

IN THE NAME OF THE REPUBLIC OF HUNGARY

In the matter of a constitutional complaint and petitions seeking a posterior constitutional examination of statutory provisions and the establishment of an unconstitutional omission of legislative duty, the Constitutional Court has adopted the following

decision:

1. The Constitutional Court holds that an unconstitutional situation of omission violating legal certainty stemming from Article 2 para. (1) of the Constitution as well as Article 13 para. (1) of the Constitution has resulted from the failure of the Parliament to provide in Act XLVIII of 1993 on Mining for the full scale of rules guaranteeing the proportionality of the restriction of ownership and serving the protection of the property right of owners of real estates located in the area of a mine plot.

The Constitutional Court calls upon the Parliament to meet its legislative duty by 15 December 2004.

2. The Constitutional Court rejects the constitutional complaint and petitions seeking the establishment of the unconstitutionality and the annulment of Section 26 paras (3) and (5), Section 38 paras (1)-(5) and Section 39 para. (1) of Act XLVIII of 1993 on Mining.

The Constitutional Court publishes this Decision in the Hungarian Official Gazette.

Reasoning

I

The Constitutional Court has received five petitions initiating the establishment of the unconstitutionality and the annulment of certain provisions of Act XLVIII of 1993 on Mining (hereinafter: "AM"). The Constitutional Court has consolidated the petitions – on account of their similarity of content – and judged them in a single procedure.

One of the petitioners received on 13 September 2001 Judgement No. 11.P.20.756/2001/12 in a lawsuit conducted at the Borsod-Abaúj-Zemplén County Court for the review of a public administration decision, and submitted to the Constitutional Court a constitutional complaint within 60 days as provided for in Section 48 para. (2) of Act XXXII of 1989 on the Constitutional Court (hereinafter: “ACC”), on 25 October 2001. In the constitutional complaint, the petitioner has requested the annulment of Section 26 paras (3) and (5) of the AM with reference to the violation of Article 9 para. (1) and Article 13 of the Constitution, because in his opinion these provisions do not guarantee any right of compensation for the owner of the real estate in connection with the registration of mine plot as a right encumbering the real estate and restricting the right to dispose over one’s property. Four petitioners – in petitions seeking the posterior constitutional examination of statutory provisions – have requested the Constitutional Court to annul Section 26 paras (3) and (5), Section 38 paras (2)-(5) and Section 39 para. (1) of the AM with reference to Article 13 of the Constitution. The challenged statutory provisions constitute a framework for the activities related to the use of the real estate in the course of the mining activity; they regulate the real estate owner’s obligation of toleration, the registration of the mine plot in the land register, the right of use of the mining enterprise, the mining easement and the settling of mine damages.

In the petitioners’ opinion, the challenged statutory provisions seriously violate the provisions of the Constitution on the protection of property by providing for an unreasonably wide range of restricting owner’s rights and “granting to the mining enterprise rights that should only be enjoyed by the owner”; furthermore, the Act does not provide for a right of compensation for the obliged party in connection with the establishment of a mine plot registered as a right encumbering the arable land, even though the right granted to the beneficiary of the mine plot clearly restricts disposal over the property and the use and utilisation of the arable land.

One of the petitioners also objects to the fact that in certain cases a mine plot can be established without the real estate owner’s knowledge, which means that the mining commission does not inform the real estate owner on either the commencement of the procedure or holding a hearing in the course thereof. This practice is based on Section 12 of Government Decree 203/1998 (XII. 19.) Korm. (hereinafter: “ID”) on the Implementation of Act XLVIII of 1993 on Mining not mentioned by the petitioner through an exact reference to

its number. In addition, one of the petitioners considers that the indication of the mine plot in the land register violates property rights.

Furthermore, another petitioner has requested the Constitutional Court to establish an unconstitutional omission of legislative duty resulting from the lack of statutory regulations in line with the rules on ownership, and to order the legislator to remedy that omission.

According to the petitioners, the challenged provisions of the AM and the indirectly challenged provisions of the ID constitute a disproportionate restriction of the property right of the real estate owner, therefore they are unconstitutional. During its procedure, the Constitutional Court requested the Minister of Economy and the president of the Hungarian Mining Office to present their opinions on the petitions.

II

1. The provisions of the Constitution relevant in respect of the petitions are as follows:

“Article 2 para. (1) The Republic of Hungary is an independent democratic state under the rule of law.”

“Article 8 para. (2) In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by law; such law, however, may not restrict the basic meaning and contents of fundamental rights.”

“Article 9 para. (1) The economy of Hungary is a market economy, in which public and private property shall receive equal consideration and protection under the law.”

“Article 13 para. (1) The Republic of Hungary guarantees the right to property.

(2) Expropriation shall only be permitted in exceptional cases, when such action is in the public interest, and only in such cases and in the manner stipulated by law, with provision of full, unconditional and immediate compensation.”

2. The provisions of Act IV of 1959 on the Civil Code (hereinafter: “CC”) relevant in respect of the petition are as follows:

“Section 108 para. (1) The owner of a real estate is obliged to tolerate the activities of organs authorised in a separate statute to use the real estate for a period of time, to obtain a right of use or restrict property rights in other ways to the extent necessary for the

performance of their professional tasks. In such cases, the owner of the real estate shall be entitled to compensation in line with the extent of the hindrance (restriction).

(2) If the use or other restriction terminates or considerably hinders the proper use of the real estate, the owner may request the purchase or expropriation of the real estate.

(3) Provisions on production, construction, health, water management and other issues concerning the exercise of the property right are included in separate statutes.”

“Section 171 para. (1) Easement or other right of use may be established in relation to a real estate in the public interest – by way of the decision of a state administration organ – for the benefit of organs authorised in a separate statute. The establishment of the right of use shall entail due compensation.

(2) The cases in which the right of use may be established and the provisions on compensation shall be laid down in a separate statute.”

3. The provisions of the AM relevant in respect of the petitions are as follows: “Section 26 para (3) Upon the application of the mining enterprise, the mine plot shall be established by way of the decision of the organ of mining supervision, based on the approval of the competent authorities. In the course of the procedure, the parties concerned shall also make a statement on the re-utilisation purpose serving as a basis for the recultivation plan. The organ of mining supervision shall notify the parties concerned on the establishment of the mine plot, and it shall contact the competent land registry office in order to have the mine plot registered in the land register. Mine plots established for the production of oil and natural gas (including carbon dioxide gas) need not be registered in the land register. The establishment of a mine plot shall not qualify as commencement of the use of the land.”

“Section 26 para. (5) The establishment of the mine plot and the registration thereof in the land register shall not change the ownership, purpose and use of the real estates on the surface of the area covered by the mine plot.”

“Section 38 para. (1) The owner (manager, user) of the real estate shall tolerate the mining enterprise or the organisation entitled to carry out geological prospecting performing observations and measurements, placing marks on the real estate and/or laying conduits under or over the surface of the real estate in a manner not preventing the proper use of the real estate. The mining enterprise and the organisation entitled to carry out geological prospecting shall compensate for any damage caused by these activities in accordance with the rules pertaining to mine damage.

(2) The following are also included among the activities defined in paragraph (1): occasional checking of conduits and related fittings, performance of maintenance and repair works thereof, as well as seismic explosion and survey.

(3) For the purpose of installing mining facilities, conduits and prospecting equipment that prevent the proper use of the real estate, – in the absence of an agreement – the mining enterprise may request the establishment of an easement to use the real estate for construction and prospecting until the completion of such works. Any damage caused shall be compensated for in accordance with the rules pertaining to mine damage. For the period of operating mining facilities and conduits – including activities related to the termination of operation – the mining enterprise may apply for the establishment of an easement against due compensation.

On the basis of the easement, the mining enterprise is entitled to use the real estate to the extent necessitated by its activities, particularly in order to perform the measures necessary for control, repairs, maintenance, capacity retention and extension, operation, security, and the prevention and elimination of breakdowns.

Any damage caused during the use of the real estate shall be compensated for in accordance with the rules pertaining to mine damage. Damage to the real estate shall be compensated for in line with the restriction caused by the easement. The mining enterprise shall attempt to reach an agreement with the owner (manager, user) of the real estate on the establishment of an easement as well as on the manner and extent of compensation by sending an offer. In the absence of an agreement, the easement shall be established and the compensation therefor shall be determined by the head of the county or metropolitan public administration office. No appeal of an administrative nature may be lodged against the decision of the head of the county or metropolitan public administration office. The party challenging the compensation may request the court to alter the decision on the establishment of the easement and the legal basis and extent thereof within 30 days upon receiving the decision. With regard to the application of the provisions in Section 108 and Section 171 of the CC and in Section 16 item f) of Act CXLI of 1997 on the Land Register, the right based on an agreement and the one based on the decision of the authority are equivalent. (4) If the mining facilities to be installed terminate or considerably hinder the proper use of the real estate and if the mining enterprise permanently needs the real estate for the mining activity, it may initiate the purchase or the acquisition of the management right of the real estate, and if these prove to be unsuccessful, it may request expropriation. The owner (manager) of the real estate may also exercise this right if, in his opinion, the mining facility has terminated or considerably hinders the proper use of

the real estate. The owner (manager) of the real estate may present his claim within one year from the installation of the facility.

(5) Any expenses (compensation, procedural costs etc.) incurred in connection with the expropriation undertaken in the concession contract or becoming necessary in the case of licensing shall be borne by the mining enterprise. The amount of expenses shall be advanced by the mining enterprise to the organisation in charge of conducting the procedure of expropriation. On the expropriated real estate, the mining enterprise shall, during the period of the right of mining, have the rights pertaining to the possession and use of the real estate free of charge.”

“Section 39 para. (1) For the purpose of establishing plots, a real estate lying between the boundaries of a mine plot may only be divided and construction thereon may only be performed on the basis of a licence issued by the competent construction authority and approved by the mining enterprise, and in compliance with the conditions defined in the licence.”

4. The provisions of the ID relevant in respect of the petitions are as follows: “Section 11 para. (6) To the application for the establishment of a mine plot the following shall be attached:

- a) the technical description of the mine plot;
- b) the definition of the real estates, underground and ground facilities, watercourses and standing waters affected by the mine plot or the operations performed on the mine plot;
- c) a list of the names and addresses of the owners (managers) of the real estates defined in item b) and the authenticated copies of the title deeds of the affected real estates issued not earlier than 3 months before;
- d) a proposal for classification in respect of major mine dangers;
- e) the map of the mine plot;
- f) in the case of mining solid minerals, the preliminary recultivation plan specifying the re-utilisation purpose previously approved by the competent authorities.”

“Section 11 para. (9) The data specified in paragraph (6) item c) need not be attached to the application for the establishment of a mine plot when it is to be established for the production of oil and natural gas, the underground storage of gas, or the production of geothermal energy.”

“Section 12 para. (1) For the purpose of establishing a mine plot, the mining commission shall hold a hearing with the participation of the applicant, the competent authorities, the

beneficiary of any existing mine plot, a representative of the territorial office of the Hungarian Geological Survey (MGSZ) and of the representative body of the local government, and – with the exceptions specified in Section 11 paragraph (9) – the owners of the real estates. Taking into account the requirements of the competent authorities and the expert opinion of the MGSZ, the mining commission shall pass a decision on establishing the mine plot, which shall specify the technical measures and conditions necessary for the elimination or reduction of the dangers involved in mining, and in the case of mining solid minerals the re-utilisation purpose previously approved by the competent authorities and the requirements determined on the basis of the preliminary recultivation plan.”

III

The petitions are, in part, well-founded.

1. Pursuant to Article 13 para. (1) of the Constitution, “The Republic of Hungary guarantees the right to property.” According to the standing practice of the Constitutional Court, the right to property is a fundamental right, which, however, is not unrestrictable [Decision 21/1990 (X. 4.) AB, ABH 1990, 73, Decision 7/1991 (II. 28.) AB, ABH 1991, 22, Decision 16/1991 (IV. 20.) AB, ABH 1991, 58, Decision 28/1991 (VI. 3.) AB, ABH 1991, 88, Decision 4/1993 (II. 12.) AB, point IV. 2. d), ABH 1993, 71, Decision 64/1993 (XII. 22.) AB, ABH 1993, 373]. As pointed out by the Constitutional Court in an earlier Decision, “In the field of protection of fundamental rights the encumbrance of property by public law may lead either to the declaration of unconstitutionality of the intervention of the public authorities, and therefore to the nullification of the legal rule on which it was based, or to an acknowledgement of the constitutionality of the burden imposed, and at most to the substitution of a legal remedy (monetary compensation) that is, guaranteeing the value of the property, for guaranteeing the physical integrity of the property. Taking is the extreme case of the application of the latter remedy expressly regulated by Art. 13(2) of the Constitution, but there are other instances in which monetary compensation arises.” [Decision 64/1993 (XII. 22.) AB, ABH 1993, 373, 379] Mining activities serve the public interest, more specifically, the supply of energy and certain building materials to the population. Even according to the most liberal concepts of property, the right to property may be restricted on the basis of public interest; Article 8 para. (2) of the Constitution – in line with the above – allows in general the

statutory restriction of fundamental rights, including the right to property, however, such restriction may not affect the essential content of fundamental rights. Nevertheless, public interest in itself is not a sufficient condition for the restriction of property, as explained by the Constitutional Court in Decision 64/1993 (XII. 22.) AB: “Because of the particularities of the nature of property protection the central point of the enquiry into the constitutionality of state intervention, the field of the constitutional review has become the adjudication of proportionality between the ends and the means, viz., the public interest and the restriction on property. At the outset of an enquiry into the necessity and unavoidability of restricting a fundamental right it must be borne in mind that Art. 13(2) of the Constitution merely requires the ‘public interest’ to justify expropriation; that is, if monetary compensation is provided a more compelling and justified ‘necessity’ need not be established for constitutional purposes.” It was also established by the Constitutional Court in respect of examining the public interest in restriction that “accordingly, the constitutional review of the ‘public interest’ determined by the democratically-elected legislature does not focus upon the question whether such legislation was unavoidably necessary, rather ... it confines its enquiry to the question of whether the invocation of the ‘public interest’ is justified, and whether the solution adopted for the ‘public interest’ violates some other constitutional rights (such as the prohibition of negative discrimination).” [ABH 1993, 373, 381-382]

Thus, such a restriction may not harm the essential content of the fundamental right concerned, and it may not violate any other constitutional right.

2. Pursuant to Article 9 para. (1) of the Constitution, the economy of Hungary is a market economy, in which public and private property receive equal consideration and protection under the law. “In respect of Article 9 para. (1) of the Constitution, the Constitutional Court underlines that it provides for equal consideration and protection under the law for public and private property. This means the equality and equal protection of the forms of property, i.e. that the private property of a private individual or that of a private entrepreneur is considered equal to and enjoys the same protection as public property.” [Decision 73/1992 (XII. 28.) AB, ABH 1992, 306, 307] As there is no constitutional connection between the challenged provisions of the AM and the constitutional provision referred to by the petitioners, the Constitutional Court has rejected the related parts of the relevant petitions.

3. The mine plot is an institution of special character: in some cases it may occupy a very large area, possibly including as many as several thousands of real estates, for example in the

case of the underground storage of gas. In such a case, actual production activities (drilling, creation of wells etc.) are only performed on a few real estates within the mine plot. The activities that can be performed on a mine plot are diverse, in some cases they only affect a small part of a real estate, while in other cases they cover a large area. The establishment of mine plots is necessary in order to create well-defined circumstances for the performance of the activities of the mining enterprise, i.e. in order to define the geographical boundaries of such activities. However, in line with the above, the activities of the mining enterprise in general have no effect at all on surface conditions. This is why Section 26 para. (5) of the AM – challenged by the petitions – provides that “The establishment of the mine plot and the registration thereof in the land register shall not change the ownership, purpose and use of the real estates on the surface of the area covered by the mine plot.” Thus, the situation on the surface is not changed, and the owner may continue his activities on the real estate. At the same time, undoubtedly, the classification of a real estate as a mine plot registered in the land register may in certain cases hinder or prevent disposal over the real estate (sale, encumbering); this is, however, not a necessary consequence as the mine plot may also increase the value of the real estate. According to one of the petitioners, the mere fact of registering the mine plot in the land register violates the right to property, because in his opinion it should not be indicated there as inclusion in the records of the mining commission would be sufficient. However, that would violate the principles of registering real estates, including the principles of publicity and public authenticity. The mere fact of registering mine plots in the land register does not result in the violation of the constitutional right to property. Beyond doubt, according to Section 39 classification as a mine plot entails, among others, that the owner of the real estate may only commence certain new construction activities on the real estate after obtaining a licence from the competent mining commission and the consent of the mining enterprise. This does not mean, however, the complete prohibition of such activities. Furthermore, if the mining enterprise requests the prohibition of construction, it must pay compensation to the owners of the real estates concerned. In that case, the value guarantee is thus realised.

4. However, mining activities result in various obligations of toleration for owners of real estates within the area of the mine plot.

A) Under the title “Restriction of Ownership of Real Estates on the Surface”, Section 38 regulates observations, measurements, the placement of marks, prospecting, and the laying of

conduits under or over the surface of the real estate. However, the AM provides for compensation – on the basis of Sections 108 and 171 of the CC – for such restrictions based on public interest, as in all cases where the proper use of the real estate is hindered to any extent or where the mining activity causes damage the beneficiary of the mine plot has to pay compensation. Such an obligation is prescribed in the last sentence of Section 38 para. (1), according to which the rules pertaining to mine damage are applicable to any damage caused in the course of performing observations and measurements, placing marks and laying conduits in a manner not preventing the proper use of the real estate. The owner's interests are further protected by Section 38 para. (3), providing that in the case of restrictions preventing the proper use of the real estate (installation of mining facilities, conduits and prospecting equipment) – in the absence of an agreement – the mining enterprise may request the establishment of an easement against compensation. Any damage caused during the use of the real estate shall be compensated for in accordance with the rules pertaining to mine damage. Damage to the real estate shall be compensated for in line with the restriction caused by the easement. The mining enterprise shall attempt to reach an agreement with the owner (manager, user) of the real estate on the establishment of an easement as well as on the manner and extent of compensation by sending an offer. In the absence of an agreement, the easement shall be established and the compensation therefor shall be determined by the head of the county or metropolitan public administration office. No appeal of an administrative nature may be lodged against the decision of the head of the county or metropolitan public administration office. The party challenging the compensation may request the court to alter the decision on the establishment of the easement and the legal basis and extent thereof within 30 days upon receiving the decision. In the case of even greater restrictions, i.e. if the mining facilities to be installed terminate or considerably hinder the proper use of the real estate and if the mining enterprise permanently needs the real estate for the mining activity, it may initiate the purchase or the acquisition of the management right of the real estate. If these prove to be unsuccessful, expropriation may be requested not only by the mining enterprise but also by the owner of the real estate if, in his opinion, the mining facility has terminated or considerably hinders the proper use of the real estate. The owner of the real estate may present his request for the sale or expropriation of the real estate within one year from the installation of the facility; this period is sufficient to make a well-founded decision in this respect. The value guarantee thus exists in these cases as well. Section 37 of the AM provides for an obligation of compensation for mine damage caused by the mining enterprise, and other damage caused by the mining activity is to be compensated for according to the rules of the

CC, furthermore, on the basis of Section 37 para. (6) of the AM, overdue claims for compensation and claims for additional compensation exceeding the compensation already paid can be enforced in civil proceedings brought against the mining enterprise.

B) Regarding the procedure of establishing a mine plot, Section 26 para. (3) of the AM sets the outlines of the procedure. Accordingly, upon the application of the mining enterprise, the mine plot shall be established by way of the decision of the organ of mining supervision, based on the approval of the competent authorities. In the course of the procedure, the parties concerned shall also make a statement on the re-utilisation purpose serving as a basis for the recultivation plan. The organ of mining supervision shall notify the parties concerned on the establishment of the mine plot, and it shall contact the competent land registry office in order to have the mine plot registered in the land register. Mine plots established for the production of oil and natural gas (including carbon dioxide gas) need not be registered in the land register. The establishment of a mine plot shall not qualify as commencement of the use of the land. The detailed procedural rules are contained in Sections 11-12 of the ID. Accordingly, during its procedure the competent mining commission must hold a hearing to which the owner(s) of the real estate(s) must also be summoned. However – as pointed out by one of the petitioners – there are cases where the mining commission is not bound by the latter obligation. These cases are listed in Section 11 para. (9) of the ID, more specifically in an erroneous reference therein: the list of the names and addresses of the owners (managers) of the real estates, underground and ground facilities, watercourses and standing waters affected by the mine plot or the operations performed on the mine plot and the authenticated copies of the title deeds of the affected real estates issued not earlier than 3 months before need not be attached to the application for the establishment of a mine plot when it is to be established for the production of oil and natural gas, the underground storage of gas, or the production of geothermal energy. Thus, in such cases a mine plot can be established without the knowledge of the owner of the real estate, since the AM does not provide for informing the parties on the commencement of the procedure. The interventions referred to above do not appear on the surface, furthermore, since the establishment of a mine plot might affect a huge amount – even thousands – of real estates, a hearing would be impossible.

Based on the above, as the challenged provisions of the AM – examined together with the cited provisions of the CC – do not restrict the right to property without compensation and to an unconstitutional extent, the Constitutional Court rejects the constitutional complaint and those parts of the petitions seeking the posterior constitutional examination of statutory

provisions that relate to the annulment of Section 26 paras (3) and (5), Section 38 paras (1)-(5) and Section 39 para. (1) of the AM.

5. According to Section 49 para (1) of the ACC, an unconstitutional omission of legislative duty may be established if the legislature has failed to fulfil its statutorily mandated legislative duty, and this has given rise to an unconstitutional situation. “For the purpose of the application of this statutory provision, the two conditions – the omission and the resulting unconstitutional situation – must exist at the same time.” [Decision 1395/E/1996 AB, ABH 1998, 667, 669]

According to the established practice of the Constitutional Court, the legislature shall be obliged to legislate even when there is no concrete mandate given by a statute if the unconstitutional situation – the lack of legal regulation – is the result of the State’s interference with certain situations of life by way of a statute, thus depriving some of the citizens of their potential to enforce their constitutional rights. [Decision 22/1990 (X. 16.) AB, ABH 1990, 83, 86] The Constitutional Court also establishes an unconstitutional omission of legislative duty in the case of the lack of the statutory guarantees necessary for the enforcement of a fundamental right. [Decision 37/1992 (VI. 10.) AB, ABH 1992, 227, 232]

The Constitutional Court establishes an unconstitutional omission of legislative duty not only if there is no regulation at all regarding a certain subject [Decision 35/1992 (VI. 10.) AB, ABH 1992, 204, 205] but also if any statutory provision with a content deducible from the Constitution is missing from the regulatory concept concerned. [Decision 22/1995 (III. 31.) AB, ABH 1995, 108, 113; Decision 29/1997 (IV. 29.) AB, ABH 1997, 122, 128] Even when an unconstitutional omission is established due to the incompleteness of the content of the regulation concerned, the omission itself is based on the non-performance of a legislative duty deriving either from an explicit statutory authorisation or – if there is no such authorisation – from the absolute necessity to have a statutory regulation. [Decision 4/1999 (III. 31.) AB, ABH 1999, 52, 57] In the practice of the Constitutional Court, an unconstitutional omission of legislative duty may also be established when the content of the legislation is inadequate, resulting in an unconstitutional situation. [Decision 15/1998 (V. 8.) AB, ABH 1998, 132, 138-139]

In the opinion of the Constitutional Court – since classification as a mine plot results in a situation of dependence for a relatively long period in respect of exercising the property rights of the owner of the real estate (it is recorded on the title deed in the land register, and a

restriction or prohibition on building might be ordered etc.) – the provisions in force pertaining to mining plots do not contain appropriate and adequately differentiated rules regarding the affected real estate. Pursuant to Section 26 para. (5) of the AM, the establishment of the mine plot and the registration thereof in the land register shall not change the ownership, purpose and use of the real estates on the surface of the area covered by the mine plot. In practice, this statutory provision is fully enforced concerning the right to property in respect of all mine plots, and it is also enforced regarding the purpose and use of the real estate in the case of mine plots where the mining activity is performed under the surface. However, the establishment of a mine plot entails a different restriction in the case of real estates where minerals can be subsequently produced through surface operations. For such real estates, the establishment of a mine plot will result in the expropriation of the real estate when the operation of the mine is started. As the legal regulations – with the exception of the provisions pertaining to the establishment of concession, the right to conduits and the right of use [Section 15, Section 38/C para. (5) and Section 38/D para. (5) of the AM] – do not provide for any deadline for commencing the operation of the mine after the establishment of the mine plot, the establishment of a mine plot may permanently terminate the marketability of the real estate because only the mining enterprise has an interest in the new purpose of the real estate. In the case of surface mining operations (production of stone, gravel, lignite etc.), the purpose and use of the real estates covered by the mine plot changes. In practice, the registration of a mine plot immediately causes a positive or negative shift in the value of the area concerned. This is especially noticeable if we take into account the rights of the mining enterprise provided for in Section 39 of the AM in connection with establishing plots and ordering the prohibition of construction. According to Section 12 para. (1) of the ID, the owner of the real estate must be heard at the hearing held in the matter of establishing a mine plot, but there is no statutory obligation to consider his opinion in the course of making a decision. Thus, any civil law claim of the owner of the real estate can only be enforced later on, upon his request and the advance payment of costs by him. In such cases, until expropriation, the establishment of a mine plot indeed constitutes a disproportionate burden for the owner of the real estate due to the lack of any deadline for commencing the mining activity – with the exception of concession, the right to conduits and the right of use – and results in legal uncertainty. In cases where the mining activity does not necessitate any intervention restricting ownership, the establishment of a mine plot has a different effect on the property relations of others' real estates. (For example: real estates over fields of oil or natural gas classified as mine plots only because of their location over the field to be exploited

but being at a significant distance (of several kilometres in some cases) from the place of production.) In such cases, the rights enjoyed by the mining enterprise that restrict property rights in relation to the mine plot (the approval of the mining enterprise is necessary for construction and the establishment of a plot) constitute a disproportionate burden for the owners. There are real estates classified as mine plots where the mine is operated by deep working and only requires a partial restriction of real estate ownership (establishment of an easement, ordering a prohibition of construction etc.). In view of all the above, the omission of the legislator results from the AM not providing for comprehensive guarantees of property protection due to the lack of deadlines. In addition, the AM does not define rules of substantive law on the delimitation of mine plots, and it does not differentiate among the various mining activities regarding the restrictions related to classification as mine plot. In respect of part of the restrictive rights (actually the most common ones), the AM does not specifically define the cases and conditions of the mining enterprise exercising its rights restricting the property right related to the real estate located within the boundaries of the mine plot (i.e. the conditions of the mining enterprise refusing to consent to construction or to the establishment of a plot or requesting a prohibition of construction). The consent of the mining enterprise to construction and the establishment of plots is a problematic issue in itself. It is not in the interest of the mining enterprise to request a prohibition of construction as it entails an obligation of compensation according to Section 39 para. (2) of the AM. It is much easier not to give consent to construction, as in that case no obligation of compensation is provided for by the AM. These regulations (no conditions and no compensation) provide an opportunity for misuse. If the establishment of a mine plot involves the necessity of future expropriation or some other severe restriction under public law, guaranteeing rules are necessary to ensure that classification as a mine plot does not cause a situation of dependence for ever. The Constitutional Court has established that, when specifying the rules on the establishment of mine plots, the State has interfered with civil law relations, and through the undifferentiated regulation of enforcing owners' interests in line with the various purposes and ways of utilisation of mine plots, it has deprived a group of citizens of the possibility to enforce their constitutional rights. This has resulted in an unconstitutional situation of omission, because, due to undifferentiated regulation, the legislator has failed to provide in the AM, for the owners of the real estates concerned, the full scale of guarantees of the right to property – in line with the purpose and use of the mine plot – against the various restrictions of ownership in the course of establishing a mine plot (making a statement in the procedure, an obligation of immediate compensation in the case of initiating the ordering of a

restriction or prohibition of construction with regard to mine plots established for surface mining activities etc.). Therefore, the Constitutional Court has called upon the Parliament to meet its legislative duty by 15 December 2004.

The publication of this Decision in the Official Gazette (*Magyar Közlöny*) is based on Section 41 of the ACC.

Budapest, 9 February 2004

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President of the Constitutional Court

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