Decision 30/2022. (XII. 6.) AB

on establishing an omission and a setting constitutional requirement in relation to certain provisions of the Act LXXVI of 2014 on Scientific Research, Development and Innovation and the Act XL of 1994 on the Hungarian Academy of Sciences, as amended by the Act LXVIII of 2019 amending certain Acts necessary for the reform of the institutional structure and the financing of the system for research, development and innovation

In the posterior examination of a statutory regulation's compatibility with the Fundamental Law and in the subject of a constitutional complaint, the plenary session of the Constitutional Court – with concurring resonings by Justices *dr. László Salamon, dr. Balázs Schanda* and *dr. Marcel Szabó* – adopted the following

decision:

1. The Constitutional Court, acting *ex officio*, establishes that the Parliament has caused an infringement of the Fundamental Law manifested in an omission by the failure to regulate the property relations between the Eötvös Loránd Research Network and the former operator of the research institute network, the Hungarian Academy of Sciences, in accordance with the principle of legal certainty enshrined in Article B (1) of the Fundamental Law and the enforcement of the right to property guaranteed by Article XIII (1) of the Fundamental Law in sections 45 to 46 of the Act LXXVI of 2014 on Scientific Research, Development and Innovation and section 3 (1a) of the Act XL of 1994 on the Hungarian Academy of Sciences, as amended by the Act LXVIII of 2019 amending certain Acts necessary for the reform of the institutional structure and the financing of the system for research, development and innovation.

The Constitutional Court therefore calls upon Parliament to meet its legislative duty by 30 June 2023.

2. The Constitutional Court – acting *ex officio* – establishes: in the context of the application of section 42/C (3) of the Act LXXVI of 2014 on Scientific Research, Development and Innovation, it is a constitutional requirement stemming from Article X (1) of the Fundamental Law that the freedom of science prevails in the making of decisions on scientific issues, and that the method and regulation of decision-making comply with the constitutional value of freedom of science.

3. The Constitutional Court rejects the petitions aimed at establishing the violation of the Fundamental Law by and the annulment of section 3 (3), section 10 and section 35

of the Act LXVIII of 2019 on the amendment of certain Acts necessary for the reform of the institutional structure and the financing of the system for research, development and innovation, incorporating section 46 (1) of the Act LXXVI of 2014 on Scientific Research, Development and Innovation.

4. The Constitutional Court dismisses the petition aimed at establishing the violation of the Fundamental Law by and the annulment of sections 1, 2, section 3 (1) to (2) and (4), sections 4, 6, 7, 8, 16, 20, 33, 36, 37 and 39, as well as Annex 1 of the Act LXVIII of 2019 on the amendment of certain Acts necessary for the reform of the institutional structure and the financing of the system for research, development and innovation.

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

Reasoning

I

[1] Sixty Members of Parliament filed a petition for posterior norm review and the President of the Hungarian Academy of Sciences (hereinafter referred to as HAS, Academy or Hungarian Academy of Sciences) filed a constitutional complaint with the Constitutional Court.

[2] 1 In their petition for posterior norm control submitted pursuant to section 24 (1) of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC), the MP petitioners challenged section 1, 2, 3, 4, 6, 7, 8, 10, 16, 20, 33, 35, 36, 37, 39 and the annex of the Act LXVIII of 2019 on the amendment of certain Acts necessary for the reform of the institutional structure and the financing of the system for research, development and innovation (hereinafter: "Amending Act"), published in the Hungarian Gazette on 12 July 2019, (i.e. all provisions of the Amending Act that concern the organisation and functioning of the HAS and basic scientific research) and sought their retroactive annulment on the grounds of violation of Article X (3) (hereinafter: "HAS-clause") and Article XIII (right to property) of the Fundamental Law. The petitioners also requested the Constitutional Court to suspend the implementation of the promulgated Amending Act not yet in force on the basis of section 61 (2) of the ACC.

[3] 1.1 The petition stresses that the Act CVI of 2007 on State Property (hereinafter: ASP) expressly provided that the property managed by the HAS would be transferred to the HAS. According to the Act CXCVI of 2011 on National Property (hereinafter: ANP), the property of the HAS does not constitute State property.

[4] According to the petitioners' position, the challenged provisions of the Amending Act restrict the constitutionally protected property of the HAS as earmarked public property (which is not owned by the State and not State property) in a manner that is contrary to the Fundamental Law, in light of Article I (4) of the Fundamental Law. The elements of that property are defined in the Act XL of 1994 on the Hungarian Academy of Sciences (hereinafter: "Academy Act"), according to which the property of the Academy includes the core property transferred to the Academy upon the entry into force of that Act and the property transferred to the Academy under the ASP. The Academy's assets include real estate, intangible assets (including intellectual property), tangible assets, cash, investments and shares.

[5] The petitioners allege a restriction contrary to the Fundamental Law of the property of the HAS, in substance its expropriation, on the grounds that this is being done in the absence of the conditions laid down in Article XIII (2) of the Fundamental Law. Pursuant to the Amending Act challenged by the petition, on the basis of section 3 of the Academy Act introduced by the Amending Act, the HAS is obliged, "unless otherwise agreed" under the Amending Act, to transfer its right of use of the assets of the research network not connected to it (taken away) in its entirety free of charge to the Eötvös Loránd Research Network (hereinafter: ELRN) as a new, independent legal entity, entrusted with the duty of operating the research network.

[6] The petitioners also complained that under section 10 of the Amending Act [which repealed, among others, section 10 (5) of the Academy Act], AS is forced to authorise the use of the name of the HAS in respect of the former institutes ("transferred or taken away from it"), which is not necessary for the achievement of the public interest objective.

[7] The petitioners also argued that the HAS has been operating as a public body since 1827, the existence of which is an achievement of the historical constitution and which therefore entitled to an institutional guarantee, the content of which is the unchanged, continuous existence of the institution. Similarly to the Hungarian Academy of Arts (the constitutional value of artistic freedom), it is a constitutional requirement also for the HAS that its composition and organisational operation shall comply with the constitutional value of the freedom of scientific research, taking into account the case-law of the Constitutional Court.

[8] The HAS is a public scientific body, the HAS-clause therefore protects the public body, including the public body's research network. The scientific autonomy of the public body research network is guaranteed by the fact that the research institutes operate under the direction and supervision of the HAS as a public scientific body. On the basis of the above, the provisions of the Amending Act that change the status of the HAS violate the HAS-clause of the Fundamental Law.

[9] The petitioners also invoked Article X (1) and (2) of the Fundamental Law, as well as several decisions of the Constitutional Court, and argued that the organisational and operational rules of the ELRN violate the freedom of science, since researchers are not protected by a guarantee, contrary to the previous regulation of the Academy Act, which stated that researchers carry out their work in accordance with their scientific convictions. Furthermore, according to the Amending Act, the task of the institutes is now "research and development", not scientific (basic) research. Under the contested regulation, researchers will be transferred together with the research institutes to a new organisational system – the ELRN – which will fundamentally restrict the choice of topics and methods of the institutes and the researchers working there. The actual or potential loss of their field of research and their research tools under the Amending Act is an infringement of the personal freedom of science of researchers.

[10] As a Governing Board (hereinafter: "Governing Board" or GB), the ELRN is responsible for governance, as opposed to supervision exercised by the former HAS Board [the Council of Academic Research Centres (hereinafter: CARC), abolished by section 10 (f) of the Amending Act], which infringes the freedom of science. The composition of the Governing Board does not guarantee the autonomy of the scientific communities, since half of its thirteen members are appointed by the Government, half by the President of the HAS and its chairman is appointed separately by the Prime Minister. The members "delegated" by the Government do not represent the scientific community.

[11] According to the previous regulation, the participation of one committee in each of the three major scientific fields was compulsory in the preparation of the decisions of the CARC: the CARC could only decide on the proposals of the committees (it could accept or reject them, but could not change them according to the Statutes of the HAS), while in the model under the Amending Act, the competent scientific departments (specialised panels) only give their opinion on the proposals made for the Governing Board. The decision-making procedure of the ELRN is also contrary to the Fundamental Law, since the ELRN is not a scientific but an administrative body (public administration), and therefore, according to Article X (2) of the Fundamental Law, as an organ of the State, it is "not entitled to decide" on scientific matters, which are necessarily decisions on scientific truths and the evaluation of scientific research.

[12] According to the petition, the implementation of the Amending Act also jeopardises legal certainty, since almost half of the research expenditure of the scientific institutes of the HAS is funded by external sources, project grants. In this context, reference was made to the 2015-2016 report submitted to the Parliament on the work of the HAS and the general situation of Hungarian science, according to which "the operating budget provided for in the Act on the Budget [...] did not even fully

cover the expenditure on personnel costs (and not at all the employer’s contributions and material expenditure).”

[13] 2 In its constitutional complaint submitted pursuant to section 26 (2) of the ACC, the petitioner (HAS) challenged section 3 (3), section 10 and Section 35 of the Amending Act and, therein, section 46 (1) of the amended Act LXXVI of 2014 on Scientific Research, Development and Innovation (hereinafter: ARDI), requesting its retroactive annulment on the grounds of the violation of Article X (3) and Article XIII (right to property) of the Fundamental Law.

[14] 2.1 The substance of the case on which the constitutional complaint is based is as follows.

[15] On 2 July 2019, the Parliament adopted the Amending Act, which amended the Academy Act along with several other Acts (e.g. Act XXXIII of 1992 on the Legal Status of Public Servants, Act CCIV of 2011 on National Higher Education, etc.).

[16] The adoption of the Act was preceded by several months of negotiations between the Government and the representatives of the HAS. According to the general reasoning of the Act, the Government of Hungary is committed to improving the country's scientific competitiveness and states that an essential element of a successful science and innovation policy is the establishment of an appropriate funding and responsibility system while respecting the autonomy of science stemming from its priority role. According to the general reasoning, the fundamental aim of the amendments is to create a more appropriate organisational framework for domestic research, development and innovation. The Act entered into force on 1 August 2019, in accordance with section 39 (1) of the Amending Act (with the exception of certain provisions).

[17] 2.2 With regard to the violation of Article XIII (right to property) of the Fundamental Law, the petitioner presented the property and ownership relations of the HAS and the statutory principles of its property management. In accordance with section 23 (2) of the Academy Act, the Academy's property consists, on the one hand, of the core property transferred to the Academy (this acquisition took place with the entry into force of the Academy Act on 30 June 1994) and, on the other hand, the property transferred pursuant to section 69 (1) of the ASP (pursuant to the latter, the Academy acquired the property elements which were State property under the Academy Act in force until 24 September 2007). The applicant submits that the property of the HAS is constitutionally protected property.

[18] In this context, the petitioner challenged section 3 (3) of the Amending Act. This provision adds an additional paragraph (1a) to section 3 of the Academy Act, which requires the Academy to ensure the right of use of the property elements owned by

the HAS and used by the individual research centres, as defined in the ARDI. As a consequence, the applicant submits that the Amending Act results in a restriction of the Academy's property and that the failure to fulfil the necessary constitutional conditions for that restriction creates a situation contrary to Fundamental Law. Referring to the case-law of the Constitutional Court [Decision 20/2014 (VII.3.) AB], the petitioner argued that the necessary conditions for the constitutionality of the restriction of property are not met. The petitioner did not dispute that facilitating the efficiency of scientific research is in the public interest. However, the petitioner argued that the condition of exceptionality is not met, since it is only met if the restriction is inherently necessary to achieve the objective pursued. Since other means were available to increase the efficiency of scientific activity and research, the condition of necessity was not met and the restriction on property could not be exceptional. Furthermore, the fact that the legislation does not provide for compensation means that the other conditions of completeness, unconditionality and immediacy cannot be met.

[19] The petitioner also alleged a violation of Article X (3) of the Fundamental Law, arguing that the HAS-clause is not merely an institutional guarantee, but more than that: Article X (3) of the Fundamental Law confers a right or an equivalent position on the HAS.

[20] According to the petitioner, the content of the HAS clause is to protect the maintenance of the status existing at the time of its declaration. However, this situation, established in 2013 (with the fourth amendment of the Fundamental Law), is violated, since although the HAS performs a number of other public tasks related to scientific life, the freedom of scientific life as a fundamental right is interpreted in relation to active scientific education and research, and the performance of this public task becomes impossible, according to the petitioner's position.

II

[21] 1 The affected provisions of the Fundamental Law:

“Article B (1) Hungary shall be an independent and democratic State governed by the rule of law.”

“Article X (1) Hungary shall ensure the freedom of scientific research and artistic creation, the freedom of learning for the acquisition of the highest possible level of knowledge and, within the framework laid down in an Act, the freedom of teaching.

(2) The State shall have no right to decide on questions of scientific truth; only scientists shall have the right to evaluate scientific research.

Hungary shall protect the scientific and artistic freedom of the Hungarian Academy of Sciences and the Hungarian Academy of Arts. Higher education institutions shall be autonomous in terms of the content and the methods of research and teaching; their organisation shall be regulated by an Act. The Government shall, within the framework of the Acts, lay down the rules governing the management of public institutes of higher education and shall supervise their management."

"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."

[22] 2 The relevant provisions of the Amending Act, taking force on 20 May 2016:

"Section 35 section 16 of the ARDI shall be replaced by the following provision:

»16. Transitional provisions

Section 45 (1) The public budgetary bodies listed in Annex 2 shall continue to operate as central budgetary bodies under the direction and founder's authority of the Secretariat of the ELRN.

(2) Changes in the form of operation, the identity of the governing body and the classification of the institutions' titles shall not affect the legal personality of the research centres, and the central budgetary bodies listed in Annex 2 shall continue to exercise all rights and obligations of the public budgetary bodies listed therein. The change in the form of operation pursuant to this paragraph shall not constitute a transformation within the meaning of section 11 (2) of the Act on Public Finances (hereinafter: APF) and the provisions of section 11 (5) to (6) of the APF shall not apply to it.

(3) The change of the form of operation pursuant to paragraph (2) shall not render the claims against the public budgetary body time-barred and may not be invoked as grounds for a claim for breach of contract or for the provision of security.

(4) The change of the form of operation referred to in paragraph (2) shall not affect the status of public servants employed by the public body as an employer, and the employment rules applicable to public body budgetary organs shall also be binding on the central budgetary organs listed in Annex 2.

Section 46 (1) Unless otherwise agreed, the HAS shall grant the free use of the property, owned by the Hungarian Academy of Sciences and used by the research centres, that serve the purpose of the placement of the central budgetary organs under Annex 2 and the operation of the research institution network, in accordance with section 42/B

(5). The user of an asset or real estate subject to free use shall be obliged to use, operate and maintain it in accordance with its intended purpose, to ensure its preservation, to bear the costs of reconstruction and development, public charges, costs and fees arising beyond the preservation of the asset, and to ensure the protection of the asset.

(2) Unless otherwise agreed, the Facilities Management Centre of the Hungarian Academy of Sciences shall continue to provide the operational tasks of the research sites listed in Annex 2 until 31 December 2021, even after the change of the governing body of the research centres.

(3) The placement of central budgetary bodies pursuant to paragraph (1) and the provision of the said assets pursuant to paragraph (1) shall not constitute the provision of services within the meaning of the Act CXXVII of 2007 on Value Added Tax.

(4) The research centres may use a designation referring to qualification by the Hungarian Academy of Sciences with the permission of the Hungarian Academy of Sciences with regard to its assessment provided pursuant to section 3 (1) (c) of the Academy Act.

Section 47 (1) The public service relationship of civil servants employed -- in the performance of a public task as defined in section 3 (1) (b) of the Academy Act -- by the Secretariat of the HAS as the employer shall terminate and on day following the termination shall be converted into an employment relationship with the Secretariat of the ELRN. The provisions of section 72 of the Act CXCIX of 2011 on Civil Service Officials (hereinafter: ACSO) shall apply to the change of status between the employer and the employee.

(2) The salary of the employees affected by the change of status at the Secretariat of the ELRN after the change of status may not be less than the salary established in their appointment as civil servants on 31 May 2019, including basic salary, basic salary adjustment, salary supplement, language allowance, qualification allowance, and in the case of managers, managers' allowance. Salaries shall take into account any reclassification made before the change of status, as required by the ACSO, any change of salary linked to a reclassification to another job, and any change of salary linked to the withdrawal or conferral of a professional title.

(3) For the purposes of entitlement to severance pay, the employment of the civil servant affected by the change of status at the HAS Secretariat (including previous employment in the event of transfer) shall be considered continuous, with the proviso that in the first

(a) year of the employment relationship established as the result of the change of status, the rules of the ACSO on dismissal by the employer,

(b) five years of the employment relationship established as the result of the change of status, the rules of the ACSO on jubilee bonus

shall continue to apply. After the expiry of the period referred to in points (a) and (b), the relevant provisions of the Labour Code shall apply.«"

[23] 3 The relevant provisions of the Amending Act, taking force on 1 September 2019:

"Section 3 (3) The following paragraph (1a) shall be added to section 3 of the Academy Act:

"(1a) The Academy shall be responsible for providing the right of use as regulated in the ARDI of the assets, owned by the Hungarian Academy of Sciences and used by the research centres, that serve the purpose of hosting the principal research network as defined in section 42/B (5), section 46 (1) and Annex 2 of the Act LXXVI of 2014 on Scientific Research, Development and Innovation (hereinafter: ARDI) and the operation of the research network.«"

"Section 10 The following provisions of the Academy Act will be annulled:

(a) in section 1 (4), the text », as well as legislation, programmes, measures directly affecting the conditions of operation of the academic research network, and the«,

(b) section 3 (1) (b),

(c) in section 8 (6), the text »The President of the Hungarian Academy of Sciences shall decide – after consulting the Doctoral Council – on the acceptance of foreign academic degrees for the purpose of employment in a scientific position (visiting researcher) at an academic budgetary body performing research in the given field of activity as a public task. The Government shall lay down by decree further rules for employment as a visiting researcher at a budgetary body under the control of the Academy.«,

(d) section 10 (5),

(e) section 15 (2),

(f) section 17 and the title of the preceding subtitle,

(g) section 18 and the title of the preceding subtitle,

(h) section 21 (1) (a),

(i) in section (2), the text »For granting the material and personnel conditions for activities supporting the research tasks of academic budgetary bodies, and for the provision of special research conditions, the Minister responsible for government science policy shall provide budgetary support in the budget chapter of the ministry under his/her leadership.«,

(j) section 21 (3) to (7),

(k) the text »multi-annual research and other« in section 22 (1),

(l) section 22 (2) to (5),

(m) section 24 (3).”

[24] 4 The relevant provisions of the ARDI in force at the time of examining the petition:

“Section 42/C (1) The main decision-making body of the ELRN Secretariat is the governing board (hereinafter: “Governing Board”).

(2) The Governing Board shall be composed of 13 members, six of whom -- not taking into account the chairman -- shall be proposed by the Minister responsible for the coordination of science policy and six by the President of the HAS, with at least two thirds of the members of the Governing Board being chosen from among scientists. The members of the Governing Board shall be appointed by the Prime Minister.

(3) The Governing Board shall

1. determine the content of the public call for applications to fill the posts of Secretary General and Deputy Secretary General; elect the Secretary General and Deputy Secretary General in the light of the results of the public call for applications;

2. adopt the strategic principles related to the operation of the ELRN;

3. decide on the establishment, restructuring and termination of research centres;

4. approve the goals and tasks of research centres, and issue their deed of foundation;

5. determine the content of public calls for managerial positions at the research centres, and shall elect the managers of the research centres;

6. decide on the operational an organisation regulations of the ELRN Secretariat and the research centres, as well as the by-laws of the ELRN Secretariat;

7. adopt the rules of asset management of the ELRN Secretariat;

8. pre-approve commitments exceeding the values laid down in the operational and organisational regulations of the ELRN Secretariat;

9. determine the criteria for providing support to the research centres;

10. approve the principles and adopt the framework of the budget of the ELRN Secretariat and the research organisations for the upcoming year;

11. evaluate the use of funding provided for the research centres’ activities;

12. approve the annual financial statements of the ELRN Secretariat and the research centres for the previous year;

13. discuss the concept of the president's reports prepared for the Parliament and the Government;

14. without prejudice to Article X (2) of the Fundamental Law, express opinion on the conceptual aspects of domestic science and society;

15. fulfil the tasks assigned to it by the deed of foundation.

(4) The Governing Board shall meet at least quarterly, and set the details of its own operational rules in its rules of procedure as part of the operational and organisational regulations, with the condition that the decisions under paragraph (3) points 2, 3, 5 and 10 shall require the majority of the votes of the Governing Board members entitled to vote."

"Section 46 (1) Unless otherwise agreed, the HAS shall grant the free use of the property, owned by the Hungarian Academy of Sciences and used by the research centres, that serve the purpose of the placement of the central budgetary organs under Annex 2 and the operation of the research institution network, in accordance with section 42/B (5). The user of an asset or real estate subject to free use shall be obliged to use, operate and maintain it in accordance with its intended purpose, to ensure its preservation, to bear the costs of reconstruction and development, public charges, costs and fees arising beyond the preservation of the asset, and to ensure the protection of the asset.

(2) Unless otherwise agreed, the Facilities Management Centre of the Hungarian Academy of Sciences shall continue to provide the operational tasks of the research sites listed in Annex 2 until 31 December 2021, even after the change of the governing body of the research centres.

(3) The placement of central budgetary bodies pursuant to paragraph (1) and the provision of the said assets pursuant to paragraph (1) shall not constitute the provision of services within the meaning of the Act CXXVII of 2007 on Value Added Tax.

(4) The research centres may use a designation referring to qualification by the Hungarian Academy of Sciences with the permission of the Hungarian Academy of Sciences with regard to its assessment provided pursuant to section 3 (1) (c) of the Academy Act."

[25] 5 The relevant provisions of the Academy Act – in force at the time of examining the petitions – are as follows:

"Section 3 (1) The public duties of the Academy: [...]

(1a) The Academy shall be responsible for providing the right of use as regulated in the ARDI of the assets, owned by the Hungarian Academy of Sciences and used by the research centres, that serve the purpose of hosting the principal research network as defined in section 42/B (5), section 46 (1) and Annex 2 of the Act LXXVI of 2014 on Scientific Research, Development and Innovation (hereinafter: ARDI) and the operation of the research network."

III

[26] 1 First of all, the Constitutional Court examined whether the petitions comply with the conditions laid down in the Fundamental Law and in the Acts, i.e. if they are suitable for being evaluated on the merits.

[27] 1.1 The petition for posterior norm control was submitted, in accordance with Article 24 (2) e) of the Fundamental Law, by the authorised persons: by sixty Members of the Parliament, reaching the number of one quarter of the MPs.

[28] First of all, the Constitutional Court states that its abstract norm control review carried out in accordance with section 52 (2) of the ACC is also limited to the constitutionality claim raised by the petitioner. The Constitutional Court found that the requirement of a explicit request under section 52 (1b) of the ACC was met only with regard to the alleged violation of the Fundamental Law in the context of section 3 (3), section 10 and section 35 of the Amending Act and, in conjunction therewith, the amended section 46 (1) of the ARDI. However, the petition does not contain any reasoning as to why the other provisions of the Amending Act referred to in the petition violate the provisions of the Fundamental Law invoked, and therefore these elements of the petition are not suitable for adjudication on the merits.

[29] The Constitutional Court also held that the grounds put forward by the petitioners on the issue of the infringement of the principle of legal certainty under the rule of law cannot be directly related to Article B (1) of the Fundamental Law, nor can they be directly deduced from it. The petitioners have put forward general allegations of a breach of the rule of law which do not justify a substantive constitutional review in respect of Article B (1). {c.p. Decision 3063/2022. (II.25.) AB, Reasoning [23]}

[30] 1.2 With regard to the constitutional complaint, the Constitutional Court found the following.

[31] The Amending Act entered into force on 1 August 2019, and the petitioner submitted the constitutional complaint on 27 August 2019, thus the statutory requirement concerning the deadline was met.

[32] The petitioner has indicated Article 24 (2) of the Fundamental Law and section 26 (2) of the ACC, which establish the petitioner's entitlement and the Constitutional Court's competence to rule on the petition.

[33] Since the quoted provisions of the Amending Act affect the provisions of the Academy Act that determine the legal status of the HAS, including its property relations and the material means essential for the performance of its characteristic scientific activities, the personal affectedness of the petitioner exists.

[34] The situation complained of by the petitioner is directly brought about by the entry into force of the Act, without a judicial decision. The changes affecting the Academy's property rights entered into force on 1 September 2019 by virtue of section 39 (2) of the Amending Act. The alleged harm occurred directly, without a separate decision by the legislature, and has continued to exist since the entry into force of the said provisions, therefore that the harm can be considered to be direct and present. With regard to the requirement under section 26 (2) (b) of the ACC, it can be established that there is no adequate appeal procedure for the remedy of the violation of rights, the situation of violation of fundamental rights occurs *ex lege*. Since it is not an administrative decision or an act that can be challenged before a court or other authority that creates the situation complained of, there can be no question of an alternative legal remedy or possibility. It is the Amending Act itself which creates the ELRN and provides for the mandatory transfer of certain assets to the ELRN for the use of the applicant. The legal remedy against the Act is not conceivable in any other way than the petition submitted to the Constitutional Court, thus the petition also meets the condition set out in section 26 (2) (b) of the ACC.

[35] It is a characteristic feature of fundamental rights that they guarantee freedom and protection to subjects of the law against the State itself, and in the case of certain fundamental rights which are linked to characteristics that are not inseparable from the human person, to legal persons as well. As the case-law of the Constitutional Court has also pointed out {Decision 3009/2012 (VI. 21.) AB, Reasoning [50]}, as a general rule, the State is obliged to refrain from intruding into the sphere of ownership of legal persons, too. The owner’s legal capacity of the petitioner as a legal person is clear on the basis of the relevant provisions of the Academy Act. According to the petitioner, the HAS is a “public body based on the principle of self-government, operating as a legal person” and its property is constitutionally protected in the same way as that of local or regional governments. One of the express addressees of the HAS clause is the petitioner itself. In the light of the foregoing, there is no doubt that the petitioner, as a legal person, is entitled to the fundamental rights and entitlements which it claims to have been infringed.

[36] The petition contains the grounds for initiating the proceedings, and the petitioner describes in detail the situation of the petitioner with regard to both Article X (freedom of scientific life) and Article XIII (right to property) of the Fundamental Law. The description of the changes in the funding and asset management mechanisms and the loss of certain partial rights of ownership is detailed and exhausts the requirements set out in section 52 (1b)(b) of the ACC.

[37] In accordance with the section 52 (1b) (c) to (e) of the ACC, the petitioner indicated the legal provisions to be examined [section 3 (3), section 10 and section 35 of the Amending Act, including section 46 (1) of the ARDI as amended] and the provisions of the Fundamental Law that were alleged to be violated, and explained the alleged violation of the Fundamental Law.

[38] The petition fulfils the requirements set out in section 52 (1b) (f) of the ACC, expressly requesting the retroactive annulment of the statutory provisions referred to.

[39] On the basis of the foregoing, it can be concluded that the petition fulfils the requirements of the provisions of section 52 (1b) of the ACC and can therefore be regarded as definite.

[40] According to section 29 of the ACC, the Constitutional Court shall admit the constitutional complaint if a conflict with the Fundamental Law significantly affects the judicial decision, or the case raises constitutional law issues of fundamental importance.

[41] The examination of proportionality with the stated public interest of the restriction of the property rights of the petitioner, such as in the present case the restriction of the right of use and the free use of certain property elements, in view of the social importance of the petitioner, is a fundamental constitutional question, which the Constitutional Court has not answered before.

[42] In view of the fact that the petitioner does not only allege a violation of the right to property, the admissibility of the petition was also examined by the Constitutional Court in relation to the alleged violation of the HAS clause.

[43] The efforts of the State to promote scientific life and to develop scientific competitiveness, and the means used to that end, often lead to conflicts with the autonomy of science. Undoubtedly, science can only function effectively if its autonomy is guaranteed, and the issues that are of crucial importance in science are decided within the scientific community, through a process (the scientific debate) that has developed within that community. Nevertheless, it is undeniable that the State must, to the extent necessary, have a say in the allocation of resources and in the basic structure of the organisational system, since the State is indispensable in building up the right scientific and research conditions. It is also the State that has the right to control public funds.

[44] Pursuant to Article 10 of the Amending Act challenged by the petitioner, a number of provisions of the Academy Act are repealed. Thus, among other things, it is no longer necessary to consult the Academy when preparing legislation, programmes and measures directly affecting the conditions of operation of the academic research network. In the future, the maintenance and operation of research networks funded from the central budget will no longer be a public task of the HAS, and the Secretary General will no longer be an ex officio member of the Council of Academic Research Institutes. The budgetary bodies of the Academy will no longer include the research institutes, research centres and the Office for Supported Research Groups.

[45] Article X (3) of the Fundamental Law, the HAS clause, refers to "freedom of science". The scientific activity of the HAS has not consisted solely in conducting research, but also in organising and ensuring it, and in maintaining and developing the institutional system in connection with it. In this respect, the question of the extent to which the relevant provisions of the Amending Act affect the petitioner's freedom of science and whether they are compatible with the obligation to protect it is a question of fundamental constitutional significance.

[46] Based on all the above, at the panel sitting of 15 December 2020, the five-member panel of the Constitutional Court decided on admitting the constitutional complaint.

[47] 2 The Constitutional Court – with regard to the fact that the subject matter of the petitions is the same – consolidated the petitions and judged them in a single procedure on the basis of section 58 (2) of the ACC.

[48] 3 The Constitutional Court ruled that the Amending Act is invalid as of 3 January 2020 pursuant to section 12 of the Act CXXX of 2010 on Legislation. According to the case-law of the Constitutional Court, "if the petitioner claims that the content of a new provision is unconstitutional, the Constitutional Court does not examine the unconstitutionality of the law enacting the new provision, but the law incorporating the new provision by means of the amendment." {Decision 8/2003. (III. 14.) AB, ABH 2003, 74, 81., reinforced in Decision 32/2014. (XI. 3.) AB, Reasoning [19]}. In view of this, in the present case, the Constitutional Court did not examine the constitutionality of the Amending Act, but the relevant provisions of the incorporating legislation, i.e. the Academy Act and the ARDI.

IV

[49] The petitions are in part well-founded, for the reasons set out hereunder.

[50] The Constitutional Court first reviewed the constitutional provisions relating to the Hungarian Academy of Sciences in the case at hand, and then separately reviewed the

violation of the right to property of the Hungarian Academy of Sciences and the violation of freedom of science in connection with the operation of the ELRN.

[51] 1 In their petitions, the petitioners derived their arguments from the constitutional status of the Hungarian Academy of Sciences, and the Constitutional Court first examined the provisions of Article X (3) of the Fundamental Law concerning the Hungarian Academy of Sciences (hereinafter: the "HAS clause").

[52] According to the submission of the HAS, Article X (3) of the Fundamental Law provides the Hungarian Academy of Sciences with a constitutionally protected legal position. As submitted by the HAS, the constitutional protection of the HAS in the Fundamental Law, by virtue of the freedom of science, has the following content: on the one hand, it protects the existence of the Academy and, on the other hand, its freedom of science. According to the petition submitted by the HAS, the protection of the existence of the institution protects the legal situation existing at the time of the entry into force of the Fourth Amendment to the Fundamental Law of Hungary, which does not exclude minor changes. The protection of freedom of science is not the freedom to express a scientific opinion, but the freedom of scientific activity, the freedom of research, which includes the freedom to choose the subject of research (topic, question, etc.), the freedom to choose the methods of research and the freedom to evaluate research, is an inherently individual freedom, but rather the exercise of individual freedoms together. According to the petition of the HAS, with the entry into force of the Amending Act, there is no scientific activity -- research -- left at the Academy to which the concept of freedom of science could be applied. The remaining tasks are not research or science-cultivation tasks, but are aimed at supporting other organisations working for science. The Amending Act therefore violates Article X (3) of the Fundamental Law.

[53] 1.1 Article X (3) of the Fundamental Law provides for the Hungarian Academy of Sciences, stating that "Hungary shall protect the scientific [...] freedom of the Hungarian Academy of Sciences [...]." Since its creation, the Fundamental Law has included institutional protection for the HAS. In contrast to the previous Constitution, the Fundamental Law specifically mentions the institution of the Hungarian Academy of Sciences, thus giving it constitutional protection. According to Article 24 (1) of the Fundamental Law, the Constitutional Court is responsible for the protection of the Fundamental Law. In order to interpret the provisions of the Fundamental Law relating to the Hungarian Academy of Sciences, the context of the provisions of the Fundamental Law must be taken into account. Article X (1) states that "Hungary shall ensure the [...] freedom of scientific research". According to Article X (2) of the Fundamental Law, "the State shall have no right to decide on questions of scientific truth; only scientists shall have the right to evaluate scientific research."

[54] Article X of the Fundamental Law lays down a triple set of requirements for the conduct of science: (1) the freedom of scientific research as enshrined in the Fundamental Law, (2) the neutrality and abstention of the State in the evaluation of scientific truth, and (3) as institutional protection: the guarantee of the freedom of science of the Hungarian Academy of Sciences and the research autonomy of higher education institutions. Article X of the Fundamental Law thus provides constitutional protection for the free conduct of scientific research and its evaluation by science. The Fundamental Law protects the HAS and its freedom of science as an institution. It is clear from the Constitution that the conduct and evaluation of scientific research are constitutionally protected values which the State must safeguard and must specifically refrain from interfering with. Non-interference applies at three levels: in particular, in relation to the freedom of science of the HAS, in relation to the research activities of higher education institutions, and more generally in relation to the scientific research activities carried out by an institution or a person. External interference in scientific research, particularly by the State, distorts scientific results and leads to undermining scientific credibility. In addition to the obligation to abstain, the State shall also ensure that the freedom of scientific research and its evaluation are free from interference. The subject one of these institutional protections is the Hungarian Academy of Sciences, which must be specifically protected by the State under its obligation of institutional protection.

[55] The Hungarian Academy of Sciences has been granted constitutional institutional protection by Article X (3) of the Fundamental Law. Previously, no constitutional provision had regulated the Hungarian Academy of Sciences as an institution. Since its foundation nearly two hundred years ago, the Hungarian Academy of Sciences has been fulfilling its goal of being an independent institution free from influence and promoting the development and progress of society. The reasoning of the Fundamental Law states that "the free and independent operation of the institutions of science, art and high-level education of the highest importance shall be specifically guaranteed by the State" [Reasoning to Article X of the Fundamental Law]. The Fundamental Law raised the previous level of protection by giving the Hungarian Academy of Sciences a constitutional status. Furthermore, according to the National Avowal: "We are proud of the outstanding intellectual achievements of the Hungarian people"; "We hold that the strength of a community and the honour of each person are based on labour and the achievement of the human mind".

[56] Since the founding of the Hungarian Academy of Sciences as an organic institution of the Hungarian reform era, the Academy has strived to preserve its dignity and prestige and to serve Hungarian science, to be both the institutional guarantor of the independence of Hungarian science and the transmitter of scientific results, a role reflected in the title of the Academy as "the advisor of the nation".

[57] 2 The legal status of the Hungarian Academy of Sciences is not defined in more detail in the Fundamental Law or in any cardinal law. The constitutional requirements related on the one hand to the composition of the Hungarian Academy of Sciences, and on the other hand, to its institutional operation are a consequence of the Hungarian Academy of Sciences' task, as stated in Article X (3) of the Fundamental Law, to guarantee freedom of science. The State and its institutional system have an obligation to refrain from influencing scientific activity. In particular, this applies to the Hungarian Academy of Sciences as an institution by guaranteeing that respect for the freedom of science shall be ensured in relation to the structure of the organisation on the one hand, and the constitutional content of freedom of science in relation to the performance of public tasks on the other. Scientific freedom of the HAS generally lies in its organisational structure: the free choice of the members of the public body and of the academics. However, freedom of science also applies to the performance of public tasks. The State can, of course, entrust public tasks to the Hungarian Academy of Sciences, but the practical implementation of these tasks is part of the autonomy of the Academy as an institution, which is inherent in the freedom of science. The State is entitled to participate in the performance of public tasks and in the organisation of the performance of public tasks without prejudice to Article X of the Fundamental Law.

[58] The Hungarian Academy of Sciences is a public body recognised by the State. The Constitutional Court has previously emphasised that social organisations and associations established under the right of association are fundamentally different from organisations established by law as public bodies in terms of their foundation, objectives and functions. In another context, in relation to chambers operating in the form of a public body, the Constitutional Court held that an organisation established as a public body is not an organisation established under the right of association {Decision 22/1994. (IV. 16.) AB, ABH 1994, 127, 129; Decision 18/2014. (V. 30.) AB, Reasoning [20]}.

[59] 2.1 The legal status of the Hungarian Academy of Sciences is laid down in the Academy Act. The Hungarian Academy of Sciences shall be an independent public body based on the principle of self-government and functioning as a legal person performing public responsibilities related to the cultivation, support, and representation of science" (section 1 of the Academy Act). This members of the public body of the HAS includes the academicians, as well as by other members of the public body who are not academicians. Academicians are elected by domestic members of the HAS (section 6 of the Academy Act). Members of the public body who are not academicians are those persons with Hungarian or naturalised scientific degrees who are involved in solving the tasks of Hungarian science and who declare to the competent department of the HAS that they wish to become members of the public body. The HAS shall admit such persons to the public body on the basis of a proposal

from the competent department. The HAS is thus a public body where membership is linked to the pursuit of science, but the attainment of a scientific degree is not sufficient, and a decision of the competent department of the HAS is also required for a person to become a member of the HAS public body.

[60] 2.2 The public tasks of the HAS are laid down in section 3 of the Academy Act In summary, the public tasks of the Hungarian Academy of Sciences include the following. It contributes to ensuring the freedom of scientific research: it supports the cultivation of science and the conduct of scientific research. [Section 3 (1) (a) of the Academy Act]; evaluates regularly the results and trends of scientific research in Hungary and abroad, and also formulates relevant proposals [Section 3 (1) (d) of the Academy Act]; promotes the development of the Hungarian language and the cultivation of science in Hungarian language [Section 3 (1) (f) of the Academy Act]; safeguards the integrity of the scientific community and the freedom of scientific research and expression [Section 3 (1) (g) of the Academy Act]; organises scientific programmes and conferences, announces calls for applications [Section 3 (1) (i) of the Academy Act]; and promotes and facilitates the social and economic exploitation of the results of scientific research [Section 3 (1) (k) of the Academy Act]. In addition, it establishes scientific departments that are the basic units of scientific professional autonomy, and it forms other bodies (e.g. scientific committees, regional committees, etc.) in a manner regulated by the Academy's Statutes [Section 3 (1) (n) of the Academy Act]; maintains a national scientific bibliographic database containing data on scientific works created and published by employees of budgetary bodies within the framework of their legal relationship as defined in section 30 (7) of the Act LXXVI of 1999 on Copyright, and scientific works published by persons receiving a grant for o the basis of a contract on the writing or creation of a scientific work from budgetary sources, as defined in section 19/A of the Academy Act, and is suitable for registering data on scientific works voluntarily published by other persons [c.p. Section 3 (1) (o) of the Academy Act].

[61] The Hungarian Academy of Sciences expresses its professional opinion in the framework of expressing scientific opinion and scientific networking at the request of the Parliament or the Government on issues within its competence, in particular in the fields of science, education, society, environment and economy [Section 3 (1) (e) of the Academy Act]; concludes agreements and maintains contacts with national, foreign and international scientific institutions and organisations, in particular academies, higher education institutions and scientific organisations of the European Union [Section 3 (1) (h) of the Academy Act]; maintains contact with scholars working abroad in Hungarian language and in subjects related to Hungary, and supports Hungarian scholars living in the neighbouring countries [Section 3 (1) (i) of the Academy Act]; facilitates the development of the scientific careers of young researchers [Section 3 (1) (p) of the

Academy Act]; contributes to strengthening the relationship between researchers and society [Section 3 (1) (q) of the Academy Act].

[62] The Hungarian Academy of Sciences, in the context of ensuring the development of science and the education of the next generation: operates a system of scientific qualification, within the framework of which it awards the title of Doctor of the Hungarian Academy of Sciences, as well as the title of Corresponding and Full Member of the Hungarian Academy of Sciences, and upon request evaluates institutions carrying out scientific activities [Section 3 (1) (c) of the Academy Act]; it may maintain scientific research groups in higher education institutions and public collections on the basis of agreements concluded with these institutions, and participate in teaching and doctoral (PhD) training in higher education institutions [Section 3 (1) (l) of the Academy Act]; promotes the new generation of scholars by maintaining a system of scholarships, the funding for which is earmarked in the Academy's budget; it may establish, from its own resources or on the basis of a universal public interest commitment, fixed-term scientific scholarships, prizes and awards for researchers who have achieved outstanding scientific results, the conditions and detailed rules of which are laid down in the Academy's regulations [Section 3 (1) (m) of the Academy Act].

[63] 2.3 On the basis of the above, the Hungarian Academy of Sciences is therefore the guardian of the freedom of Hungarian science, actively involved in the dissemination of domestic and international scientific results, and is also involved in the certification and production of scientific results.

[64] 2.3 The legislative change underlying the petition previously provided that, in the framework of the production of scientific results, the HAS shall maintain, establish its rules of operation and effectively operate a network of professional research centres for the purpose of conducting scientific research, funded from the central budget [Annulled section 3 (1) (b) of the Academy Act]. Together with the repeal of this statutory public task, the public tasks of the HAS were supplemented by the provision that the HAS is "responsible for securing, as defined in the ARDI, the right to use the assets owned by the Hungarian Academy of Sciences and used by these research centres for the accommodation of the professional research network and the operation of the research centres' network, as defined in section 42/B (5), section 46 (1) and Annex 2 of the Act LXXVI of 2014 on Scientific Research, Development and Innovation (hereinafter: ARDI)" [Section 3 (1a) of the Academy Act].

[65] Every two years the President of the HAS shall report to the Parliament on the work of the HAS, and for this purpose regularly assesses and evaluates the domestic effectiveness and international reputation of the individual scientific disciplines. [Section 3 (2) of the Academy Act]. The President of HAS shall inform the Government

annually about the work of the HAS and its achievements in the promotion of Hungarian society and economy. [Section 3 (3) of the Academy Act].

[66] For the performance of its public tasks, the HAS establishes and operates publicly funded institutions over which it exercises management rights, and may establish companies over which it exercises ownership rights. the HAS may also support other organisations active in the field of science and the arts [Section 2 (1) of the Academy Act].

[67] In the performance of its public tasks, the HAS shall manage its property, the budget subsidies approved for it, its own revenues and other resources in accordance with the provisions of the Academy Act on the management and property of HAS. [Section 4 of the Academy Act].

[68] On the basis of all the above, the Constitutional Court finds that the Hungarian Academy of Sciences is a constitutionally protected public body, whose institutional structure and the performance of its public functions are based on the freedom of science, which the State must guarantee. The Fundamental Law protects the Hungarian Academy of Sciences as such an institution, and if its freedom of science is infringed, the Academy is entitled to constitutional protection.

[69] 3 According to the HAS, by abolishing the operation, as a public task, of the research network (research centres and institutes) entitled to cultivate science, the Parliament violated the HAS clause of the Fundamental Law.

[70] On the basis of the foregoing, the Constitutional Court finds that the Hungarian Academy of Sciences is entitled to constitutional protection in its organisational structure and in the performance of its public tasks as defined by the law-maker. This means that the Hungarian Academy of Sciences is protected by the Fundamental Law as an institution, and in the present case the (independent) operation of the research centres and institutes as a public task that has been abolished or transformed and transferred to another body does not violate Article X (3) of the Fundamental Law. The mere fact that the State intends to continue to perform a public task through another body is not in itself contrary to the Fundamental Law. In the Academy Act the Parliament defines several public tasks. The freedom of science is directly or indirectly enforced in the performance of these public tasks. In the election of the members of the HAS, self-regulation and the evaluation of scientific results are based on scientific criteria. Scientific freedom prevails in carrying out various forms of support (support for young researchers, support for the publication of scientific works, etc.) as public tasks, as the State has no right to influence or decide in the context of these tasks. According to the Constitutional Court, Article X (3) of the Fundamental Law does not in itself provide for the organisation of the research centre and research institutes within the organisation of the HAS. Nor is it possible to derive from the Fundamental

Law any requirement which would determine the institutional system through which the State must organise the freedom of scientific research. What can be deduced from the Fundamental Law is nothing less that the State must ensure the freedom of scientific research within the established organisational system, and must provide a constitutional guarantee that this organisation operates free from external influence with regard to freedom of science. The Constitutional Court therefore dismissed the petition for infringement of Article X (3) of the Fundamental Law.

V

[71] 1 The Constitutional Court then considered the petitioners' applications concerning the right to property. Both the MP petitioners and the HAS complained that the newly created legal person was carrying out its tasks "on the property" of the HAS. According to the petitioners, the property of the HAS is not State property, but is the property of the HAS (special-purpose property). According to the petitioners, the constitutional problem arises from the fact that a newly created legal entity of the State has taken over the research network previously operating under the control of the HAS. It has done so in such a way that the HAS has become a public body with the public task of securing the right to use the assets owned by the HAS and used by the HAS for the accommodation of the professional research network within the meaning of the ARDI and for the operation of the research network, as defined in the ARDI. To summarise the petitioners' arguments: ownership by the HAS will be formally maintained, but with the newly established public task (or the redistribution of public tasks), the HAS will lose part of its partial ownership rights, which it must provide to another, independent organisation, free of charge and without time limit, in order to enable it to fully perform its public tasks. According to the petitioners, the property of the HAS is protected under Article XIII of the Fundamental Law and the Amending Act constitutes a disproportionate restriction of fundamental rights in this respect.

[72] 2 First of all, the Constitutional Court reviewed the relevant case-law relating to Article XIII (1) to (2) of the Fundamental Law.

[73] The Constitutional Court summarised its case-law in relation to the fundamental right to property under Article XIII (1) of the Fundamental Law in the Decision 3192/2022 (IV. 29.) AB – reinforcing the provisions laid down in the Decision 3002/2019 (I. 2.) AB and the Decision 3076/2017 (IV. 28.) AB – as follows: "The provision provided for in Article XIII (1) of the Fundamental Law confers fundamental legal protection on property. In the view of the Constitutional Court, the constitutional protection of property is primarily a safeguard against interference by the State in the exercise of public authority, based on the criteria of value guarantee and restriction in the public interest. The Constitutional Court recalls its consistent case-law developed in the area

of the right to property recognised in Article XIII (1) of the Fundamental Law, according to which the scope and manner of constitutional protection of property do not necessarily follow the concepts of civil law and cannot be identified with the protection of abstract civil law property, nor with the partial rights of possession, use and disposal, nor with its definition as a negative and absolute right. The content of the right to property, protected as a fundamental right, shall be interpreted at all times together with the applicable limitations of public law and the (constitutional) limitations under private law. The extent of the constitutional protection of property is always concrete; it depends upon the subject-matter, the object and the function of property, as well as the nature of the restriction. The fundamental right to property protects the property already acquired and, in exceptional cases, the expectations of property." (Reasoning [41])

[74] In its Decision 3329/2020 (VIII.5.) AB, the Constitutional Court stated that "behind the extension of the constitutional protection of property rights to other rights of pecuniary value outside civil law, there is the function of property to protect the autonomy of the individual. [c.p.: Decision 64/1993. (XII.22.) AB]. The Constitutional Court's case-law on expectations shows that, on the one hand, the Constitutional Court has not extended fundamental rights protection to expectations in general, but mainly to expectations under public law, such as social security rights, which are based on the payment of contributions by the interested parties {Decision 3209/2015. (XI. 10.) AB, Reasoning [66]}. However, the expectation of property is only protected by fundamental rights if it is based on a law {Decision 23/2013. (IX. 25.) AB, Reasoning [74]; Decision 3115/2013. (VI. 4.) AB, Reasoning [34]; Decision 3021/2017. (II.17.) AB, Reasoning [62]; Decision 3209/2017. (IX. 13.) AB, Reasoning [20]; Decision 3128/2020. (V. 15.) AB, Reasoning [55]}." (Reasoning [17])

[75] 3 The Constitutional Court then reviewed the past and present ownership relations between the research network and the HAS.

[76] 3.1 According to the provisions of the Academy Act in force until 31 August 2019, the public task of the HAS is to maintain, establish the rules of operation and efficiently operate a network of professional research sites funded from the central budget for the purpose of conducting scientific research. [Section 3 (1) (b) of the Academy Act in force until 31 August 2019]. Sections 17 to 18 of the Academy Act provided for the academic research network. Academic research centres and research institutes functioned as budgetary bodies. The research centre and the research institutes were autonomously involved in solving the Academy's public tasks, they could undertake public tasks independently and could also carry out other activities. [Section 18 (1) of the Academy Act in force until 31 August 2019]. The Academy Act provided in detail for the management of the research centre and the research institutes, the definition of their scientific programmes and the procedure for their adoption. From the point of

view of property management, the Academy Act distinguished between academic budgetary bodies, which included research centres and research institutes. Academic budgetary bodies are (still) involved in the implementation of the HAS's public tasks. The sources of funding are budget support, other public funds and their own revenues. According to the provisions of section 21 (3) of the Academy Act in force until 31 August 2019, the budgetary source included the following: "(a) basic support related to the performance of public tasks; (b) expenditure allocated to the research centres and research institutes for the tasks defined in the budget heading of the Academy; (c) the amount that can be used for the participation in public task tenders (own share).", and according to paragraph (4) of the same provision of the Act, basic support shall include: " the budgetary sources established in proportion to the public tasks, under conditions laid down by law, established for (a) the operating expenses of research institutions; (b) the amounts needed to create the material and personnel conditions for activities in support of research tasks; (c) the expenses of special research conditions; (d) the personnel and material expenses that may be linked to the performance of public tasks." and paragraph (5) of the same statutory provision also included, as a guarantee rule, that "the total amount of the basic support established for research institutes shall be adjusted in line with changes in the volume of public tasks affecting the scope of research institutes." In relation to using the property of the HAS, the statutory regulation provides that "the Academy shall conclude a property use contract with the budgetary bodies under its control on handing over property for use. The main content and form of the contract for the use of property shall be laid down in the Statutes." [Section 23 (3) of the Academy Act]

[77] On the basis of the above, the Constitutional Court finds that the research centres and research institutes operated as budgetary bodies, and as special academic budgetary bodies under the Academy Act they used the property of the HAS on the basis of a contract for the use of property. The challenged statutory provision obliged the HAS to provide, as a newly incorporated public duty, the right of use as regulated in the ARDI of the assets, owned by the Hungarian Academy of Sciences and used by the research centres, that serve the purpose of hosting the principal research network as defined in section 42/B (5), section 46 (1) and Annex 2 of the Act LXXVI of 2014 on Scientific Research, Development and Innovation (hereinafter: ARDI) and the operation of the research network".

[78] 3.2 The Constitutional Court establishes that the Hungarian Academy of Sciences, as a public body, is entitled to the right to property under Article XIII (1) of the Fundamental Law.

[79] The Constitutional Court notes that the legal status of property linked to a public task as a special purpose is specific from the point of view of Article XIII. From the point of view of the exercise of the right to property, this means that the holder – the

Hungarian Academy of Sciences – as the recipient of the public task and as the legal person disposing of the property necessary for the performance of the public task, is considered as the owner vis-à-vis third parties and is entitled to the constitutional protection under Article XIII (1) of the Fundamental Law, however, this protection is already modified vis-à-vis the State (Parliament) as the determiner of the public task. In a constitutional sense, the special-purpose property linked to the public task shares the situation of the public task. In other words, the property of the Hungarian Academy of Sciences as a public body is protected by Article XIII of the Fundamental Law. Just as the subject of property rights is socially bound – in the terminology of the Fundamental Law, it entails social responsibility – this property is subject to the respective public and civil law obligations. As a public body, the Hungarian Academy of Sciences performs public tasks. The property of the HAS as a public body is also special-purpose property and is linked to the public tasks performed. If these public tasks are modified, they may necessarily entail the exercise of rights linked to the property assigned to the public task.

[80] The Constitutional Court has assessed the infringement of the Fundamental Law alleged by the petitioners in relation to Article XIII (2) (paragraph V/3.3 of the reasoning of the decision, Reasoning [81] et seq.) and Article XIII (1) (paragraph V/3.4 of the reasoning of the decision, Reasoning [83] et seq.) of the Fundamental Law, as follows.

[81] 3.3 The Constitutional Court then examined the elements of the petition concerning the violation of Article XIII (2) of the Fundamental Law. In relation to Article XIII (2) of the Fundamental Law, the petitioners claimed that the challenged legislation constituted an expropriation of the property of the HAS. The Constitutional Court points out the following in this regard. The contested legislation does not change the identity of the owner, The owner remains the Hungarian Academy of Sciences.

[82] With regard to the property of the Hungarian Academy of Sciences, the amended legislation does not affect the existence of the right of ownership, but determines how and in what manner the exercise of the rights of the new recipient of the public task must be ensured in the property in question. The petitioners infer from this that the legal obligation to ensure the property basis for the performance of the public task empties out the right of the HAS to property. The contested provision results in a disproportionate burden on the assets of the HAS. However, the HAS, as a public body, performs a public task to which the property necessary for the performance of that public task is also linked, that is to say, the property is also purpose-tied. The public task to be carried out on the assets owned by the HAS remains unchanged, therefore the purpose-limitation of the assets is not affected. However, the partial ownership rights of the HAS as owner are undoubtedly restricted. Its ownership, and its most important partial right, the right of disposing over the assets, is retained. It cannot be deduced from the statutory changes that the right to dispose of property has

disappeared. The statutory changes have created – due to the obligation to perform a public task – a public (purpose) property which was originally purpose-tied (earmarked) under public law, over which the ownership of the HAS has not ceased, its right of disposal has been retained, thus the rules on the management of assets in the Academy Act and the Statutes of the HAS can be applied. On the basis of the above, the Constitutional Court held that the conditions under Article XIII (2) of the Fundamental Law are not met, and therefore the conditions laid down therein cannot be accounted for. The Constitutional Court therefore dismissed the elements of the petition alleging an infringement of Article XIII (2).

[83] 3.4 On the basis of the above, the Constitutional Court held that the contested regulation constitutes a restriction of property that does not reach the level of expropriation, and therefore the test of "public interest-proportionality" should be applied in the case under examination, in view of the specific public law limitation of the restriction of property. According to the consistent case-law of the Constitutional Court, the constitutional standard for the restriction of property rights under Article XIII (1) of the Fundamental Law – when examining the basis of the restriction of rights – is less stringent than the necessity standard for fundamental rights under Article I (3) of the Fundamental Law, since in this case it is sufficient to demonstrate the existence of a public interest {Decision 34/2015. (XII. 9.) AB, Reasoning [46]; Decision 3180/2018. (VI. 8.) AB, Reasoning [23]; Decision 3311/2019. (XI. 21.) AB, Reasoning [47]}.

[84] 3.4.1. The question to be examined is therefore whether the public interest of the restriction under the Amending Act can be established. According to the reasoning of the Amending Act, the law-maker intends to stimulate the research, development and innovation system by making the organisational system more efficient, in addition to providing additional resources to promote competitiveness. The reasoning of the Amending Act underlines that "a fundamental principle of successful innovation and science policy is that the expectations for research and innovation activities funded by public money and in the public interest operate under a dual system of responsibility, due to the specific autonomous nature of scientific activity. The development of general orientations for innovation and scientific research funded by public money and in the public interest is a shared responsibility of the scientific community, institutions representing citizens, business and civil society that take up social issues. To ensure the effectiveness of these efforts, the development of a more effective organisational framework is subject to continuous and dynamic evaluation and (public) governance measures." The research network within the HAS has been changed and restructured in order to achieve these objectives. Performing, carrying out the objectives (public tasks) set out in the reasoning of the Amending Act, which have not been contested by the petitioners, are considered to be in the public interest, which contributes to the development of scientific research and innovation. On the basis of all the above, the

Constitutional Court concludes that the above objectives (public tasks) constitute constitutionally justifiable (acceptable) public interests from the point of view of Article XIII (1) of the Fundamental Law, which justify the need for the restriction on property in the case under examination.

[85] 3.4.2. In the scope of examining the proportionality of the restriction, the Constitutional Court assessed the following aspects.

[86] 3.4.2.1. In the context of the proportionality of the restriction of the right to property, the Constitutional Court first of all started its examination from the subjective side of Article XIII (1) of the Fundamental Law. The Hungarian Academy of Sciences, as a public body, is entitled to the protection of the right to property, as stated above. The Hungarian Academy of Sciences is an organisation which has been established in the course of Hungarian history, inherently through private donations. The State has subsequently provided additional resources for its scientific tasks and has placed certain assets directly at the disposal of the Academy or made them available to it. The fact that the HAS was not created by the State is important in this case, and it cannot be considered a public body created by the State. By enacting the Academy Act, the State has placed the HAS in a specific public legal position, strengthening its legal status and giving it a special public status based on its history. The questions raised in the petitions concerning the right to property therefore apply in a special way to the HAS. The State recognised by the Academy Act the HAS as an organisation established by the Hungarian nation. The preamble of the Academy Act also emphasises the role of the State: "the Hungarian Academy of Sciences was established by the nation for the cultivation of the Hungarian language and for the service of science. It is a legitimate social demand that the freedom of operation and activity of this national institution with a long history of Hungarian scholarship – without diminishing the autonomy of other institutions cultivating and representing science – be expanded by strengthening its self-governing rights, and that its internal life be made more democratic." [Preamble to the Academy Act] The HAS is therefore not considered a State body, nor are its assets the property of the State. The State may decide to allocate assets to the performance of certain public tasks and may determine the manner in which it does so. In this respect, the law-maker has a wide margin of discretion. However, the property granted to the HAS is purpose- and public task-related, because the granting of property to the HAS is always linked (directly or indirectly) to the performance by the HAS of the statutorily specified public tasks.

[87] 3.4.2.2. The assessment of the proportionality of the restriction on property is linked to the organisation and deployment of the performance of the public service. The allocation of public functions and the drafting of the relevant legislation is a matter for the law-maker's discretion. In the present case, the Constitutional Court had to rule on the extent to which the removal and reorganisation of the public task laid down in

the Academy Act result in a restriction of the ownership of the property (elements) belonging to the public task and of Article XIII (1) of the Fundamental Law, i.e. to what extent the performance of a public task shares the situation of the property associated with it.

[88] In the Decision 3180/2018 (VI. 8.) AB (hereinafter: "CCDec"), the Constitutional Court examined the question of the State changing the obligation to perform a public task. The CCDec examined the obligation to provide primary education in the context of the State and the local government. As examined in the CCDec, the provision of primary education became the responsibility of the State instead of the local governments. In this connection, the question examined in the CCDec was the status of the assets previously used for the performance of the public task, following the transfer of the public task. The constitutional question was whether the transfer of the property necessary for the performance of a public task to the new public body infringed the right of local government to property. In relation to Article XIII (1) of the Fundamental Law, the Constitutional Court held the following. "The change in the tasks and powers relating to public education was, according to the reasoning of the Act on National Public Education, to ensure that the new public education system provides a »uniform, high-quality education of high quality for all children, in order to educate persons who respect the common good and the rights of others, who are capable of fulfilling their potential and of living independently and achieving their goals to the fullest extent of their abilities«. The provision of public education as a public task, within an appropriate organisational framework and to an appropriate standard, constitutes a fundamental public interest which is acceptable for the purposes of Article XIII of the Fundamental Law." CCDec, Reasoning [23]. "For this reason, it follows from the fact that the property of the local authorities is bound to their tasks that a statutory provision which restricts, in favour of the State, the right of the local governments to property to the extent strictly necessary for the performance of a given public education task as a matter of public interest, does not therefore constitute a violation of the right to property under Article XIII (1), provided that the law-maker considers, on the basis of professional criteria, that the performance of public education tasks by the State results in a more efficient system which better reflects professional criteria than a system where the performance of these tasks is carried out by the local governments. The right of the local governments to property and its restriction by the State share the legal situation of the competence that justifies ownership by the local government: if the competence in question is exercised by the local government, the property assigned to the competence is also a municipal one; if, however, the competence in question becomes ex lege State competence, municipal property may be restricted in favour of the State, in accordance with the cornerstone provisions of the Act CXCVI of 2011 on National Property and the Act on Local Governments" (CCDec, Reasoning [25]).

[89] On the other hand, as regards the proportionality of the restriction, the CCDec made a distinction in respect of the transfers of property whether it has taken place between the parties by agreement or by the decision of the Minister. In the first case, there is no violation of Article XIII (1) of the Fundamental Law, while in the latter case, the Constitutional Court held that the protection of Article XIII (1) of the Fundamental Law should be ensured by granting the possibility of judicial remedy. "As the establishment of a free asset management right by a decision, the owner local government is not considered to have given its voluntary and express consent to the restriction of the right to property, it is therefore an important element of guarantee in this case, not only in form but also in substance, that the law-maker has provided for the possibility of judicial review against the decision. Granting the possibility of judicial review serves to ensure that the property and rights of property of local governments are restricted only to the extent strictly necessary for the performance of their functions. It is only to that extent that the establishment of a right of free asset management right by means of a decision may be regarded as lawful under the Fundamental Law and the provisions of the Act on National Public Education challenged in the application, in particular its section 99/G (1). It is not, however, for the Constitutional Court to examine that question, but for the courts hearing the individual case. Consequently, in the absence of an agreement between the parties, the court must also decide on the question of how the using of a piece of property or rights of pecuniary value for the performance a public education task and other tasks that remain within the scope of the local government's duties and competences (such as, for example, public catering) can be divided between the school district centre and the local government, since the establishment of a free asset management right cannot impede the performance of the remaining duties and competences of the local government." (CCDec, Reasoning [28])

[90] Furthermore, the Constitutional Court also took into account the fact that by acquiring the right of asset management, the new trustee acquires not only the rights of asset management but also the obligations that go with it, thus that the new trustee also bears the burden of the property (CCDec, Reasoning [29]) The Constitutional Court also took into account that "when establishing a free asset management right over local government property, the owner municipality may also legitimately expect that the mutual cooperation between the school district centre and the local government apply not only to the procedure of handover under the provisions of section 99/H. § (2) of the Act on National Public Education, but also for the subsequent period of free asset management, and that the school district centres manage the assets in such a way as to ensure that the owner municipalities are able to use the real and movable property for community purposes in all cases, where it does not hinder the performance of public education tasks (in particular, for example, during afternoons, weekends or school holidays when the property is not used for the performance of

public education tasks) and on the same terms as if the property or rights of pecuniary value could be disposed of by the owner municipality independently. Finally, the Constitutional Court also points out that the right of free asset management is limited in time. Pursuant to section 74 (4) of the Act on National Public Education, which entered into force on 1 January 2017, the right of free asset management continues to exist until "the performance of the public task of public education by the school district centre or the vocational training centre ceases in the given real property.« Accordingly, the free asset management right will cease when the public education task in question ceases to be the responsibility and competence of the school district centre due to a change in the relevant legislation. The right of free asset management shall also cease if the property or right of pecuniary value in question no longer serves the performance of the public education task for some reason, such as the reorganisation of education." (CCDec, Reasoning [30] to [31])

[91] 3.4.2.3. In the context of the restriction on property, this means that the State may change the scope of addressees that perform certain public tasks, but only within the limits of the Fundamental Law. In itself, the allocation (or relocation, reorganisation) of certain public tasks to a particular body does not generally raise constitutional questions. However, the Constitutional Court may in such cases examine certain collisions of fundamental rights, such as the protection of acquired rights {Decision 29/2011. (IV. 7.) AB; Decision 23/2013. (IX. 25.) AB, Reasoning [74]; Decision 3115/2013. (IV. 4.) AB, Reasoning [34]; Decision 3021/2017. (II. 17.) AB, Reasoning [62]; Decision 3209/2017. (IX. 13.) AB, Reasoning [20]} or the existence of guarantee rules connected in a specific way to certain public tasks.

[92] In the CCDec, the Constitutional Court considered the property rights' consequences of a change in the obligation to perform a public task to be a restriction on the right to property in accordance with the Fundamental Law. Article XIII (1) of the Fundamental Law does not preclude the establishment of an asset management right which is exercised on the property of the local government (as a quasi-easement under public law), in the public interest and to the extent necessary, subject to the following conditions. The restriction of ownership is based on an agreement between the parties or an act of public authority of limited duration which lays down a duty of cooperation between the parties and provides for judicial review of the agreement or act of public authority. The new holder bears the burden of the property and the restriction of ownership may only be imposed to the extent necessary for the performance of the public task in question.

[93] The Constitutional Court holds that in the present case, as a result of a change of the party performing the public tasks, the right to property may be constitutionally restricted if its subject is a property allocated by the State as a special purpose asset for the performance of a public task, and the restriction is justified by a justifiable public

interest, and the substantive guarantees (the restriction is necessary for the performance of the public task, the rights and obligations of the parties are fixed for a limited period of time) as well as the procedural guarantees (direct judicial protection) are granted. The Constitutional Court notes that it is necessary to examine, on a case-by-case basis, the impact of changes in the exercise of a public task on the legislation in question.

[94] 3.4.2.4. The designation of the party responsible for the performance of public tasks is a matter for the law-maker. In the present case, the petitioners complain that the new addressee of a public task must perform its public task by using property which is not owned by it but by the previous addressee of the public task. The legal link between the two is that the new public duty of the former addressee of the public task is to provide the assets necessary for performing the public task. The Constitutional Court points out the following in this regard.

[95] The obligation on the State to perform public services is more than a mere legislative declaration. In defining a public task, it is for the law-maker to determine whether it regulates the obligation to perform that public task in such a way that the addressee of the public task is capable of performing it. If this is not the case, the designation of a public task cannot fulfil its function and the State must find another way of performing it. The deployment of public tasks must, from a constitutional point of view, both define the objective to be achieved and provide the means to achieve it. In the performance of a public task, if the objective is missing, the legality or appropriateness of the use of the means provided may be called into question; if the objective is clear but the means to achieve it are lacking, the addressee of the public task cannot perform it. In the present case, the public task has been identified, the law-maker has designated the addressee of the public task, but has indirectly provided the means necessary for the performance of that task by ordering the performance of the public task on the assets of the former public task-holder. One of the essential conditions for defining the public task is to provide the conditions necessary to achieve the objective. The system introduced by the Amending Law results in a mutually burdensome situation in which the entity previously entrusted with a public task and the new entity are mutually dependent, so that the effective performance of the public task requires the development of the legal conditions for such cooperation.

[96] 3.4.2.5. Their public service obligations make public law entities to become purpose-bound legal entities. In other words, it is the performance of national public tasks that entitles the Hungarian Academy of Sciences to retain this status and to dispose of the resources associated with it in an autonomous manner. The performance of public tasks and the legal status of the assets linked to the purpose (the effective performance of the public task) are inextricably linked. The assets of the HAS are thus special-purpose assets which cannot be used for anything but for the performance of

its public tasks and the related activities. The way in which the assets are used is also linked to this, as is laid down in a separate chapter of the Academy Act, the obligation to perform public tasks and the extent to which they are performed must be proportionate to the assets. In other words, if the scope of public tasks changes, the property (or its elements) may follow that. In this case, however, the law-maker may only restrict the property of the HAS as a public body to the extent proportionate to performing the public task. The HAS uses its assets autonomously, within statutory limits, to fulfil its public tasks. Thus, the termination or reallocation of a public task does not in itself justify the termination of the purpose limitation of a particular item of property, since the HAS may use it for the achievement of other public purposes and tasks to be performed by it in accordance with the Academy Act.

[97] With the aim of supporting and stimulating research and development, the contested legislation brought about a change in the situation of the research centres and research institutes operated by the HAS as public tasks, which had several consequences in terms of property law. The law-maker can, at its option, make constitutional changes to an existing institutional structure in several ways. In the present case, the law-maker has exceptionally chosen to define as a statutory public task of placing under a new governance structure those budgetary bodies that were previously under the control of a public body enjoying priority, possessing partly special-purpose assets owned by the HSA and partly created from budgetary sources. The law-maker is expected, in making such an exceptional change, to create a structure, capable of performing the public tasks, that justifies the change. However, the expectations placed on such structures are not necessarily constitutional issues. The State enjoys a wide margin of discretion in organising the appropriate institutional arrangements to guarantee the most efficient performance of public tasks. The Constitutional Court does not have the power to review efficiency in itself, but it does have the competence to account for the requirements linked to the nature of the institutional system (in this case, academic freedom and the right to property).

[98] 3.4.3. According to the petitioners' position, the property of the Hungarian Academy of Sciences was restricted and taken away by the challenged provision of the law in violation of Article XIII of the Fundamental Law. In relation to the violation of Article XIII (1) of the Fundamental Law, the Constitutional Court finds the following.

[99] The Constitutional Court establishes that, in the present case, the assignment of the purpose-bound property (performance of a public task) of the HAS as a public body to a new competent party may be effected without infringing Article XIII (1), Article B (1) and Article I (4) of the Fundamental Law if the new holder of the public task is capable of performing the public task by virtue of a statutory provision, the scope of the property assigned to the public purpose is precisely defined and is based on an agreement between the parties or an act of public authority. Only an agreement on

property or an act of public authority which imposes a restriction on the property of the former public body only to the extent necessary for the performance of the public task and which provides for judicial review of the act is in conformity with the Fundamental Law. The new body that actually uses the assets not only acquires the rights to the assets, but also bears the burdens. For the performance of a given public task, the requirements for cooperation between the parties must be laid down in a legally enforceable manner. The transfer of the right to use public property may only take place for a fixed period, i.e. limited in time.

The fixed term is expected to provide a realistic possibility for the parties to modify the legal relationship and renegotiate certain terms.

[100] The above considerations must also be reflected in the legislation applicable to the present case. The legislation in force does not contain the conditions laid down by that constitutional requirement and the Constitutional Court has no competence to lay down such conditions.

[101] Section 46 (1) of the ACC empowers the Constitutional Court to call upon the body that committed an omission to fulfil its duty, together with specifying the time limit, if, in the course of its proceedings in the exercise of its powers, it finds an infringement of the Fundamental Law caused by the law-maker's omission. Pursuant to section 46 (2) (c), it is deemed to be a failure to fulfil a legislative task if the essential content of the legal regulation derivable from the Fundamental Law is incomplete. {Decision 9/2022. (V. 25.) AB, Reasoning [57]}.

[102] According to the Constitutional Court, in the case of the provisions examined in the present proceedings, it is possible to act in accordance with the powers granted to it under section 46 of the ACC, in a manner that saves the law in force. In fact, the Constitutional Court found that the unconstitutionality of the contested legislation was due to the fact that the law-maker had not been sufficiently careful in determining the property law consequences of the new management structure of the research institute, which had previously also used the property of the HAS as a public task and was funded separately from the central budget. For this reason, the Constitutional Court held that the restitution of compliance with the Fundamental Law requires the supplementing or amending of the text in force, together with the regulation of the legal problems that may arise, rather than the annulment of the contested provision. This will ensure that the legislative change is implemented in accordance with the Fundamental Law, in particular Article XIII (1) and Article B (1).

[103] The Constitutional Court therefore held, acting *ex officio*, on the basis of section 46 (2) (c) of the ACC, that the Parliament has caused an infringement of the Fundamental Law manifested in an omission by the failure to regulate the present and

future property relations when it reorganised into a new governance structure the research centre and the research institutes formerly operated as a public task of the HAS, in accordance with the consequences of legal certainty enshrined in Article B (1) of the Fundamental Law and in accordance with Article XIII (1) of the Fundamental Law in the Amending Act and the incorporating sections 45 to 46 of the ARDI and section 3 (1a) of the Academy Act. The property of the Hungarian Academy of Sciences is earmarked non-State property (linked to the performance of public tasks), within which the property acquired by the Hungarian Academy of Sciences is subject to property protection under Article XIII (1) of the Fundamental Law. The State has to create a regulatory framework that also provides the conditions and guarantees necessary for the performance of public tasks.

[104] As a means of eliminating an infringement of the Fundamental Law, the law-maker has a wide discretionary power, the constitutional aspects of which have been determined in the present decision. The Constitutional Court establishes that in the application of section 3 (1a) of the Academy Act, it is the requirement arising from Article XIII (1), Article B (1) and Article I (4) of the Fundamental Law that the owner of public property (earmarked for a specific purpose) must tolerate the restriction (in the public interest and in a proportionate manner) of the ownership of public property necessary for the performance of a public task. A restriction of ownership may be imposed if the new holder of the public task is statutorily qualified to perform the public task, the restriction of ownership is strictly necessary for the performance of the public function and the scope of the property subject to the restriction of ownership is clearly defined. A further condition is that the new holder should be bound by the obligations, the use of the property is based on an agreement between the parties for a limited period of time or on an act of public authority against which direct judicial remedy is granted.

[105] The Constitutional Court therefore called on the Parliament to fulfil its legislative duty by 30 June 2023.

VI

[106] The MP petitioners complained that the Amending Act infringes on the one hand the individual freedom of science of researchers, and on the other hand the decision-making mechanism of the newly established body does not ensure the freedom of science, thus it violates the Fundamental Law.

[107] 1 The Constitutional Court has previously addressed the issue of academic freedom in the Constitutional Court’s decisions on higher education institutions. The Decision 21/2021 (VI. 22.) AB dealt in detail with the freedom of science and its

institutional guarantee aspect. According to the Decision 21/2021 (VI. 22.) AB, "pursuant to Article X (1) of the Fundamental Law, Hungary shall ensure the freedom of scientific research and artistic creation, the freedom of learning for the acquisition of the highest possible level of knowledge and, within the framework laid down in an Act, the freedom of teaching. Article X (3) of the Fundamental Law guarantees the academic autonomy of higher education institutions when it states that higher education institutions shall be autonomous in terms of the content and the methods of research and teaching; their organisation shall be regulated by an Act of Parliament. The independence and autonomy of higher education institutions is enshrined in the Fundamental Law with regard to the content of research (science) and teaching (education). This autonomy is complemented by Article X (2) of the Fundamental Law, which states that the State is not entitled to decide on scientific truth, and that only those who are engaged in scientific research are entitled to evaluate scientific research. This section of the Fundamental Law imposes a general obligation on the State to abstain from evaluating scientific research, which by analogy also applies to the research activities of higher education institutions." (Reasoning [23])

[108] With regard to higher education institutions, the Decision 21/2021 (VI. 22.) AB stated that "the autonomy of research and teaching can only be asserted if it is accompanied by an appropriate guarantee system. The guarantee system applies primarily to the higher education institution, and the institution itself must ensure this in its internal functioning, therefore the autonomy of higher education institutions in research and teaching necessarily presupposes the existence of rules that can guarantee this. Respect by the State for the research-teaching autonomy of higher education institutions thus not only requires that research-teaching autonomy be implemented at the individual level, but also imposes a positive obligation on the State; it shall build an institutional system that ensures the exercise of autonomy vis-à-vis and within higher education institutions. The State has a duty to protect institutions, which is reflected in the regulation of higher education institutions in a way that ensures research and teaching autonomy free from external influence." (Reasoning, [24])

[109] The Constitutional Court also held that "research-education autonomy free from interference and the right to higher education is realised through higher education institutions. Higher education institutions can only guarantee that research and teaching activities are free from external influence if they are accompanied by appropriate guarantees. The system of guarantees within higher education institutions can inherently be ensured by the organisational system, the organisational order. Higher education autonomy is not for its own sake, it can only work within an appropriate institutional framework. Within the institutional framework, organisational arrangements must be put in place to ensure that the bearer of autonomy can express and articulate its views and, as an exerciser of research and teaching autonomy,

participate in the formulation of the rules governing its operation. The organisational framework must therefore be capable of ensuring that the holders of the autonomy granted to higher education institutions by the Fundamental Law have a meaningful influence on the rules governing their operation, as a guarantee of autonomy." (Reasoning [26]) The Constitutional Court also stated that "the exercisers of the research-teaching autonomy granted to higher education institutions by the Fundamental Law are the lecturers and researchers of the higher education institution; and, by virtue of the close connection with the right to education, the exercisers of the autonomy are the students participating in the courses provided in higher education. Article X (3) of the Fundamental Law requires that the organisational structure of higher education institutions shall ensure that the subjects of higher education autonomy have influence on the operation of the higher education institution, can express their views on research and teaching autonomy, can clash their opinions with each other and have decision-making rights in matters related to research and teaching autonomy. To exercise this right, the institution must have an organisational structure in which those exercising autonomy have influence in decisions concerning the higher education institution. If it is organised on a representative basis, the composition of the institutional body, which is representative (e.g. by election), must be representative of those who exercise autonomy, i.e. the mandate of such a body must come from the persons exercising the autonomy." (Reasoning, [27])

[110] The Constitutional Court considers that the above constitutional requirements established for higher education institutions in relation to the freedom and autonomy of research are also applicable to institutions engaged in scientific research. In other words, freedom of scientific research can only be asserted if (1) it is free from external (in particular State) influence and (2) the institution conducting scientific research has an organisational guarantee that the representatives of science can express their views, i.e. the representatives of science have the right to decide on scientific matters. This is without prejudice to the amount of resources that the State spends on scientific research, which depends on its own capacity to cope with the burden and may set specific priorities. Scientific freedom is enshrined in the fact that the use of the available resources within the legal framework and the evaluation of the scientific results achieved are carried out by the representatives of science.

[111] 2 According to the petitioners, individual research freedom of the members of the research network under the control of the HAS is violated by the institutional transfer, especially because the new legislation does not include the previous provision of the Academy Act that "researchers employed in the research centres of the academic research network (hereinafter: researchers) shall carry out their work in accordance with their scientific convictions. They may not be obliged to perform any activity contrary to this" [section 18 (5) of the Academy Act, provision in force until 31 August 2019]. The

Constitutional Court finds that the mere failure to transpose this provision does not result in a situation contrary to the Fundamental Law. The individual aspect of the freedom of scientific research, i.e. the right of the researchers to carry out their work in accordance with their own scientific convictions, was declared by the Academy Act, but it is protected by the Fundamental Law in Article X as the freedom of scientific research and in Article IX as part of the freedom of scientific expression. Consequently, since the statutory provision only reinforced the already existing protection under the Fundamental Law with declaratory force, the absence of this does not in itself constitute a detrimental change. On this basis, the Constitutional Court rejected this element of the motion by petitioner 1.

[112] 3 The MP petitioners also complained that the community level of freedom of science was also violated because, contrary to the previous regulation, the newly established institution's Governing Board is responsible for the management of research and development instead of the supervision of research. The composition of the GB does not ensure the autonomy of the scientific communities, nor does the decision-making mechanism correspond to the autonomy of the scientific communities.

[113] It follows from the above-mentioned case-law of the Constitutional Court that the autonomy of science is violated if decisions on scientific matters are not taken by representatives of science. As regards the composition of the GB, section 42/C (2) of the ARDI provides as follows: "The Governing Board shall be composed of thirteen members, six of whom - not taking into account the chairman - shall be proposed by the Minister responsible for the coordination of science policy and six by the President of the HAS, with at least two thirds of the members of the Governing Board being chosen from among scientists. The members of the Governing Board shall be appointed by the Prime Minister." According to the MP petitioners, there is a majority of government representatives and the rule that at least two thirds of the members of the Board will be scientists is not an appropriate guarantee at all.

[114] In the Constitutional Court's view, it is a constitutional requirement, arising from previous case-law of the Constitutional Court, that scientific experts should have the right to decide on scientific matters. The challenged provision of the Act empowers the Minister responsible for science policy and the President of the HAS to delegate 6-6 members. At least two thirds of the members must be scientists.

The Constitutional Court finds that the contested provision does not violate Article X of the Fundamental Law. The representatives of science enjoy a qualified majority in the Board, i.e. the vast majority of the members of the Board are scientists, that is to say they themselves are part of the scientific community. The arguments of the petitioners are hypothetical and cannot be subject to constitutional assessment, and

the Constitutional Court could not take them into account in support of the alleged violation of the Fundamental Law.

[115] Further arguments put forward by the MP petitioners, according to which the decision-making mechanism and the management tasks in general violate the freedom of science, are also hypothetical statements that cannot be linked to the challenged statutory legislation. In accordance with the case-law of the Constitutional Court, the legitimacy of freedom of science is guaranteed and there is no infringement of freedom of science in this respect. The Constitutional Court notes that section 42/C (3) of the ARDI sets out the following for the GB concerning matters of science: "4. approve the goals and tasks of research centres", "9. determine the criteria for providing support to the research centres", "14. without prejudice to Article X (2) of the Fundamental Law, express opinion on the conceptual aspects of domestic science and society". On the basis of the above, scientific legitimacy of the GB is granted, and the Constitutional Court concludes that the contested regulation does not entail a violation of Article X of the Fundamental Law.

[116] The violation of the Fundamental Law alleged by the petitioners may arise through the enforcement of the internal regulations and further organisational provisions established by the ELRN on the basis of the challenged statutory provision. The legal regulation of the operational structure of the new legal entity is therefore not solely a matter of the ARDI. However, as an institution carrying out scientific research, the new holder of the public task must establish an internal regulatory system that ensures the enforcement of Article X of the Fundamental Law.

[117] The Constitutional Court, on the basis of section 46 (3) of the ACC, attached a constitutional requirement under paragraph 2 of the holdings of the decision to section 42/C (3) of the ARDI in order to ensure that the scientific autonomy guaranteed by Article X (1) to (2) of the Fundamental Law is enforced in the context of the decision-making powers that concern scientific matters. Having an operational regulation complying with the constitutional requirement and its application are the guarantee conditions for ensuring that no operation infringing on academic autonomy can develop.

VII

[118] The publication of the Decision of the Constitutional Court in the Hungarian Official Gazette is based upon the second sentence of section 44 (1) of the ACC.

Budapest, 15 November 2022.

Dr. Tamás Sulyok,
President of the Constitutional Court
rapporteur Justice of the Constitutional Court

Dr. Ágnes Czine, Justice of the Constitutional Court

Dr. Egon Dienes-Oehm, Justice of the Constitutional Court

Dr. Tünde Handó, Justice of the Constitutional Court

Dr. Attila Horváth, Justice of the Constitutional Court

Dr. Imre Juhász Justice of the Constitutional Court

Dr. Miklós Juhász, Justice of the Constitutional Court

Dr. Zoltán Márki, Justice of the Constitutional Court

Dr. Béla Pokol, Justice of the Constitutional Court

Dr. László Salamon, Justice of the Constitutional Court

Dr. Balázs Schanda, Justice of the Constitutional Court

Dr. Marcel Szabó, Justice of the Constitutional Court

Dr. Péter Szalay Justice of the Constitutional Court

Dr. Mária Szívós, Justice of the Constitutional Court

Concurring reasoning by Justice *Dr. Balázs Schanda*

[119] 1 I consider that the constitutional requirement set out in paragraph 2 of the holdings of the decision, which follows directly from Article X of the Fundamental Law, is uncontested. I also agree with paragraph 1 of the holdings of the decision, according to which a situation has arisen in which the right to property and legal certainty have been infringed in the creation of the ELRN. I accept that three years after formulating the legislation, the unconstitutional situation can only be remedied by new legislation to be enacted by Parliament.

[120] 2 At the same time, I consider it important to make it clear that in the context of the protection of the right to property of institutions performing public functions, with regard to the "case-by-case" examination of the regulation, no case-law should be developed which limits the deprivation of the use of property, or its transfer to another institution, to the question of the exercise of a public function. I agree that the property

of the HAS is, to a large extent, earmarked public property to which the positions developed in relation to the protection of municipal property can be applied in certain respects. However, public interest alone should not be the basis for the law-maker to transfer a special-purpose asset assigned to a public function or the use of that special-purpose asset from one legal entity to another. The Constitutional Court would not have the means to determine the content of public interest with regard to an Act of Parliament; only in extreme cases, where there is a manifest lack of public interest, could it question that the law-maker is pursuing the public interest.

[121] 3 The volume of assets involved is a guarantee element of freedom of science. In line with the consistent practice of the Constitutional Court, the majority decision also stipulates that the freedom of science extends not only to the pursuit of research, but also to the organisation and provision of research and the maintenance of an institutional system in connection with it. On the other hand, the majority decision demonstrates that public funds are controlled by the State. I find this statement simplistic in the present case: the State can set the framework for the cultivation and organisation of science, it can decide on the funding of science, but it does not have complete discretion to reorganise the scientific institutional system. This is not only a question of property (i.e. the right to property), but also of freedom of science. In such cases, the criteria for the constitutionality of the restriction are also different: the question of whether the restriction is a matter of property but indirectly affects freedom of science must be judged under the general fundamental rights restriction test rather than the public interest test.

Budapest, 15 November 2022.

Dr. Balázs Schanda,
Justice of the Constitutional Court

Concurring reasoning by Justice *dr. László Salamon*

[122] I agree with paragraphs 1 and 2 of the concurring reasoning with the addition that, in view of its private and public resources and its function, the property of the HAS is a very unique, specific form of ownership which, exceptionally, allows, under the guarantees to be developed pursuant to paragraph 1 of the holdings of the decision – without creating any precedent –, the use of the property by an organisation separated from it in terms of legal sociology and which has acquired legal personality.

Budapest, 15 November 2022.

Dr. László Salamon,
Justice of the Constitutional Court

Concurring reasoning by Justice *Dr. Marcel Szabó*

The National Avowal of the Fundamental Law expressly lays down that the Fundamental Law "shall be an alliance among Hungarians of the past, present and future". One example of this association is the Hungarian Academy of Sciences, which, according to the Act XI of 1827, was set up "from a fund to be established by voluntary and free donations" and the activities of the HSA aim not only to promote the life of the generations of the present, but also, due to the specific nature of science, of the future, too. The law-maker must therefore proceed with increased caution in all cases where a regulation has a significant impact on the organisation and operation of the Hungarian Academy of Sciences.

[124] As the decision points out, there is no obligation deductible under the Fundamental Law for the Hungarian Academy of Sciences to operate a research network. Accordingly, the legislature may decide, in accordance with the Fundamental Law, that a research network should in the future be operated not by the Hungarian Academy of Sciences but by another institution. However, the Fundamental Law places a number of limits on the content of such legislative decisions.

[125] On the one hand, in the case of the reorganisation of the research network, it is a constitutional requirement stemming from Article X (3) of the Fundamental Law that the freedom of scientific research must be fully enforced in the case of the new research network, which now operates independently of the Hungarian Academy of Sciences. I agreed with the constitutional requirement set out in paragraph 2 of the decision, which, by its very nature, can ensure that the freedom of scientific research will be fully respected in the future. If the Constitutional Court formulates a constitutional requirement in relation to the possible interpretation or application of a statute and thereby expressly sets out the limits of the scope of interpretation of the relevant provision of the Fundamental Law, neither the law-maker nor the law-applying bodies may disregard or impair it. {see for example the Decision 16/2021. (V. 13.) AB, Reasoning [35]}.

[126] On the other hand, a further limitation of the restructuring of the research network is that it must not endanger, make impossible or complicate the operation of the Hungarian Academy of Sciences as a constitutionally protected institution. On the one hand, no amendment to the legislation affecting the Hungarian Academy of Sciences may deprive the HSA of its core assets, which are based on private donations and are inextricably linked to the history of the Academy and serve the interests of the Hungarian scientific community as a whole. On the other hand, as is expressly stated in section 46 (1) of the ARDI, the free transfer of use requires the user to use the property with the care of a good steward, that is to say, to develop and preserve it and to bear the public charges in addition to preserving its condition. Thirdly, the purpose

and duration of free use are also linked to the operation of the research network directly connected to the property in question, which cannot be disposed of by the user of the property without limits. However, in the case of such a statutory grant of free use, the above issues can only be examined on a case-by-case basis (asset by asset, as the case may be), for which it is essential that the right to apply to the courts is also statutorily granted. Since, however, the right of recourse to the courts cannot currently be inferred from the legislation at issue, I have also agreed with the finding of legislative omission stated in paragraph 1 of the holdings of the decision.

Budapest, 15 November 2022.

Dr. Marcel Szabó,
Justice of the Constitutional Court