27 Importance of the Legal Protection of Biological Diversity

Thoughts on the Constitutional Court's Decision No. 28/2017 (X. 25.) AB

Marcel Szabó[*]

27.1 Introduction

The reduction of biological diversity is one of today's most serious challenges that the states interested in and obliged to protect the environment face. According to the 2016 October WWF report, the Global Living Planet Index, that is examined continuously based on the populations of certain species, is 58% lower in the populations of vertebrate animal species compared to the 1970 base-year, that is the population size of vertebrate animal species decreased by more than a half in average in a little more than 40 years.[1] According to the forecast in the Living Planet Report, if human activity remains unchanged, such rate may also reach 67%. compared to the 1970 base-year by 2020.[2] According to another study, whilst since 1965, the ratio of national parks and conservation areas increased by 600%, the land-based biological diversity suffered a loss of 40%, and the marine biological diversity decreased by 20%.[3]

A so radical decrease of the biological diversity has several reasons which are related to human activity without exception. Those reasons include, but are not limited to the destruction and disappearance of habitats (where the natural habitat of a given species changes, for example due to construction on the area, logging, mining or water abstraction), the over-exploitation of species (first of all, due to the increased hunting and fishing activities), the environmental pollution (which renders the habitats unsuitable for survival), the appearance of invasive species and diseases, as well as the climate change (the temperature and the change in the quantity of precipitation).[4] A part of such reasons is influenced directly by human activity, including in particular changing the characteristics of the given habitat (in case of environmental pollution, as well as fishing and hunting

* Marcel Szabó: judge, Constitutional Court of Hungary; professor of law, Pázmány Péter Catholic University, Budapest.

1 Living Planet Report 2016, 18.

2 Living Planet Report 2016, 44.

3 Camilo Mora & Peter Sale, 'Ongoing Global Biodiversity Loss and the Need to Move Beyond Protected Areas: a Review of the Technical and Practical Shortcomings of Protected Areas on Land and Sea', *Marine Ecology Progress Series*, 2011, pp. 251-255.

4 Living Planet Report 2016, 21.

activity), whilst the other part of those reasons is related only indirectly to human activity (climate change, the appearance of invasive species and diseases).

However, the biological diversity is affected not only by human activity, but this interaction prevails also in the opposite direction: the fullest possible preservation of the biological diversity is essential in order to preserve the quality of human life in the long term. The report prepared by the special envoy examining the relations between human rights and the environmental protection[5] and adopted by the UN Human Rights Council in 2017, specifies also the rights to life, health, food, drinking water and culture which cannot be ensured effectively without preserving the biological diversity and thereby the ecosystem services.[6] Ecosystems play a role, amongst others, in cleaning the water, improving the air quality (absorbing particulate matter, increasing the humidity), improving food security, pollination, as well as in the production of plant-based medicines and pharmaceutical preparations.[7] Having regard to the fact that human activity can influence significantly both directly and indirectly the condition of the environment and of the nature, including the biological diversity, both the international and national laws shall include rules which, if observed or caused to be observed, can restrict the potentially harming activities.

27.2 The International Legal Obligation of Preserving the Biological Diversity

The basic document of the international legal obligations concerning the biological diversity is the Convention on Biological Diversity[8] adopted at the UN Conference on Environment and Development (Rio de Janeiro, 1992) and which currently has 196 parties, including the European Union as an intergovernmental organisation. Having regard to the outstandingly high number of states participating in the Convention, it can be said with conviction that the provisions of the Convention reflect also the intent of the international community as a whole, thereby serving as a reference point for the legislation and application of the law by all states. Whilst in the Convention it is not questioned that the states have sovereign rights over their own biological resources, it confirms that the preservation of biological diversity has become a common cause for humanity as a sepa-

5 Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.

6 *See further*: A/HRC/34/49, Human Rights Council, Report of the Special Rapporteur, in particular Section 5 of the report.

7 *See further*: Submission by the Research Institute of Ecology of the Hungarian Academy of Sciences, entitled 'A biológiai sokféleség pusztulása – a magyarországi hazai illetve nemzetközi védelem alatt álló területek szerepe a biológiai sokféleség védelmében, és egyezményi kötelezettségek teljesítésében', to the Constitutional Court's Decision No. 28/2017 (X. 25.) AB, pp. 2 and 3. http://public.mkab.hu/dev/dontesek.nsf/0/ace6942234d099eec1257f22005dec24/$FILE/II_3394_7_2015_allasfoglalas_anonim.pdf.

8 Act LXXXI of 1995.

rate international legal category and the states are responsible for preserving their own biological diversity and using their own biological resources in a sustainable manner. The essential requirement for the use of biological resources is sustainability: such resources may only be used in a manner and at a pace which still do not result in the decrease of biological diversity in the long-term, maintaining thereby the possibility for satisfying the needs and ambitions of current and future generations.[9] In 2002, the Conference of Participants (COP) that is responsible for the implementation of the Convention, established that biological diversity is the basis on which the human civilisation was created, and the decrease of biological diversity is not only one of the biggest challenges that humanity faces, but it also threatens the concept of sustainable development and the interests of future generations.[10] At the end of 2010, at the session of the COP in Nagoya, the states undertook to take efficient and urgent measures in order to stop the decrease of the biological diversity by 2020, ensuring that the diversity of ecosystems and their services are maintained. To achieve this, the global Strategic Plan for the preservation of biological diversity between 2011 and 2020[11] was adopted with a consensus; according to such Strategic Plan, amongst others, at least 17% of the land areas and fresh water habitats and 10% of marine areas shall be protected efficiently. By the end of this decade, the pace of devastation of natural habitats shall be reduced by a half and at least 15% of the already deteriorated habitats shall be restored. The value of biological diversity is also expected to be included in the specific national development strategies and planning processes.

As regards the preservation of biological diversity, the decision entitled "Transforming our World: the 2030 Agenda for Sustainable Development" and adopted unanimously on 25 September 2015 in the UN General Assembly also sets forth the same obligations as the Convention on Biological Diversity.[12] According to one of the seventeen sustainable development goals laid down in the Agenda, the states undertake to "protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss." According to Goal 15.5, they "take urgent and significant action to reduce the degradation of natural habitats, halt the loss of biodiversity and, by 2020, protect and prevent the extinction of threatened species."[13]

The obligation to preserve biological diversity, however, does not apply only universally, but also at a regional level. According to the Preamble of the International Conven-

9 *See further*: Art. 2 of the Convention.

10 *See further*: UNEP/CBD/COP/6/20, Report of the Sixth Meeting of the Conference of the Parties to the Convention on Biological Diversity. https://www.cbd.int/doc/meetings/cop/cop-06/official/cop-06-20-en.pdf.

11 COP 10 Decision X/2. Strategic Plan for Biodiversity 2011-2020. Source: https://www.cbd.int/decision/cop/?id=12268.

12 A/70/L.1, Transforming our World: the 2030 Agenda for Sustainable Development.

13 *See* the Hungarian translation: http://ffcelok.hu/celok/szarazfoldi-okoszisztemak-vedelme/.

tion on the Conservation of European Wildlife and Natural Habitats,[14] adopted by the European Council, "the conservation of natural habitats is a vital component of the protection and conservation of wild flora and fauna", and the main objective of the Convention is "to conserve wild flora and fauna and their natural habitats"[15] and all Contracting Parties shall take the appropriate and necessary legal and administrative measures to that effect.[16] The European Union as an intergovernmental organisation is a participant also to this agreement, together with all Member States of the European Union.

27.3 Biological Diversity in the Applicable Strategic Documents

The abovementioned international legal documents constitute clear and expressly undertaken international obligations even for Hungary. The specification of such international obligation may only be possible by creating and implementing the relevant detailed rules in the domestic law. In the applicable domestic law, several strategic documents set out the short, medium- and long-term goals which shall be achieved in the legislation and in the application of the law in order to preserve the biological diversity.

According to the Framework Strategy on National Sustainable Development as adopted by Parliament Decision No. 18/2013. (III. 28.), in accordance with the international processes, in our country, the natural environment is restricted to an always smaller area, and Hungary's territory has already lost almost 90% of its natural ecosystem services, whilst the elimination of, and construction on, natural areas continues at a large pace.[17] In the Framework Strategy, maintenance of the biodiversity which is unique even in Europe, the preservation of the landscape and natural assets, as well as blocking the exhaustion of ecosystem services, are set out as minimum requirements.[18] In the 2013-2014 progress report of the Framework Strategy, which was acknowledged by the Government in Government Decision No. 1888/2016 (XII. 29.), it is expressly specified that due to the wrong trends and practices of the land use change, the majority of the habitats is threatened, therefore, the biodiversity is expected to decrease further in Hungary. This expected negative scenario may only be avoided by transforming and reforming knowingly the land use and prohibiting the transformation of areas that are still active biologically.

In accordance with the international obligations undertaken by Hungary and its obligations deriving from the EU law, the Strategy on National Biodiversity adopted by Parliament Decision No. 28/2015 (VI. 17.), is aimed at stopping the decrease of biological diversity and the further decline of ecosystem services and to improve their condition in

14 International convention No 1990/7 from the Minister of Environmental Protection.
15 *See*: Art. 1 of the Convention.
16 *See*: Art. 4 of the Convention.
17 *See* Section 5 of the Strategy: The Condition of Our National Resources.
18 *See* Section 6 of the Strategy: The Goals and Measures of the Transition Towards Sustainability.

the upcoming years. To this end, the aspects of preserving biological diversity shall necessarily be included in all laws and strategic decisions that affect the condition of the biological diversity, and in their implementation.[19]

27.4 Legal Status of the Natura 2000 Areas and Their Importance in Preserving the Biological Diversity

Natura 2000, which was established by the European Union, is a single European ecological network which, by protecting the natural habitat types having Community importance, as well as wild fauna and flora species, ensures the preservation of biological diversity and contributes to maintaining or restoring their favourable conservation status. The legislative bases of the Natura 2000 network are Directive 79/409/EEC (the so-called Birds Directive) and Directive 43/92/EEC (the so-called Habitats Directive). The general objective of the Birds Directive is to protect all birds species that naturally occur in the territory of the Member States,[20] whilst the main objective of the Habitats Directive is to preserve biological diversity, ensure the long-term preservation of the species and habitat types by maintaining and increasing their natural spread.[21] One of the main reasons for establishing Natura 2000 network was that, whilst all Member States of the European Union became participants of the most important international agreements on environmental protection, the participating states had a considerably large discretion in implementing the conventions. Since the environment and the economic development cannot be strictly separated from each other, the different approaches relating to environmental protection and the differently intensive rules also ensure different conditions in the European Union that strives to standardise the conditions of the internal market.

21.44% of Hungary's area is covered by Natura 2000 areas,[22] which is slightly over the average of the European Union's Member States (18.12%). By Hungary's adhesion to the European Union, the Natura 2000 network is complemented by the Pannonian biogeographical region,[23] which covers the whole territory of Hungary. The Pannonian region provides home to 105 animal species and 36 plant species listed in the Habitats Directive, as well as 101 bird species listed in the Birds Directive,[24] meaning that it has outstanding importance in ensuring the biological diversity. The domestic legal background for the

19 National Strategy on Biodiversity, Executive Summary.
20 *See* Art. 1(1) of the Directive.
21 *See* Art. 1(1) and (2) of the Directive.
22 Nature conservation data, Ministry of Agriculture, 2018, 20.
23 The specific Natura 2000 regions: Atlantic, Boreal, Continental, Alpine, Pannonian, Steppic, Black Sea, Mediterranean, Macaronesian. The Pannonian region covers the territories of the Czech Republic, Hungary, Romania and Slovakia. See further: Natura 2000 in the Pannonian Region. European Commission, 2010, 4.
24 Nature conservation data, Ministry of Agriculture, 2018, 20.

regulation of Natura 2000 areas is provided by Government Decree No. 275/2004 (X. 8.) on the conservation areas having European Community importance.

The areas included in the Natura 2000 network, that is the special protection areas for birds and the special areas of conservation are designated by the Member States, exclusively based on professional criteria. Whilst the Member States had exclusive competence to designate the areas to be designated under the Birds Directive, they could only make a proposal for special areas of conservation to the Commission which examined the proposals of each Member State with the involvement of experts. In Hungary, the lands concerned by areas of conservation having European Community importance are set out in the KvVM decree of the Minister of Environment and Water No 14/2010 (V. 11.). The Natura 2000 status of specific lands shall also be indicated in the land registry.[25]

According to Section 8(1) of the Government Decree No. 275/2004. (X. 8.), activities that do not jeopardise or violate the achievement of the preservation goals of Natura 2000 areas and carried out lawfully, in accordance with the relevant final authorisation already at the time when they are designated, may be carried out without limitation in Natura 2000 areas. Whilst the Government decree sets forth strict conditions regarding the specific investments to be carried out in Natura 2000 areas, agricultural activities may essentially be carried out without any general regulatory restriction in those areas. In its Decision No. 28/2017 (X. 25.) AB, the Constitutional Court had to assess, in the context of such agricultural activities, whether it is justified to maintain the state ownership of Natura 2000 areas or private owners are also able to provide for preserving the natural values of these areas accordingly, having regard in particular to the agricultural use of such areas.

In its study on the Pannonian region, the European Commission also emphasizes that a large portion of the region's natural vegetation has been transformed into fertile agricultural production areas and that nowadays almost two thirds of the region is covered by cultivated habitats.[26] Several elements of the European Union's agricultural subsidisation system, however, clearly encourage to the most effective agricultural production even today, and there are only a few exceptions where the specific area payments are independent from the production. It can be generally said that the significant losses of habitats were caused and are still caused primarily by the agriculture[27] as it clearly favours cropland management which covers almost half of Hungary's territory. In such circumstances it may be justified to assume that the owners of specific agricultural areas select a land use method which is the most profitable for them under the applicable law and regardless of

25 According to Section 39/A(j) of FVM decree of the Minister of Agriculture and Rural Development No. 109/1999 (XII. 29.) regarding the implementation of Act CXLI of 1997 on the land registry, the area's Natura 2000 status can be noted as the legal status of the real estate.

26 Natura 2000 in the Pannonian Region. European Commission, 2010, 10.

27 Europe's Environment: The Third Assessment. Chapter 11. Biological Diversity. European Environmental Agency, 2013, 231.

the effects such land use method exercises, if applicable, to the flora and fauna of the relevant area.

For the sake of completeness, it is worth mentioning that in addition to the effect of the agriculture, other factors also play a role in the decrease of biological diversity in Hungary, including for example the motorway constructions or the reclassification of certain areas as urban areas and constructions carried out in those areas. The effects of such factors are further strengthened by the fact that Hungary is affected by global warning more than the average.[28] However, a decrease in the intensity of agricultural activity is not expected either in Hungary or globally. According to certain estimates, the Earth's population will be between 8.3 and 10.9 billion by 2050,[29] and based on the estimate carried out by UN Food and Agricultural Organisation (FAO), agricultural production may increase also by 60%.[30] Such a growth rate is unimaginable without involving always more areas in the agricultural production which necessarily leads to a further decrease in the flora and fauna of the areas concerned.[31]

27.5 Constitutional Law Related Issue – Regulation of Natura 2000 Areas

By its Decision No. 1666/2015 (IX. 21.), the Government decided to sell state-owned lands to farmers within the framework of the "Lands for Farmers!" Program; such decision was first replaced by Government Decision No. 1062/2016 (II. 25.) and then by Government Decision No. 1203/2016 (IV. 18.) which contained unchanged provisions in respect of the sale of Natura 2000 areas. Pursuant to those Government decisions, within the framework of the "Lands for Farmers!" Program, farmers could acquire state-owned lands up to the generally applicable maximum threshold of 300 hectare, but forests and conservation areas were not subject to such sale.[32] Pursuant to Act LIII of 1996 on the conservation of nature, Natura 2000 areas may equally be Natura 2000 areas which are classified as protected areas of conservation or which do not qualify as protected areas of conservation. According to the abovementioned Government decisions, the "Lands for Farmers!" Program did not cover the sale of Natura 2000 areas classified as protected areas of conservation, but the sale of Natura 2000 areas not classified as protected areas of conservation became possible and was realised on several occasions within the framework of that Program. Neither the already cited Government Decree No. 275/2004 (X. 8.), nor the Birds Directive and the Habitats Directive contain any

28 Faragó Tibor & Schmuck Erzsébet (ed.), *A biológiai sokféleség megőrzése. Az élet sokszínűsége,* Magyar Természetvédők Szövetsége, Budapest, 2012, p. 7.
29 Global Megatrends Assessment 2015, European Environmental Agency, 2015, p. 15.
30 World Agriculture Towards 2030/2050: The 2012 Revision, ESA Working Paper, FAO, Rome, 2012.
31 OECD Environmental Outlook to 2050, OECD, Paris, 2012.
32 *See* Section 1(d) of Government Decision No. 1666/2015 (IX. 21.).

restrictions regarding the ownership of Natura 2000 areas, therefore, currently there are no obstacles to the private ownership of those areas under the law.

In connection with the "Lands for Farmers!" Program, 1/4 of the Members of Parliament challenged the provision of Government Decree No. 262/2010 (XI. 17.) on the detailed rules for exploitation of the lands belonging to the National Land Fund, according to which where state-owned lands are sold, the auction notice shall include a reference to the Natura 2000 status of the areas concerned. As they argued, such a provision made a step back with respect to the already achieved institutional level of nature conservation without this being unavoidable in order to enforce other fundamental rights or constitutional values. In their view, the Natura 2000 areas subject to sale are sold through auctions, according to the general rules which do not allow for enforcing the criteria of nature conservation.

27.6 Article P of the Fundamental Law – Goal of the State or a New Approach

According to Article P(1) of the Fundamental Law,

> "natural resources, in particular arable land, forests and the reserves of water, biodiversity, in particular native plant and animal species, as well as cultural assets shall form the common heritage of the nation; it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations."

The obligation to preserve the physical, biological and cultural fundaments as specified in Article P(1) of the Fundamental Law is a big step forward with respect to the protection of assets that form a common heritage of the nation; this is confirmed beyond doubt also by the motivation of the legislative proposal for the Fundamental Law: this provision

> "declares that Hungary protects and preserves the healthy environment. By that, the requirement of sustainability appears as a new element in the Fundamental Law, indicating the direction for the state and the economy to manage the environmental assets responsibly. It is specifically emphasized that the specific Hungarian environmental assets and the Hungarian cultural assets shall be preserved by everyone for future generations."[33]

33 *See*: http://www.parlament.hu/irom39/02627/02627.pdf. In the legislative proposal, Art. P was originally indicated as Art. O.

Article P(1) shall be read together with the National Awoval of the Fundamental Law which is expressly declared that

> "we commit to promoting and safeguarding our heritage, our unique language, Hungarian culture, the languages and cultures of nationalities living in Hungary, along with all man-made and natural assets of the Carpathian Basin. We bear responsibility for our descendants; therefore, we shall protect the living conditions of future generations by making prudent use of our material, intellectual and natural resources."

In this context, in the National Awoval it is also declared that the Fundamental Law "shall be an alliance among Hungarians of the past, present and future." Thus, even the National Awoval shows that the decisions adopted by the actual governments affect also the future generations, therefore, the decisions of the actual government and legislature shall take into account also the interests of future generations. This also means that the cited provisions of the National Awoval read together with Article P(1) set out a framework for interpretation of the Fundamental Law as a whole; according to such framework of interpretation, the interests of future generations shall generally be taken into account with the same weight as, and simultaneously with, the actual needs. This is true even because pursuant to Article R(3) of the Fundamental Law, "the provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historical constitution."

The Constitutional Court established that the Fundamental Law not only preserved the protection level of the fundamental right to a healthy environment, but it contains much more detailed provisions in that respect as compared to the former Constitution. The Fundamental Law thereby developed further also the environmental assets recognised and the view followed by the Constitution and the Constitutional Court.[34] Whilst the former Constitution declared only the right to a healthy environment, and amongst others, in its Decision No. 28/1994 (V. 20.) AB, the Constitutional Court derived from that the substantive requirements of the regulation applicable to the protection of the environment, the Fundamental Law specifies that arable lands and the biological diversity are considered to be assets which shall be preserved by the state and everyone for the future generations. Consequently, now it can directly inferred from Article P of the Fundamental Law that the constituent power intended to protect the human life and human living conditions, so in particular arable lands and biodiversity in relation therewith, in order to ensure the living conditions for future generations and, in any event, not to worsen those conditions due to the generally accepted principle of the prohibition to

34 Constitutional Court Decision No. 16/2015 (VI. 5.) AB, para. [91].

take steps backward.[35] The prohibition to take any steps backwards as an additional obligation of the state concerning the regulation of the environment shall cover both the substantive and procedural regulation of the environment and the organisational regulation of its institutional system.[36]

Article P(1) of the Fundamental Law exceeded the former Constitution not only in the sense that it sets out specifically that the elements of the common heritage of the nation worth protection. Article P(1) also sets out that the protection of the environment is not only an obligation of the state, but "it shall be the obligation of the State and everyone." Thus, Article P(1) contains a significant step forward as regards the scope of those obliged: "whilst based on the Constitution, only the obligations of the state got an emphasis, the Fundamental Law is also about the obligations of 'everyone', so including the civil society and any and all citizens."[37] However, where the obligation to protect the environment applies equally to the state in the broad sense and the natural and legal persons, such an obligation by its nature may not be fully identical in respect of each legal person. In addition to knowing and complying with the applicable legislative provisions, natural and legal persons cannot generally be expected and forced to adapt their conduct to the protection of the environment as an abstract goal, the state however can also be expected to determine clearly the legal obligations that must be complied with both the state and private parties in order to achieve the effective protection of the assets named in Article P (1) of the Fundamental Law.[38] As regards the obligation to adopt laws on environmental protection, the Constitutional Court has already pointed out that "all tasks that are otherwise performed by the state through the protection of individual rights, shall be carried out by providing statutory and organisational guarantees here.[39] This could be satisfied by the legislature only where it makes consideration in the long term, through several government cycles when it adopts its decisions.[40]

Article P(1) of the Fundamental Law sets out also specifically the obligation to protect biological diversity, including in particular the domestic flora and fauna species. Therefore, such obligation has become a constitutional asset in the Hungarian legal order which shall be taken into account by the legislature even in adopting regulations falling within each sector-specific policy.[41] The obligation to preserve the diversity of species is important not only because those can be interpreted as resources which may be used and exploited by human activity, but also because they are valuable and worth protection.

Considering all the above, in my view, it can be established beyond doubt that Article P(1) of the Fundamental Law is much more than a state goal: it is a generally binding test

35 Constitutional Court Decision No. 28/2017 (X. 25.) AB, para. [28].
36 Constitutional Court Decision No. 3223/2017 (IX. 25.), paras. [27]-[28].
37 Constitutional Court Decision No. 16/2015 (VI. 5.), para. [92].
38 Constitutional Court Decision No. 28/2017 (X. 25.), paras. [30].
39 Constitutional Court Decision No. 28/1994 (V. 20.), ABH 1994, 134, 138.
40 Similarly: Constitutional Court Decision No. 988/E/2000, ABH 2003, 1281, 1289.
41 Constitutional Court Decision No. 28/2017 (X. 25.), para. [35].

that exceeded the limits set by the former Constitution at least from three aspects. On the one hand, now the Fundamental Law specifies beyond doubt that the common heritage of the nation worth protection as it is and not only because they contribute to human living conditions. On the other hand, it can be clearly inferred also from the Fundamental Law that one purpose of protecting the common heritage of the nation is to preserve the living conditions of future generations and to preserve such assets for future generations. And finally, as opposed to the approach followed in the former Constitution, now the protection of the common heritage of the nation shall expressly be the obligation of the state and everyone. In this context, it should also be mentioned that, in connection with the right to property, the Fundamental Law underlines that "property shall entail social responsibility."[42] In my view, the obligation to protect the assets set out in Article P(1) may be interpreted also as a named aspect of social responsibility and as such it can be directly enforced.

27.7 Is It Justified to Maintain the State Ownership of Natura 2000 Areas? Findings of the Constitutional Court on Omission by the Legislature

Article P(1) of the Fundamental Law does not allow for a conclusion that the state ownership of Natura 2000 areas shall be maintained and no such provision can be read in the regulation concerning the legal status of Natura 2000 areas. Is it then justified to maintain the state ownership of such areas? The answer depends on the regulatory context: in case if the legal provisions contain clear obligations for the owners and users of the areas as regards the restrictions and the requirement of preserving natural assets that they shall take into account in using and exploiting Natura 2000 areas and if, at the same time, the state applies an efficient control mechanism that ensures the application of such restrictions, it is not justified to maintain state ownership. The situation changes where the regulatory context is incomplete, the controlling mechanism is weak and the state and EU subsidisation rules take into account almost exclusively management and production aspects: in such case, the protection of assets as specified in Article P(1) of the Fundamental Law can hardly be achieved if state ownership is not maintained.

Currently, the regulation of Natura 2000 areas differs only in one substantial element from the general rules of sales: consent from the minister responsible for nature conservation is required.[43] However, no specific provisions apply for the exercise of the right to consent, it may be considered only as a means for achieving the general land possession policy objectives, which results clearly also from the Minister's answer to the Constitutional Court's request that is available at the Constitutional Court's website: by the summer of 2017, 24 thousand hectares of Natura 2000 areas were sold, but the Minister

42 Art. XIII(1) of the Fundamental Law.

43 Section 3(1) of the Government Decree No. 262/2010 (XI. 17.).

refused to consent only to the sale of 42 hectares which corresponds to a bare 0.175% of the total area designated for sale.[44] Thus, all this means that in addition to the Minister's right to consent, no special rules or additional requirements apply in respect of the sale of Natura 2000 areas which do not qualify as protected areas of conservation. In selecting the areas to be sold, there is no guarantee aimed at ensuring the quantitative and qualitative protection of Natura 2000 areas that are still owned by the state before sale, because the selection of areas to be sold is governed only by the Government's general land possession policy objectives.[45] According to the laws, however, revenues from the exploitation of lands included in the National Land Fund may also be spent on reducing the sovereign debt,[46] therefore, based on the regulation it cannot be excluded that in selecting Natura 2000 areas to be sold, the decisive criteria will be the money value of such areas, instead of their natural value, and the maximisation of state revenues. Essentially, only these criteria apply in respect of the sale of lands: due to the rules of sale at auctions, the ownership of the land will be acquired by the person with the highest price offer regardless of how much the individual bidders are capable of ensuring the special treatment of Natura 2000 areas. Therefore, the Constitutional Court established that the Fundamental Law was violated by the legislature's omission as, at the time when it allowed for the sale of Natura 2000 areas, it failed to adopt rules which would allow for taking into account the assets and the peculiarities of environmental protection and nature conservation in selecting the lands to be sold and during the sales procedure.

In addition to the incompleteness of the regulation on the sales procedure, however, the regulation regarding farming on privately owned Natura 2000 areas is also incomplete. Due to the applicable regulation, the land use sustainability plan shall be prepared in respect of all Natura 2000 areas regardless of their owners.[47] At the same time, due to their legal situation, such sustainability plans are unsuitable for setting out land use rules that are binding and enforceable in respect of private owners.[48]

The proper exploitation of state-owned Natura 2000 areas is ensured by the institution of property management for nature conservation[49] according to which application of the traditional (regional), ecological and semi-natural farming methods shall be favoured in these areas. In case where the specific state-owned Natura 2000 area is exploited not directly by the state, but a tenant, the annex to the tenancy agreement includes a list containing the provisions for the preservation or improvement of the natural state; by controlling the owner, the National Land Fund monitors and enforces compliance with

44 *See*: http://public.mkab.hu/dev/dontesek.nsf/0/ace6942234d099eec1257f22005dec24/$FILE/II_3394_11_2015_FM_allafoglalas_anonim.pdf.

45 Constitutional Court Decision No. 28/2017 (X. 25.) AB, para. [60].

46 Section 28 of Act LXXXVII of 2010 on the National Land Fund.

47 Section 4(5) of the Government Decree No. 275/2004 (X. 8.).

48 Constitutional Court Decision No. 28/2017 (X. 25.) AB, para. [63].

49 Section 43/A (1) of the Government Decree No. 262/2010 (XI. 17.) According to Section 3(1) of the Government decree, for the purposes of such decree, areas cover also Natura 2000 areas.

those provisions and where necessary, it may also terminate the tenancy agreement.[50] In the absence of state ownership, however, the National Land Fund does not have the right to carry out controls in respect of privately owned Natura 2000 areas, regardless of the fact that such a list shall formally be attached to the agreements concerning the sale and purchase of Natura 2000 areas.[51]

A further deficiency of the regulation is constituted by the fact that the legislature adopted clear and general land use rules, which are binding and enforceable regardless of the owner, only in respect of Natura 2000 grasslands.[52] In respect of other land uses (including in particular, arable lands, reeds, forests, wooded areas, fishponds),[53] however, no further special legal provisions are applied. This also means that in case of these areas, the substantive law does not hinder the new owner of the area in exploiting the Natura 2000 area in a manner that even though is more profitable for it, prejudices the natural assets in that area. In this context, in its decision, the Constitutional Court pointed out that where a land that was owned previously by the state is acquired by more than one private person and such new owners, independently one from the other, choose the land use that is the most profitable for them, the form of use of each area may be different. However, the biological diversity may be preserved less effectively in smaller, isolated areas, because the island and mosaic like setting of the areas does not allow for free contact among populations which, in the long term, may prejudice also the viability of the populations of species.[54] All this means that the risk of deterioration in the condition of Natura 2000 areas would exist even if the legal provisions would, in an unchanged form, apply to both state-owned and privately owned Natura 2000 areas. At the same time, this means that a regulation identical to that applicable in respect of state-owned areas would still not be sufficient in respect of privately owned Natura 2000 areas, because the regulation shall ensure the protection of natural assets in terms of the level and efficiency of protection ensured by the laws instead of the laws themselves.[55] In this context, the Constitutional Court mentioned also the precautionary principle according to which, in adopting decisions and laws concerning the condition of the environment, the state shall confirm that, also taking into account the scientific uncertainty, the con-

50 Section 47(1) of the Government Decree No. 262/2010 (XI. 17.).

51 *See*: Constitutional Court Decision No. 28/2017 (X. 25.) AB, paras. [65]-[66].

52 *See* Government Decree No. 269/2007 (X. 18.).

53 *See* FVM decree of the Minister of Agriculture and Rural Development No. 109/1999 (XII. 29.).

54 *See* the answer given by the Ombudsman and his deputy to the Constitutional Court's request. Source: http://public.mkab.hu/dev/dontesek.nsf/0/ace6942234d099eec1257f22005dec24/$FILE/II_3394_6_2015_allasfoglalas_anonim.pdf.

55 Similarly: Constitutional Court Decision No. 28/1994 (V. 20.) AB, ABH 1994, 134, 142.

dition of the environment will certainly not deteriorate as a consequence of the given measure.[56] Having regard to the fact that based on the applicable legal context, the state cannot confirm that, the Constitutional Court established that, by its omission, Parliament violated the Fundamental Law, because it failed to adopt rules for the exploitation of privately owned Natura 2000 areas and the control of such exploitation, which would ensure a guarantee scheme similar to that of state ownership in order to preserve the assets of Natura 2000 areas.[57]

27.8 Conclusions

Whilst in acting on its own motion, it established the legislature's omission, the Constitutional Court declined the motion of the Members of Parliament. Such motion was declined, because the provision challenged by the proposing Members of Parliament, according to which the major laws concerning Natura 2000 areas shall be indicated in the action notice, provides also for an important guarantee. Namely, its aim is to inform the potential auction buyers already before the beginning of the auction about the legal provisions concerning the use and exploitation of the given area, as well as whether the area that they wish to purchase is covered by the Natura 2000 network. The Constitutional Court underlined that the annulment of such provision would not mean that in the future no Natura 2000 areas could be sold at an auction, but only that the regulation concerning the special status of Natura 2000 areas should not be indicated even in the auction notice.[58]

The real issue determined by the Constitutional Court in its decision, is not caused by the fact that Natura 2000 areas may also become privately owned, but by the fact that the regulation concerning Natura 2000 areas is incomplete: except for grasslands, the legislature failed to specify which specific activities may be carried out by the owners on these areas and it also failed to create the guarantees for controlling those activities. However, in particular due to the priorities of the European Union's agricultural policy, the owners and users of agricultural lands are primarily interested in cultivating the area and thereby maximising the available state and European Union subsidies. Therefore, in order to make effective changes with regard to the protection of our natural assets, much more than new laws, a change of approach that is needed. Remedying the omission established

56 Constitutional Court Decision No. 28/2017 (X. 25.) AB, para. [75]. The precautionary principle is set out (non-exhaustively) in the Convention on Biological Diversity, the UN Framework Convention on Climate Change (promulgated in Act CIX of 2004), the Treaty on the Functioning of the European Union (Art. 191), the international human rights case law (judgment of the European Court of Human Rights of 27 January 2009 in *Tatar v. Romania*, Case No. 67021/01) and the Hungarian law (in particular, Section 6 of Act LIII of 1995 on the general rules for the conservation of the environment).

57 Constitutional Court Decision No. 28/2017 (X. 25.) AB, para. [76].

58 Constitutional Court Decision No. 28/2017 (X. 25.) AB, in particular para. [56].

by the Constitutional Court is only the first step in this change of approach.[59] The assets specified in Article P(1) of the Fundamental Law may be preserved in the long term, which shall be a legal and moral obligation for everyone, only in this way, by changing the regulatory environment together with the approach followed by farmers.[60]

59 As regards that omission, Parliament failed to comply with the Constitutional Court's decision by the finalisation of the manuscript (1 December 2018). The deadline set by the Constitutional Court elapsed on 30 June 2018.

60 In his encyclical letter Laudato si', Pope Francis says: "Each year sees the disappearance of thousands of plant and animal species which we will never know, which our children will never see, because they have been lost for ever. The great majority become extinct for reasons related to human activity." In the encyclical letter, the conclusion is clear: "We have no such right." Pope Francis: Encyclical letter Laudato si', 2015, Chapter III: Loss of biodiversity, s. 33. Electronically available at: https://uj.katolikus.hu/konyvtar.php?h=469.