ministerial Opinion, which has not been substantiated by specific arguments, the section cited applies only to waste subject to the product fee and to municipal waste, for which the costs of waste management are currently being paid, but does not include industrial waste, which may generate revenue for economic operators; in their case, they can still choose the person of the waste manager themselves (page 23). The provision can be applied to all original waste producers who meet the characteristics described therein (that is, "whose primary waste generated by its activities exceeds in total fifty thousand tonnes in total, based on the data accepted by the waste management authority for the year preceding the current year, and has a waste management plan as part of its corporate governance system"); the waste covered by the provision, similarly to the waste owned by other waste holders pursuant to the new Section 31 (2) (a) of the Act on Waste, may also include waste with an asset value and, in addition, in a significant amount; therefore, the Constitutional Court could not rule out the concern about the restriction of property raised by the petitioner in relation to the provision, regardless of the legal categorisation of the types of waste concerned.

[33] The provisions laid down in Section 49 (1) of the Act of Parliament thus lay down rules for waste and waste holders belonging to a specific category of waste in a relatively uniform manner; the Act of Parliament does not differentiate according to whether the waste in question has an asset value or represents no value, or according to whether it is a waste owner or another waste holder who does not qualify as such. With regard to waste owners, constitutional property protection must be ensured; although the public interest may justify the need for a restriction in this case as well, the constitutionality of the restriction is conditional on ensuring proportionality; however, such a provision ensuring compensation cannot be deduced from the contested regulation.

[34] On the basis of the review of the impugned provisions, the Constitutional Court concluded that the new Section 31 (2) (a), (2a) and (2b) of the Acton Waste, albeit referring to the public interest not disputed by the petitioner, in certain cases restricts the ownership of the waste by the waste holder, who is also a waste owner, that it causes him a real monetary disadvantage, but does not impose an obligation of compensation to ensure proportionality. Therefore, the Constitutional Court concluded that Section 49 (1) of the Act was contrary to Article XIII of the Fundamental Law.

[35] The Constitutional Court emphasises that it is the task of the legislator to create a sufficiently differentiated system which simultaneously creates compensation for waste owners and takes into account the full implementation of mandatory public service, environmental and public health considerations in a manner that they also comply with our regulatory obligations under EU law.

[36] The Constitutional Court further emphasises that in the present case the violation of the right to property was established due to the restriction on the ownership of the waste and not due to the restriction of the waste management activities in general, considering that, in accordance with its case law referred to in point III/2.2 (Reasoning [18] et seq.), the Constitutional Court does not in itself consider the hope of future profits from economic activity to be protected by Article XIII of the Fundamental Law.

[37] 3. The Constitutional Court then reviewed the element of the petition of the President of the Republic alleging a violation of Article M) (2) of the Fundamental Law.

[38] 3.1 Pursuant to Article M) (2) of the Fundamental Law, Hungary shall ensure the conditions for fair economic competition. Hungary shall act against any abuse of a dominant position, and shall protect the rights of consumers.

[39] As put forth in the petition, the new Section 18/D (1) of the Act on Waste contained in Section 38 (2) of the Act of Parliament is contrary to the Fundamental Law because although the recovery of waste will not be granted a concession, as a result of the amendment both certain incinerators and certain waste recovery operators will be restricted by the fact that they may not refuse the use of their assets by the concessionaire, the concession company or the concessionaire's subcontractors. This amendment, in the opinion of the President of the Republic, creates a unilateral dominant position by this provision of the Act for the concessionaire, the concession company or the concessionaire's subcontractor; therefore, it violates Article M) (2) of the Fundamental Law.

[40] In order to assess the petition, the Constitutional Court had to review, on the one hand, the obligations of State action against the abuse of a dominant position; on the other hand, whether the rules on the use of waste recovery facilities conflict with the above State obligation.

[41] 3.2 The Constitutional Court has so far dealt with the content of the prohibition of abuse of a dominant position contained in the second sentence of Article M) (2) of the Fundamental Law primarily in connection with the establishment and maintenance of an institutional system protecting consumers' interests and legislation guaranteeing consumers' rights.

[42] However, in terms of the development of the legal institution, it has historically been the first to focus on the relationship between competitors. The legal framework and conditions of the competitive economy include the provisions known as antitrust rules that have spread from Canada and the US worldwide. These were joined by the cartel ban on the European continent, which prevents or eliminates the emergence of contractual monopolies without organisational concentration. All this protects not only

small and medium-sized enterprises from large capital forces, but also political public power and democracy from the concentration and influence of economic power. Legislation protecting the structure of the competitive economy was joined by the prohibition of unfair market practices, its general clause and, specifically, prohibited statutory facts. Already among these, there has been a ban on the abuse of a dominant position, first against competitors and then against consumers on the part of all competitors.

[43] The concept of economic dominant position or abuse of an economic dominant position is regulated by Sections 21 and 22 of Act LVII of 1996 on the Prohibition of Unfair Market Practices and Restriction of Competition (hereinafter referred to as the "Unfair Market Practices Act"), which was already in force when the Fundamental Law was adopted; therefore, the content of these provisions of the Unfair Market Practices Act may also be taken into account when interpreting the constitutional obligation under Article M) (2) of the Fundamental Law.

[44] 3.3 The operator of the waste incineration plant as well as that of the waste management facility the operation of which is necessary for the performance of the public waste management task as established by Section 38 (2) of the Act of Parliament, defined in Section 18/D (1) of the Act on Waste, may not, to the extent of its spare capacity, refuse the use of the facility by the concessionaire, the concession company or the concessionaire's subcontractor in connection with the performance of a public waste management task. In return for the use of the facility, the operator is entitled to the fee specified in the decree of the President of the Hungarian Energy and Utilities Regulatory Office (hereinafter referred to as the "Office") issued for the implementation of this Act. Pursuant to Section 18 / D (3), if the operator of the device concerned does not allow the use of the device by concluding a contract on the date specified in the law, the waste management authority shall oblige the operator to do so at the request of the concessionaire, the concession company or the concessionaire's subcontractor.

[45] 3.4 Pursuant to Section 22 (1) of the Unfair Market Practices Act, an entity is in a dominant position in the relevant market, which may carry out its economic activities largely independently of other market participants, without having to take into account the market behaviour of its competitors, suppliers and business partners.

[46] Economic dominant position, as a concept of competition law, is not primarily due to the fact that an undertaking is in a favourable or potentially privileged position vis-à-vis an undertaking with a civil or other legal relationship, but is essentially the possibility of independent market behaviour. The petition did not specifically substantiate the existence of the latter. In the absence of an economic dominant position, such position cannot be abused, either. However, in order to carefully assess

the constitutional concern indicated by the petitioner, the Constitutional Court also reviewed whether the impugned regulation would also allow for the abuse of an economic dominant position in the event it presented itself.

[47] Section 21 of the Unfair Market Practices Act lists examples of prohibited cases of abuse of an economic dominant position. Most of these cases clearly cannot be interpreted in relation to the reviewed regulation. Further consideration needs to be given to point (a) of the provision, which states that "unfairly fixing purchase or selling prices or otherwise imposing an undue advantage or forcing the acceptance of adverse terms in a business relationship, including the application of general terms and conditions" shall be prohibited; and point (d), pursuant to which it shall be prohibited "to influence the economic decisions of the other party in order to obtain an undue advantage".

[48] In line with the Ministerial Opinion on the provision, the availability of current spare capacity is necessary to fulfil the obligations of the Member States and is therefore in the public interest. For the capacity used, the owner of the facility receives a fee covering the justified costs under strict official supervision. Efficient use of capacity is also in the interest of the owner of the waste management facility.

[49] Under the legislation in question, the concessionaire, the concession company or the concessionaire's subcontractor is not entitled to charge an unfair price for the use of the waste management facility, as the President of the Office is entitled to set the usage fee in a decree. Pursuant to the Act of Parliament, the above persons may not influence the economic decisions of the operator of the waste management facility in order to obtain an undue advantage because the facilities can only be used to the extent of their free capacities, and the use in this case is also to promote the right to a healthy environment, so it may be carried out in the public interest.

[50] Based on the review of the contested provisions, the Constitutional Court found that the new Section 18/D (1) of the Act on Waste, in the context described in the justification included in the petition, does not constitute an abuse of a dominant position either on the basis of the relevant case law of the Constitutional Court or the norms of the applicable legislation; thus, it does not violate the obligation of the State under Article M) (2) of the Fundamental Law in this respect. For this reason, the Constitutional Court dismissed the petition seeking a finding of unconstitutionality by non-conformity with the Fundamental Law of Section 38 (2) of the Act of Parliament.

[51] 4. The Constitutional Court finally reviewed the element of the petition of the President of the Republic alleging a violation of Article XXI (1) of the Fundamental Law.

[52] 4.1 Pursuant to Article XXI (1) of the Fundamental Law, Hungary shall recognise and endorse the right of everyone to a healthy environment.

[53] The petition describes that the new Section 53/C of the Act on Waste, as established by Section 62 of the Act of Parliament, regulates the content of the concession contract and the cases of termination of the contract. However, these provisions do not provide guarantees in the event that the concessionaire ceases to operate or is unable to do so. The fundamental right to a healthy environment requires, in addition to obligation of institutional protection by the State, that the regulation does not constitute a retrograde step and thus does not cause irreversible damage. However, the above-mentioned lack of regulation may result in the failure of the State to perform waste management tasks, which endangers the enforcement of the fundamental right to a healthy environment.

[54] 4.2 The new Section 53/C (4) of the Act on Waste sets out the grounds on which the concessionaire may terminate the concession contract with 6 months' notice. The possible grounds for termination by the State are set out in Subsection (8) of this section.

[55] In relation to the above element of the petition, the Ministerial Opinion (pp. 28 to 30) points out that the Act contains a number of guarantee rules for the provision of state waste management tasks. On the one hand, the provisions aim to ensure that only a concessionaire who meets strict quality assurance conditions can be awarded a concession from the outset; on the other hand, in the event that the concessionaire nevertheless subsequently ceases to operate for any reason, or is unable to perform it for any reason or performs its duties at an inadequate level, then this should not result in the failure of the State to perform waste management tasks and should not jeopardise the exercise of the constitutional fundamental right to a healthy environment. The Act of Parliament amends Act CXXV of 2013 on the Qualification of Waste Management Public Service Activities, which adapts the provisions of the previous regulation to the new concession system. The continuous monitoring of the concession activity is ensured on the one hand by the reporting and data provision obligations prescribed by the Act of Parliament, on the other hand, by the control powers of the waste management authority and the Office and, on the third hand, by the compliance opinion to be regularly renewed [*Cf.* Section 53/J (2) and (3) of the Act on Waste introduced by Section 62 of the Act of Parliament and Section 47/A (4a) of the Act on Waste introduced by Section 57 of the Act of Parliament; Section 78 (B) (2) (17) of the Act on Waste, introduced by Section 78 of the Act of Parliament, and Section 82 (2) of the Act on Waste; and Section 32/A (2) to (4) of the Act on Waste amended by Section 49 (2) of the Act of Parliament]. Pursuant to Section 53/D (4) of the Act on Waste, "[i]f any part of the public waste management task is not performed in accordance with the provisions of this Act or the concession contract, or such performance may not be ensured for any reason, the rules of this Act shall apply with the exceptions specified in the Act on the Provision of Certain Public

Services and Related Amendments to the Act." In addition, Section 95 of the Act of Parliament establishes a separate procedure for the issue by amending Section 1 (1) to (7) of Act CXXXIV of 2013 on the Provision of Certain Public Services and Related Amendments to the Acts of Parliament (hereinafter referred to as the "Public Services Act"). Under the relevant regulation, if the concessionaire does not provide the public waste management public task in accordance with the provisions of the Act on Waste, or such provision cannot be ensured for any reason, within 15 days after the receipt of the relevant information, the State body designated for this purpose in the government decree shall designate a public interest service (PIS) provider(s) with a waste management permit within the framework of an official procedure for the temporary performance of the public waste management task. The service provider is obliged to perform this activity for a service fee calculated by the waste management authority. In appointing temporary provision of the public task, the State body shall take into account the public interest in the efficiency, speed and economy of provision of such public task, as well as the fair interests of the population. The designation for temporary provision of the public task is effective until a new concession contract is concluded.

[56] 4.3 In view of the above, the Constitutional Court found that the new Section 53/D (4) of the Act on Waste established by the Act of Parliament, its other rules referred to above, and the new Section 1 (1) to (7) of the Public Services Act provides an alternative way for the State to maintain the operation of the waste management system if, in the event of termination of the contract, or for any other reason, the concessionaire does not fulfil its role undertaken in waste management. On the basis of all the foregoing, the Constitutional Court came to the conclusion that there is no regulatory deficit described in the petition, which carries the risk of the complete failure of the State tasks of waste management, which would jeopardise the fundamental right to a healthy environment; therefore, for these reasons, this Court did not find the incompatibility of Section 62 of the Act of Parliament, which established Section 53/C of the Act on Waste, with Section XXI (1) of the Fundamental Law.

[57] 5. In view of the finding that Section 49 (1) of the Act of Parliament is contrary to the Fundamental Law, the Act of Parliament shall not be promulgated on the basis of Section 40 (1) of the Constitutional Court Act.

[58] 6. The Constitutional Court ordered the publication of the decision in the Hungarian Official Gazette on the basis of the second sentence of Section 44 (1) of the Constitutional Court Act.

Budapest, 19 January 2021

Dr. Tamás Sulyok, sgd.,

Chief Justice of the Constitutional Court

Dr. Tamás Sulyok, sgd.,
Chief Justice of the Constitutional Court
on behalf of
dr. Ágnes Czine
Justice, prevented from signing

Dr. Tamás Sulyok, sgd.,
Chief Justice of the Constitutional Court
on behalf of
dr. Egon Dienes-Oehm,
Justice, prevented from signing

Dr. Tamás Sulyok, sgd.,
Chief Justice of the Constitutional Court
on behalf of
dr. Tünde Handó
Justice, prevented from signing

Dr. Tamás Sulyok, sgd.,
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Dr. Attila Horváth,
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Dr. Tamás Sulyok, sgd.,
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Dr. Tamás Sulyok, sgd.,
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on behalf of
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Dr. Tamás Sulyok, sgd.,
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dr. Marcel Szabó,
Justice delivering the opinion of the Court, prevented from signing

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Justice, prevented from signing