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## Constitutional judgment 3-4-1-25-11

### JUDGMENT OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT

**No. of the case** 3-4-1-25-11

**Date of judgment** 17 April 2012

**Composition of court** Chairman Märt Rask, members Tõnu Anton, Henn Jõks, Lea Laarmaa and Ivo Pilving

**Court Case** A request of the Chancellor of Justice to declare § 158<sup>1</sup>(1) of the Law of Property Act and § 15<sup>2</sup>(1) and (2) of the Law of Property Act Implementation Act in conjunction with § 15<sup>4</sup>(2) to (4) of the Law of Property Act Implementation Act invalid to the extent they do not prescribe a sufficient payment to the owner of an immovable for the obligation to tolerate utility networks or utility works required in public interests, and the first sentence of § 158<sup>2</sup>(1) to the extent it refers to the amount of payment provided for in § 15<sup>4</sup> of the Law of Property Act Implementation Act.

**Basis of proceeding** The request no. 7 of 23 December 2011 of the Chancellor of Justice

**Hearing** Written proceedings

**DECISION** To declare § 15<sup>4</sup>(2) to (4) of the Law of Property Act Implementation Act and the part “in the amount established in § 15<sup>4</sup> of the Law of Property Act Implementation Act” of the first sentence of § 158<sup>2</sup>(1) of the Law of Property Act to be in conflict with the Constitution and invalid as of the entry into force of this judgment.

#### FACTS AND COURSE OF PROCEEDINGS

1.

§ 15<sup>2</sup> of the Law of Property Act Implementation Act (LPAIA) which was valid from 1 April 1999 to 31 December 2002 prescribed the right of the owner of utility networks or utility works to demand, within ten years as of the land was entered in the land register, establishment of either a real servitude or a personal right of use. § 15<sup>4</sup> of the LPAIA exempted the owner of utility networks or utility works until 1 January 2009 from making of a payment for tolerating, provided a real servitude or a personal right of use had been established in his or her favour.

2. The wording of § 15<sup>2</sup> of the LPAIA which entered into force on 1 January 2003 provided for the obligation of the owner of an immovable to tolerate utility networks or utility works erected on the owner's immovable or land not yet entered in the land register before 1 April 1999 regardless of whether or not the immovable is encumbered with a corresponding real right. It was required to tolerate utility networks or utility works without payment regardless of whether the immovable was encumbered with a restricted real right.

3. By its judgment of 30 April 2004 in matter no. 3-4-1-3-04 the Supreme Court declared § 15<sup>4</sup>(2) of the LPAIA, which prescribed exemption from making of a payment for the obligation to tolerate until 1 January 2009, unconstitutional and invalid because it burdened the owner of land more than was justified by the interests of the public and the owners of utility works.

4. § 158<sup>2</sup>(1) of the Law of Property Act (LPA) which entered into force on 26 March 2007 prescribes the right of the owner of an immovable to demand payment for tolerating utility networks or utility works in the amount established in § 15<sup>4</sup> of the LPAIA. § 15<sup>4</sup>(2) to (4) of the LPAIA provide that the amount of annual payment for tolerating a utility network or utility works on the immovable of the owner or for tolerating a restriction on the use of land arising from a protective zone of a utility network or utility works equals the amount of the one-percent taxable value of the land corresponding to the protective zone of the utility network or utility works, multiplied by the coefficient depending on the intended purpose of use of land.

#### **REQUEST OF THE CHANCELLOR OF JUSTICE**

5. On 23 December 2011 the Chancellor of Justice had recourse to the Supreme Court with a request to declare § 158<sup>1</sup>(1) of the LPA and § 15<sup>2</sup>(1) and (2) of the LPAIA in conjunction with § 15<sup>4</sup>(2) to (4) of the LPAIA unconstitutional and invalid to the extent they do not prescribe a sufficient payment to the owner of an immovable for the obligation to tolerate utility networks or utility works required in public interests. The Chancellor of Justice also requested, for the purpose of legal clarity, to declare unconstitutional and invalid the first sentence of § 158<sup>2</sup>(1) of the LPA to the extent it refers to the amount of payment provided for in § 15<sup>4</sup> of the LPAIA. In addition, the Chancellor of Justice requested postponement of the judgment declaring the said provisions invalid for six months under § 58(3) of the Constitutional Review Court Procedure Act (CRCPA).

6. The obligation to tolerate utility networks or utility works required in public interests, arising from § 158<sup>1</sup>(1) of the LPA and § 15<sup>2</sup>(1) and (2) of the LPAIA, prevents the owner of the immovable from freely possessing and using at least that part of the owner's property on which the utility networks or utility works are located. In addition to the restrictions on land directly beneath the utility networks or utility works, the owner's possibility to use the land within the protective zone of the utility networks or utility works is also restricted. For instance, the protective zone of an electrical installation on overhead transmission lines is, depending on the voltage of the line, 2 to 40 metres on both sides of the axis of the power line. Use of land within a protective zone has been restricted by law. Use of other parts of an immovable may also be restricted since the owner of the immovable must allow the owner of the utility networks or utility works to install necessary markings of utility networks or utility works and to perform maintenance and repair works; whereas, by way of access of necessary machinery.

7. There is a legitimate objective for establishing the obligation to tolerate utility networks and utility works in public interests and for restricting the payment for tolerating made for the obligation to tolerate – it is guarantee of electrical, gas and other connections to residents in the whole of Estonia for an affordable price; whereas, also avoiding upsurges in price. The payment for tolerating in the current amount serves the

interests of consumers of universal services since upon the increase in payments for tolerating, the price of services offered to consumers would probably also increase.

**8.** Use of land within a protective zone according to its intended purpose may prove to be impossible, and in some cases it is not excluded to deem such restrictions *de facto* as expropriation of property without the consent of the owner within the meaning of § 32(1) of the Constitution. § 32(1) of the Constitution prescribes the obligation to pay a fair compensation explicitly only for cases of expropriation of property without the consent of the owner. Nevertheless, payment of a fair compensation is a relevant measure also in some cases of other restrictions on ownership provided for in § 32(2) of the Constitution in order to ensure just balance between the interests of owners of an immovable and the interests of the public. Also in the case-law of the European Court of Human Rights it has been found that the balance between the interests of an individual and of the public is not guaranteed if for restrictions on the right of ownership no compensation has been prescribed for individuals or if the compensation is unreasonably small.

**9.** The Chancellor of Justice brought an example of an immovable, the forested area of which is crossed by a power line of 160 metres and with the voltage of 330 kV, the protective zone of which is 40 metres on both sides of the axis of the line, and the forest is also crossed by a line with the voltage of 110 kV, the protective zone of which is 25 metres on both sides of the line. The total protective zone amounts to 1.58 hectares and in practice, the owner of the electrical installation has cut down the entire forest within the protective zone. The land is too wet to be used as arable land.

**10.** § 158<sup>2</sup>(1) of the LPA grants the owner of an immovable the right to demand payment for tolerating utility networks or utility works required for public interests in the amount established in § 15<sup>4</sup> of the LPAIA. Based on § 15<sup>4</sup>(1) of the LPAIA, owners of immovables encumbered with the obligation to tolerate have the right to receive payment for tolerating in the amount established in subsections (2) to (4) of the same section also in case of an obligation to tolerate other utility networks and utility works arising from the law. Pursuant to § 15<sup>4</sup>(2) to (4) of the LPAIA, the amount of annual payment for tolerating a restriction on the use of land equals the amount of the one-percent taxable value of the land subject to restrictions, multiplied by the coefficient of 0.05 to 0.75, depending on the intended purpose of the land; in case of a building – multiplied by the coefficient of 5 or 10. In the above example, the owner of an immovable has the right to receive, for tolerating, a payment of 31.6 cents a year.

**11.** It appears from the explanatory memorandum that in establishing the coefficients of payment for tolerating, it was proceeded from to what extent the restriction caused by utility networks or utility works restricts the use of the immovable for its intended purpose, and also from that the amount of payment for tolerating would correspond to the land tax of the encumbered land. Owners of land are required to pay the full rate of the land tax for the land beneath the utility networks and utility works to be tolerated in public interests and for the land within their protective zone. In substance, that part of the immovable is used by the network operator in provision of services in its economic activities. Considering the methods for calculating land tax and payment for tolerating, in most cases the land tax subject to payment by the owner of land significantly exceeds the possible payment for tolerating to be received. Based on the Land Tax Act, the rate of land tax shall be, in general, 0.1–2.5 per cent of the taxable value of land annually. Only a few local authorities have established land tax of less than 1 per cent, in particular in case of areas under cultivation and for natural grasslands. On the other hand, in case of a payment made to the owner of an immovable, the one-percent taxable value shall be multiplied by the coefficient corresponding to the intended purpose of the land, which in case of land is 0.75 the most. In the above example, the land tax for the area of land within the protective zone is 7.58 euros a year, i.e. approximately 24 times more than the payment which the owner is entitled to.

**12.** The valid regulatory framework does not guarantee fair compensation to the owner of an immovable. The rights of owners of immovables encumbered with utility networks and utility works are restricted disproportionately in ensuring the availability of universal services and in avoiding increase in price.

## **OPINIONS OF THE PARTICIPANTS IN THE PROCEEDING**

**Riigikogu**

**13.-15.**

[Not translated.]

**Minister of Justice**

**16.-17.** [Not translated.]

**Minister of the Environment**

**18.-20.** [Not translated.]

**Minister of Economic Affairs and Communications**

**21.-23.** [Not translated.]

**CONTESTED PROVISIONS**

**24.** § 158<sup>1</sup>(1) of the LPA:

“The owner of an immovable is required to tolerate utility networks or utility works on the immovable of the owner and permit the building thereof on the immovable if the utility networks or utility works are required in the public interest and there is no other technically and economically more expedient possibility to connect to utility networks or utility works the consumption site of a person who wishes to connect to the utility networks or utility works or to develop the utility networks or utility works. Utility networks or utility works have been built in public interest if public services are provided through them and these are owned by a person, to whom extends the obligation established in subsection 72 (1) of the Electronic Communications Act, subsections 65 (1) or 66 (1) of the Electricity Market Act, subsection 7 (1) of the Public Water Supply and Sewerage Act or subsection 18 (2) of the Natural Gas Act or who is a network operator within the meaning of the District Heating Act operating in the corresponding area. Upon termination of the contract for the provision of universal services the obligation to tolerate shall not cease in the case that the provision of services offered to all persons through the corresponding utility works is continued pursuant to the general procedure. The obligation to tolerate provided for in this subsection is created pursuant to the procedure provided for in the Immovables Expropriation Act by establishment of compulsory possession.”

**25.** The first sentence of § 158<sup>2</sup>(1) of the LPA:

“The owner of an immovable has the right to demand payment for tolerating utility networks or utility works provided for in subsection 158<sup>1</sup>(1) of this Act in the amount established in subsection 154 of the Law of Property Act Implementation Act.”

**26.** § 15<sup>2</sup>(1) and (2) of the LPAIA:

“(1) The owner of an immovable is required to tolerate existing utility networks or utility works erected before the first registration of land if the first registration took place before 1 April 1999. The owner of an immovable is required to tolerate utility networks or utility networks also upon the existence of the prerequisites provided for in subsection 158<sup>1</sup>(1) of the Law of Property Act or upon the existence of another obligation to tolerate.

(2) The owner of an immovable is required to tolerate also utility networks or utility works regarding which there is no obligation to tolerate provided for in subsection (1) of this section, if such utility networks or utility works belong to a network operator set out in subsection 158<sup>1</sup>(1) of the Law of Property Act and have been erected with the consent of the owner before 1 April 1999 and such utility networks or utility works are used as intended and in public interest.”

**27.** § 15<sup>4</sup>(2) to (4) of the LPAIA:

“(2) The amount of annual payment to the owner of an immovable for tolerating a utility network or utility works on the immovable of the owner or for tolerating a restriction on the use of land arising from a protective zone of a utility network or utility works equals the amount of the one-percent taxable value of the land corresponding to the protective zone of the utility network or utility works, multiplied by the coefficient provided for in subsections (3) or (4) of this section. The payment for tolerating utility works in a building equals the amount of the one-percent taxable value of the land corresponding to the physical share of the building in which the utility works is situated, multiplied by the coefficient of the purpose of use provided for in subsection (4) of this section. If no intended purpose of use was designated to land while the taxable

price of land was determined, such land is deemed as land not designated for a specific purpose.

(3) The coefficient of the intended purpose of use of land is 0.75 for residential land and protected land; 0.5 for commercial land; 0.25 for production land, mining land and social land; 0.1 for land of bodies of water, transportation land, land of waste disposal sites, national defence land and profit yielding land, and 0.05 for land not designated for a specific purpose. If several intended purposes of use have been designated to land, the payment is calculated on the basis of the intended purpose of use that has been designated to land to a greater extent. If the purposes of use designated to land are equal, the payment is calculated on the basis of the highest coefficient.

(4) With regard to utility works in a building, if it is completely impossible to use a part of the building, the coefficient of the purpose of use is 10; if it is partly impossible to use the building, the coefficient of the purpose of use is 5.”

## **OPINION OF THE CHAMBER**

**28.** First, the Chamber determines the relevant norms and finds the fundamental right interfered with (I), then assesses the constitutionality of the relevant norms (II), and finally weighs the request of the Chancellor of Justice to postpone the entry into force of the judgment (III).

### **I**

**29.** The Chancellor of Justice had recourse to the Supreme Court with a request to declare § 158<sup>1</sup>(1) of the LPA and § 15<sup>2</sup>(1) and (2) of the LPAIA in conjunction with § 15<sup>4</sup>(2) to (4) of the LPAIA unconstitutional and invalid to the extent they do not prescribe a sufficient payment to the owner of an immovable for the obligation to tolerate utility networks or utility works required in public interests. The Chancellor of Justice also requested, for the purpose of legal clarity, to declare unconstitutional and invalid the first sentence of § 158<sup>2</sup>(1) of the LPA to the extent it refers to the amount of payment provided for in § 15<sup>4</sup> of the LPAIA.

**30.** The Chancellor of Justice justifies his request with arguments as to why the contested provisions prescribe insufficient payment for tolerating utility networks or utility works located on an immovable or for tolerating a restriction on use of land arising from the protective zone of utility networks or utility works (obligation to tolerate), and why such a payment is in conflict with the Constitution. The Chamber is of the opinion that only some of the provisions contested by the Chancellor of Justice regulate the amount of payment.

**31.** § 158<sup>1</sup>(1) of the LPA and § 15<sup>2</sup>(1) and (2) of the LPAIA provide for the obligation of the owner of an immovable to tolerate utility networks and utility works. These provisions do not regulate nor restrict compensation paid for the obligation to tolerate.

**32.** The first sentence of § 158<sup>2</sup>(1) of the LPA prescribes the right of the owner of an immovable to demand payment for tolerating utility networks or utility works, and refers to the provision providing for the amount of the payment. In case the provisions regulating the amount of the payment would be removed from the legal order due to declaration of invalidity, the reference to these provisions would become empty. Consequently, the part “in the amount established in § 15<sup>4</sup> of the Law of Property Act Implementation Act” of the provision is relevant due to a close connection with the provisions prescribing the amount of the payment.

**33.** § 15<sup>4</sup>(2) of the LPAIA establishes the method for calculating the payment, subsections (3) and (4) the coefficients used in the method. These provisions prescribe what kind of payment a person can demand for a restriction on the exercise of the right of ownership, i.e. they regulate the amount of the compensation for the obligation to tolerate, and are therefore relevant.

**34.** In keeping with the aforesaid, the Chamber verifies, under the request of the Chancellor of Justice, the constitutionality of § 15<sup>4</sup>(2) to (4) of the LPAIA and the part “in the amount established in § 15<sup>4</sup> of the Law of Property Act Implementation Act” of the first sentence of § 158<sup>2</sup>(1) of the LPA due to a close connection

with the said provisions.

**35.** Next, it shall be ascertained which fundamental right the restriction interferes with. A situation where a person's right to freely use his or her property is restricted constitutes interference with the right of ownership guaranteed by § 32 of the Constitution. Interferences with the fundamental right of ownership are divided in two. The second sentence of § 32(1) of the Constitution provides for the conditions for expropriation of property without the consent of the owner. Other restrictions are regulated by the second sentence of § 32(2) of the Constitution. In any way, the restriction on the amount of payment for the obligation to tolerate restricts the right provided for in the second sentence of § 32(2) of the Constitution. Therefore, the Chamber first verifies the constitutionality of that interference.

## II

**36.** A situation where an interference with a fundamental right provided by law does not have a legitimate objective or where the restriction is disproportional with regard to the objective constitutes an interference with the fundamental right. The Chamber identifies the legitimate objective of the interference below.

**37.** The second sentence of § 32(2) of the Constitution prescribes a simple statutory reservation for restricting the right of ownership. A simple reservation by law means that, in general, the right of ownership may be restricted for any purpose which is not in conflict with the Constitution.

**38.** The Chancellor of Justice is of the opinion that the objective of restricting the amount of payment for the obligation to tolerate is to guarantee electrical, gas and other connections to residents throughout Estonia for an affordable price, thereby also avoiding upsurges in price, since upon any increase in payments for tolerating, the price of services provided to consumers would probably increase as well. The Chamber holds that the objective of restricting the amount of payment is not merely to guarantee the reasonable price of services guaranteed to residents through electrical, gas and other connections (hereinafter also of universal services). The objective is to guarantee to every person the reasonable price of universal services. One of the elements of the price of universal services is the expenses of provision of the service and these expenses include compensation payable to owners of immovables for the obligation to tolerate.

This means that the payment made for the obligation to tolerate affects the price of universal services. Since universal services are provided through infrastructures, the functioning of free market is complicated in this field. Consequently, guaranteeing the reasonableness of the price of universal services with lesser expenses is not in conflict with the Constitution and therefore corresponds to the reservation in the second sentence of § 32(2) of the Constitution. Based on the aforesaid, the Chamber holds that the objective of the restriction to guarantee, for a reasonable price, the availability of the services provided through utility networks and utility works is legitimate.

**39.** A restriction is proportional if it is appropriate, necessary and reasonable with regard to the objective to be achieved.

**40.** Restricting the amount of payment prescribed for the obligation to tolerate is a appropriate measure for guaranteeing the reasonable price of universal services. Restricting the payments for tolerating to be made by providers of universal services suppresses the higher price of universal services arising from payments for tolerating.

**41.** A measure is necessary if it is not possible to achieve a goal by some other measure which is less burdensome on a person but which is at least as effective as the former (see, e.g., the Constitutional Review Chamber of the Supreme Court judgment of 26 March 2009 in matter no. 3-4-1-16-08, paragraph 29). The Chamber is of the opinion that the restriction on the obligation to tolerate is necessary for the achievement of the objective. It is true that various mechanisms for compensation by the state for a greater payment to be made by the provider of universal services cannot be ruled out, but these measures would place a greater

burden on the state budget. Therefore, such alternative measures would not be as effective.

**42.** In deciding on the reasonableness of the restriction it is necessary to weigh up the significance of the legitimate objective, on the one hand, and the intensity of the restriction for the owners of encumbered immovables, on the other hand.

**43.** It was noted in the explanatory memorandum of the draft Act which established the obligation to tolerate: “In determining the amount of payments for tolerating it has been proceeded from the principle that the amount of payment for tolerating would correspond to the land tax of the land encumbered with the obligation to tolerate, i.e. in essence, the amount of the land tax paid for the land encumbered with the obligation to tolerate would be compensated to the owner of the immovable.” (X Riigikogu 1067 SE.) The Chamber holds that a restriction on the right of ownership is in any case disproportional if the use of land for its intended purpose is impossible and the compensation received for the restriction is even smaller than the land tax.

**44.** Next, the Chamber compares the payment prescribed for the obligation to tolerate and the amount of the land tax because both are calculated based on the taxable value of the land. Pursuant to § 5(1) of the Land Tax Act, the rate of land tax shall be, in general, 0.1-2.5 per cent of the taxable value of land annually. According to § 15<sup>4</sup>(2) and (3) of the LPAIA, in order to establish the amount of the payment to be made to the owner of an immovable for tolerating utility networks and utility works, the one-percent taxable value of the land shall be multiplied by a corresponding coefficient which in the case of land is 0.05-0.075. Consequently, in order for the compensation to cover the land tax or exceed it, the rate of land tax should be equal to the coefficient or lower.

**45.** It appears from the land tax data of 2012 on the website of the Tax and Customs Board that in addition to areas under cultivation and for natural grasslands, the rate of land tax is less than 1 per cent only in five local authorities; whereas, in four of them only in part, and less than 0.75 per cent only in two. However, the highest coefficient of 0.75 of the intended purpose has been established only for residential land and protected land which most likely forms a small part of the encumbered land. For instance, the coefficient of profit-yielding land is 0.1 and profit-yielding land includes forest land. The tax rate of areas under cultivation and for natural grasslands is 0.1 per cent or less in 32 local authorities. Of these, 23 are cities where no such land exists or where there is very little of it, and in four of the remaining nine rural municipalities the tax rate is 0.1 per cent only partially. Considering the aforesaid, it must be noted that the compensation prescribed by law is mostly smaller than the land tax to be paid on the land.

**46.** The Chamber holds that the restriction would also be generally disproportional if the payment made for the obligation to tolerate would be limited to the land tax payable for the encumbered part of the immovable and if the owner would be able to use the immovable in part regardless of restrictions. The situation of an immovable subject to the obligation to tolerate can be compared to a situation where the owner places his or her land at the disposal of someone else – another person has the right to use the land in some way and the owner himself or herself waives in full or in part the possibility to use the land during that time.

**47.** In calculating the payment for tolerating, the law in force takes into account the value of the immovable (through the taxable value of the land – the first sentence of § 15<sup>4</sup>(2) of the LPAIA), the size of the encumbered part and the intended purpose of the land, but fails to consider the actual effect of the restriction. The law in force prescribes different coefficients for land with different intended purposes, but fails to consider the characteristics of the utility networks, utility works or a part thereof located on the immovable. This means that the effect of the encumbering object on the ordinary use of the immovable has not been considered. In order to consider the actual effect of the restriction, it is not necessary to examine the ordinary use of every single immovable and the object located thereon. It would require a lot of time and labour and would probably cause many disputes. It would also be unreasonable if the owner of the utility networks or utility works and the owner of the immovable had to agree on the amount of payment for tolerating in every single case. As the Legislature classifies immovables by their intended purpose, it is also possible to classify parts of utility networks and utility works, taking account of the factual and legal restrictions usually

accompanying the utility networks and utility works, depending on the intended purpose of the land. In such a way it is possible to develop a method of finding the amount of compensation based on the actual effect of the encumbrance on the immovable.

**48.** If usually one type of object of utility networks or utility works affects one type of immovable in the same way, then in exceptional circumstances the effect may be more extensive. It is not to be excluded that in such cases the owner of an immovable should have the right to demand a higher payment than the one calculated on the basis of the uniform method.

**49.** The Supreme Court found in point 61 of its judgment of 31 March 2011 in matter no. 3-3-1-69-09: “A situation in which a single individual or only a few individuals should, in the public interest, bear greater expenses than others who also use the means and resources created in general interests would be in conflict with the principle of equality. A need for payment of fair compensation to ensure the proportionality of an interference with the fundamental right of ownership arises in situations where the proprietary loss of one individual is disproportionately vast compared to that of others.” The Court to the view that fair compensation must be prescribed to the extent that the individual's fundamental right of ownership is interfered with more than is justified by the obligation to tolerate in public interests (paragraph 64 of the same judgment).

**50.** The Chamber finds that, considering both the public interest to be provided with universal services for a reasonable price and the constitutional right of owners of immovables encumbered with the obligation to tolerate to receive compensation for the obligation to tolerate, the owners of immovables must, in any event, be compensated for the obligation to tolerate. Although compensation for the restriction must be prescribed in any event, it may, due to public interest, be smaller than upon compensation for the restriction in full. Thereby the actual effect of utility networks or utility works on the immovable must be taken into account.

**51.** In keeping with the aforesaid, the Chamber holds that § 15<sup>4</sup>(2) to (4) of the LPAIA and the part “in the amount established in § 15<sup>4</sup> of the Law of Property Act Implementation Act” of the first sentence of § 158<sup>2</sup>(1) of the LPA are in conflict with the second sentence of § 32(2) of the Constitution and must be repealed because they do not prescribe reasonable compensation to the owner of an immovable for the obligation to tolerate utility networks or utility works required in public interests.

**52.** The Chancellor of Justice is of the opinion that in situations where the use of land for its intended purpose in the protective zone of utility networks or utility works is in fact impossible, it is not to be excluded to deem such restrictions *de facto* expropriation of property without the consent of the owner within the meaning of the second sentence of § 32(1) of the Constitution. Considering that the second sentence of § 32(1) of the Constitution establishes on expropriation of property without the consent of the owner stricter requirements than the second sentence of § 32(2) of the Constitution on other restrictions on the right of ownership and that the Chamber established a violation of the right provided for in the latter, the Chamber does not deem it necessary to additionally assess the violation of the right provided for in the second sentence of § 32(1) of the Constitution.

### III

**53.** The Chancellor of Justice requested that the entry into force of the judgment repealing the contested provisions be postponed by six months under subsection 3 of § 58 of the CRCPA. The Chancellor of Justice is of the opinion that a situation in which the grounds for calculating compensation provided by law would become void could be problematic in view of the principles of both legal clarity and legitimate expectation.

**54.** The Chamber does not deem it justified to postpone the entry into force of the judgment. Upon the entry into force of this judgment, there are no provisions in the legal order on the basis of which to calculate the amount of the payment. But the grounds for demanding payment, i.e. § 158<sup>2</sup>(2) to (7) of the LPA and § 15<sup>4</sup>(1) of the LPAIA, will remain in force. This means that owners of immovables have the right to demand



compensation for the obligation to tolerate from owners of utility networks and utility works and thereby receive appropriate compensation for the restriction of their fundamental right. The same situation would exist after six months, unless the Legislature establishes new provisions during that period.

**55.** The Chamber holds that in this case it is nevertheless necessary to repeal the unconstitutional provisions pursuant to a procedure different from the usual procedure. In general, constitutional review judgments have retroactive force (see the Supreme Court *en banc* judgment of 10 March 2008 in court case no. 3-3-2-1-07, paragraph 19). However, the Supreme Court has held that it is possible to restrict the retroactive force of a judgment (ibid., paragraph 20 and section VI). Such prospective repeal may be justified based on, for example, the principle of legal certainty arising from § 10 of the Constitution. In this case § 15<sup>4</sup>(2) to (4) of the LPAIA and the part “in the amount established in § 15<sup>4</sup> of the Law of Property Act Implementation Act” of the first sentence of § 158<sup>2</sup>(1) of the LPA must be repealed prospectively (*ex nunc*) in the interests of legal certainty.

**56.** If the judgment entered into force retroactively, the owners of immovables encumbered with the obligation to tolerate who had not contested the amount of payment would have the right to demand greater compensation for the last three years (§ 158<sup>2</sup>(7) of the LPA). This would bring about extensive and unforeseeable financial obligations for owners of utility networks and utility works. In general, owners of utility networks and utility works are holders of fundamental rights. The retroactive force of this judgment would have an extensive negative side-effect on the fundamental rights of owners of utility networks and utility works with regard to the time already passed. The Act has so far restricted the obligations of owners of utility networks and utility works towards owners of immovables. The retroactive repeal of the restriction would be treacherous to them, i.e. it would harm their legitimate expectation. It must be noted that the extent of additional obligations accompanying the retroactive repeal of the restriction is unknown at present. It would probably only become clear as a result of numerous disputes in court. Therefore, the retroactive force of the judgment would cause a substantial lack of legal clarity. In conclusion, the unexpected extra costs, relating to the previous period, of providers of universal services may give rise to the need to increase to an unpredictable extent the price of universal services.

**57.** The Chamber holds that the need to avoid the consequences accompanying the negative side-effect outweighs the interference the rights of owners of immovables with regard to the time already passed.

**58.** The Chamber notes additionally that the objective of avoidance of upsurges in price, as part of the legitimate objective indicated by the Chancellor of Justice, is relevant and can be taken into account in establishing the new regulatory framework. If the Legislature establishes constitutional rules for compensation for the obligation to tolerate, it can also take into account the need to avoid an upsurge in price, which is in the public interest, and establish higher payments gradually.

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