

Case C-254/23

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

20 April 2023

Referring court:

Ustavno sodišče Republike Slovenije (Slovenia)

Date of the decision to refer:

13 April 2023

Petitioners for a review of constitutionality:

INTERZERO Trajnostne rešitve za svet brez odpadkov d.o.o.

Interzero Circular Solutions Europe GmbH

and Others

Surovina, družba za predelavo odpadkov d.o.o.

DINOS, družba za pripravo sekundarnih surovin d.o.o.

and Others

Other party to the proceedings:

Državni zbor Republike Slovenije

Subject matter of the main proceedings

Petitions for the initiation of proceedings for the review of the constitutionality of the Zakon o varstvu okolja (Law on environmental protection) to the extent that it governs the extended producer responsibility system and determines the transition period for the implementation of the new extended producer responsibility system; national legislation under which the collective fulfilment of the obligations flowing from extended producer responsibility ('extended producer responsibility obligations') must be carried out on a non-profit basis and by a single organisation ('the Organisation') and which prohibits capital links and family ties between the

Organisation and the contractors that collect or treat waste in the context of the extended producer responsibility system ('Contractors').

Subject matter and legal basis of the request for a preliminary ruling

Interpretation of EU law; Article 267 TFEU

Questions referred for a preliminary ruling

1. Must a legal person that has the exclusive right to carry out the collective fulfilment of extended producer responsibility obligations in respect of products of the same type within the territory of the Republic of Slovenia be regarded as an undertaking entrusted with the operation of a service of general economic interest, within the meaning of Article 106(2) of the Treaty on the Functioning of the European Union (read in the light of Article 14 TFEU, Protocol No 26 on services of general interest and Articles 8 and 8a of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain directives), where that activity includes:
 - the conclusion of contracts with the producers of certain products pursuant to which those producers entrust that legal person with the task of ensuring on their behalf the proper management of the waste resulting from those products;
 - the organisation of a system for the collection and treatment of waste (the conclusion of contracts with commercial companies to carry out, on the Organisation's behalf, the collection and proper treatment of all waste resulting from products to which extended producer responsibility applies), and
 - the keeping of a register of the products to which extended producer responsibility applies and which are placed on the market in the Republic of Slovenia, and the keeping of a register of the collected and treated waste resulting from the products to which extended producer responsibility applies, and the transmission of that data to the Ministry,and where that legal person is obliged, in order to carry out that activity, to conclude contracts both with producers having extended producer responsibility and with the commercial companies that will carry out the collection and treatment of waste?
2. Must Articles 16 and 17 of the Charter of Fundamental Rights of the European Union, Articles 49, 56 and 106 TFEU, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market and Articles 8 and 8a of Directive

2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain directives be interpreted as precluding legislation pursuant to which the collective fulfilment of extended producer responsibility obligations in respect of products of the same type may be carried out by only one legal person in the territory of the Member State and only on a non-profit-making basis, meaning that income must not exceed actual expenditure incurred in the collective fulfilment of the extended producer responsibility obligations and that the legal person in question must use any profits solely for carrying out its activities and implementing measures for the collective fulfilment of the extended producer responsibility obligations?

3. In the event that question 2 is answered in the negative, must Article 16 of the Charter of Fundamental Rights of the European Union, Articles 49, 56 and 106 TFEU, the principles of legal certainty and of the protection of legitimate interests and Articles 8 and 8a of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain directives be interpreted as precluding legislation by means of which a Member State changes the activity of the collective fulfilment of extended producer responsibility obligations in respect of products of the same type, transforming it from a regulated, market-oriented profit-making activity carried on by a number of economic operators into an activity that only one organisation is authorised to carry on and which must be carried out on a non-profit-making basis, as described in question 2?

4. Must the provisions of EU law referred to in question 3 be interpreted as precluding national legislation which, by reason of the entry into force of a new legislative framework for the collective fulfilment of extended producer responsibility obligations, results, by operation of law (*ex lege*), in interference in individual relationships such as to terminate all contracts concluded between the economic operators that carried on the collective fulfilment of extended producer responsibility obligations in accordance with the previous regime and the producers having extended producer responsibility obligations, and between the economic operators that carried on the collective fulfilment of extended producer responsibility obligations in accordance with the previous regime and the economic operators that collected and treated waste resulting from products in respect of which the collective fulfilment of extended producer responsibility obligations must be carried out?

5. In circumstances where new legislation as described in questions 3 and 4 is adopted, must the principles of legal certainty and of the protection of legitimate expectations be interpreted as requiring the legislature to establish a transition period and/or to introduce a system of compensation? If so, what criteria determine the reasonableness of the transition period or the system of compensation?

6. Must Article 16 of the Charter of Fundamental Rights of the European Union, Articles 49, 56 and 106 TFEU, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market and Articles 8 and 8a of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain directives be interpreted as precluding legislation pursuant to which producers that have extended producer responsibility obligations and place on the market 51% of the products of the same type to which the extended producer responsibility obligation applies are required to establish a legal person entrusted with the collective fulfilment of the extended producer responsibility obligations, and pursuant to which producers of products of the same type must, in the event that authorisation is withdrawn, establish such a legal person anew, or must the abovementioned provisions of EU law be interpreted as precluding rules pursuant to which only producers may hold a share in such legal person?

7. Must Article 16 of the Charter of Fundamental Rights of the European Union, Articles 49, 56 and 106 TFEU, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market and Articles 8 and 8a of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain directives be interpreted as precluding legislation pursuant to which producers that hold a share in the legal person that carries out the collective fulfilment of extended producer responsibility obligations may not be persons that carry on the collection or treatment of waste resulting from the products to which the collective fulfilment of extended producer responsibility obligations applies in that legal person?

8. Must Article 16 of the Charter of Fundamental Rights of the European Union, Articles 49, 56 and 106 TFEU, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market and Articles 8 and 8a of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain directives be interpreted as precluding legislation pursuant to which a producer that holds a share in the legal person that carries out the collective fulfilment of extended producer responsibility obligations and the legal person that carries on the collective fulfilment of extended producer responsibility obligations may not:

- have direct or indirect capital links with the person carrying on the collection or treatment of waste resulting from products to which the collective fulfilment of obligations applies in the legal person that carries on the collective fulfilment of extended producer responsibility obligations or have management or control rights in that legal person;
- have capital links or family ties with a person that holds or controls voting rights in the governing body or supervisory body of the legal

person referred to in the previous indent or with that legal person's representative?

9. Must Article 16 of the Charter of Fundamental Rights of the European Union, Articles 49, 56 and 106 TFEU, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market and Articles 8 and 8a of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain directives be interpreted as precluding legislation pursuant to which the restrictions mentioned in questions 7 and 8 apply equally to members of the governing body of the legal person that carries on the collective fulfilment of extended producer responsibility obligations, to members of the supervisory body of that legal person and to that legal person's representative?

10. Must Article 16 of the Charter of Fundamental Rights of the European Union and Articles 49 and 56 TFEU to be interpreted as precluding legislation pursuant to which producers that have extended producer responsibility obligations and place on the market products intended for household use must without exception conclude a contract under which they entrust the legal person that has the authorisation to carry on the collective fulfilment of extended producer responsibility obligations with the task of fulfilling their obligations flowing from extended producer responsibility?

Provisions of EU law relied on

Articles 14, 49, 56 and 106 TFEU

Protocol No 26 to the TFEU on services of general interest

Charter of Fundamental Rights of the European Union ('the Charter'), Articles 16 and 17

Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain directives, as last amended by Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC on waste, ('the Framework Directive on Waste'), in particular, Articles 8 and 8a

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market ('the Services Directive').

Provisions of national law relied on

Constitution of the Republic of Slovenia ('the Slovenian Constitution')

Zakon o varstvu okolja (Law on the protection of the environment; 'the ZVO-2')

Succinct presentation of the facts and procedure in the main proceedings

- 1 Two petitions have been lodged with the Ustavno sodišče (Constitutional Court, Slovenia) for the initiation of proceedings for the review of the constitutionality of the ZVO-2 to the extent that it governs the system of extended producer responsibility ('the EPR') and determines the transition period for the implementation of the new EPR system. The present case is thus a procedure for verifying the constitutionality of a law or, more precisely, certain provisions of the ZVO-2, that was initiated by petitioners. It is not, therefore, a procedure arising out of proceedings brought by applicants before an ordinary court.
- 2 One petition for a review of constitutionality was lodged by certain commercial companies that manufacture products to which the EPR applies (producers), certain economic operators that, pursuant to environmental authorisations ('EAs') and decisions approving joint projects, carry out the collective fulfilment of the EPR obligations flowing from the Zakon o varstvu okolja (Law on the protection of the environment; 'the ZVO-1') ('ZVO-1 operators') and a commercial company that is established in another Member State of the European Union and holds a business share as a ZVO-1 operator and carries on the economic activity of waste management. The other petition was lodged by commercial companies that are both ZVO-1 operators and holders of an EA for the economic activity of waste management, together with commercial companies that are producers subject to the EPR and at the same time holders of an EA for carrying on the economic activity of waste management.

The essential arguments of the parties in the main proceedings

- 3 The petitioners base their challenge to the provisions at issue partly on EU law directly and partly on provisions of the Slovenian Constitution.
- 4 The petitioners maintain that the contested provisions of the ZVO-2 conflict with Articles 2, 3.a, 14, 33 and 74 of the Slovenian Constitution, Articles 16 and 17 of the Charter and Article 1 of the First Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms. They allege that the contested provisions of the ZVO-2 also conflict with Articles 49, 56, 102 and 106 TFEU, European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, as last amended by Directive (EU) 2018/852 of the European Parliament and of the Council of 30 May 2018 amending Directive 94/62/EC on packaging and packaging waste, and the Framework Directive on Waste. The petitioners also maintain that the legislative framework at issue conflicts with the Services Directive and Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services.
- 5 The petitioners maintain that the legislation at issue is contrary to the Slovenian Constitution and the TFEU in that the legislature has transformed an economic

activity oriented toward the market into an activity outside the market. The change in the nature of the activity, from a market-oriented economic activity to a non-profit-making activity, is a restriction of the market of the highest degree. The legislature has also infringed the rights mentioned by establishing that only one entity may carry on the collective fulfilment of the obligations flowing from the EPR, namely the Organisation.

- 6 The contested legislation imposes an undue restriction on freedom of establishment and the freedom to provide services. By means of the contested legislation, the State has raised insurmountable barriers to entry into the market for the collective fulfilment of the obligations flowing from the EPR. The legislation in question, a State measure, creates unequal opportunities for economic operators and distorts competition.
- 7 The contested legislation runs counter to the right to private property, in that it restricts capital holdings in the Organisation and determines how profits are to be used. The petitioners also maintain that the contested legislation has undermined their legal expectations and breaches the principle of preserving confidence in legal rules. The entry into force of the contested legislation would mean that the petitioners that are ZVO-1 operators would have to cease their activities. The detriment to their position was unexpected. The legislature had no objective reason based on any overriding public interest to adopt such legislation.
- 8 The petitioners further maintain that truly free competition in the market for the collective fulfilment of EPR obligations enabled substantial cost reductions to be achieved in packaging waste management. They cite, as an example, the regime in the Federal Republic of Germany, where the abolition of the monopoly is expected to stimulate new investment in infrastructure and reduce operating costs, while improving recycling rates.
- 9 The petitioners also take issue with the rules that distinguish between the producers that will establish the Organisation and producers that will merely conclude a contract with the Organisation. They emphasise that the representatives of the two groups of producers compete with each other in the products market. The contested legislation will mean that one group of producers will be obliged to conclude a contract with the Organisation, which will be owned by their competitors in the market. The petitioners maintain that the rules laid down in the ZVO-2 that extend the restrictions on capital links beyond what is absolutely necessary in order to eliminate conflicts of interests make it impossible for some of them to pursue their activity of collectively fulfilling EPR obligations. That overly broad restriction of capital links is, they argue, disproportionate and excessive.
- 10 The Državni zbor (the National Assembly of Slovenia) has not responded to the petition for a review of constitutionality.

- 11 The Government of the Republic of Slovenia has submitted observations on the petition for a review of constitutionality. It maintains that the Framework Directive on Waste laid down minimum requirements for EPR systems that had to be transposed into domestic law. It was therefore necessary to recast the EPR entirely within the Slovenian legal system. By means of the ZVO-2, appropriate and legitimate measures were adopted in order to transpose the obligations laid down in the Framework Directive on Waste. The aim of the EPR system and the purpose of introducing EPR obligations was to ensure efficacy in the separate collection of waste, to raise awareness and to inform people of the importance of waste prevention and about the re-use and disposal of waste, to change the behavioural habits of all those involved in the use of products and to ensure that waste from products is properly managed across the country. The economic efficiency of the EPR system was therefore an entirely secondary consideration to the fulfilment of EPR obligations. Product manufacturers are responsible for compliance with the environmental aspects associated with products throughout their entire life cycle (from design to management at the point where they become waste).
- 12 According to the Slovenian Government, the Framework Directive on Waste permits both EPR systems in which the collective fulfilment of EPR obligations is carried out by a single organisation and EPR systems in which that activity is carried out by several organisations. A centralised system with a single organisation has reportedly been introduced in various Member States, for example the Czech Republic and the Republic of Estonia. In the Slovenian Government's opinion, competition between organisations does not improve the efficiency of the EPR system, as is clear from the rules in the Czech Republic. The Slovenian Government disputes the petitioners' assertion that the EPR system under the ZVO-2 entails the introduction of a monopolistic system that impinges on economic freedom. It is more important to the effectiveness of the EPR system that the State ensure the transparency of the organisation's activities and the absence of distortions of competition in the market for waste management than the fact that the collective fulfilment of EPR obligations is carried out by a single organisation. The Slovenian Government maintains that it is precisely by having only one organisation that the EPR system is sure to be most effective.
- 13 In the Slovenian Government's opinion, the key role in the functioning of the EPR system falls to the producers. A comparative analysis of foreign regulations shows that EPR systems in which the producers themselves set up, operate and own the system are the most efficient in economic and environmental terms. The EPR systems will help to change the behaviour of producers in such a way that their activities generate the least possible amount of waste or in such a way that waste is as amenable as possible to re-use. The responsibility of producers goes beyond the mere obligation to pay the costs of ensuring that EPR obligations are fulfilled and extends to the actual implementation of the prescribed management of waste and the assumption of obligations and liabilities throughout the entire life cycle of their products. It is for this reason that there must be a link between producers and

the Organisation, so that the Organisation is able to ensure, on behalf of and for the account of producers, the proper management of waste.

- 14 The Slovenian Government emphasises that, in introducing the EPR system and in regulating the operation of the Organisation, it is necessary to avert the risk of distortions of competition in the waste management market. The prohibition on waste management being carried out by the Organisation and the prohibition on the Organisation's having capital links or family ties with producers should also ensure that the Organisation's sole function is to fulfil EPR obligations and should prevent distortions of competition in the waste management market.
- 15 In the course of the proceedings, the Constitutional Court has taken the opinion of the Ministrstvo za okolje, podnebje in energijo (Ministry of the Environment, Climate and Energy; 'the Ministry'). The Ministry has clarified that the aim of the ZVO-2 is to preserve the environment and to protect nature and also to transpose the obligations imposed by a number of directives into Slovenian law. The Ministry maintains that the contested provisions entail no constitutionally unlawful tampering with the rights acquired by the petitioners. The Ministry asserts that it was necessary to modify the EPR system in order to comply with the minimum requirements laid down by the Framework Directive on Waste, for which reason the petitioners' complaint that the amendment of the legislative framework was unforeseeable is without merit. The objectives pursued by the legislation justify interference in economic freedom and with the right to private property. The Ministry maintains that the rule governing the EPR system that provides for a single organisation is necessary and that it would not be possible to attain the objectives pursued by the modification of the system by means of less intrusive measures. The implementation of the EPR system cannot take second place to the generation of profits. The collective fulfilment of EPR obligations is not, in the Ministry's opinion, an activity that can be freely carried on in the market or one that any party can engage in on account of its own commercial interests. The Ministry maintains that the contested provisions do not restrict freedom of establishment or the freedom to provide services. Waste management is a service of general economic interest ('SGEI') to which the Services Directive applies along with the rules on the internal market and competition. However, it is permissible to depart from those rules where it is necessary to do so in order for citizens to continue to have access to basic services. By means of the restrictions on capital links and family ties between producers having a holding in the Organisation and the Organisation itself, on the one hand, and Contractors, on the other, competition in the market for waste management is preserved and ensured.

Succinct presentation of the reasoning in the reference for a preliminary ruling

- 16 The petitioners argue that the legislative provisions at issue are unconstitutional, inter alia, on the basis of EU law. In other words, they maintain that those provisions are contrary not only to the Slovenian Constitution, but also to EU law.

The petitioners' reference to EU law cannot be regarded as merely general, nor can it be said that it is irrelevant for the purposes of the present proceedings for a review of constitutionality. The Constitutional Court takes the view that the interpretation of EU law is indispensable for the purposes of the decision in this case. The Constitutional Court is indeed bound by the claims put forward by the petitioners, but is not bound by their legal characterisation in the petition for a review of constitutionality. Therefore, the Constitutional Court may, of its own initiative, find other provisions of EU law and of the Slovenian Constitution to be relevant.

17 The referring court states that interpretation of Articles 16 and 17 of the Charter, Articles 49, 56 and 106 TFEU, the Services Directive and Articles 8 and 8a of the Framework Directive on Waste will be decisive in the assessment of legislation:

- (i) pursuant to which the Organisation must be established solely by producers that have EPR obligations and place on the market 51% of the products of the same type to which the EPR obligation applies, and pursuant to which those producers must, in the event that authorisation is withdrawn, establish such an organisation anew;
- (ii) pursuant to which the collective fulfilment of EPR obligations may be carried out by only one organisation that, by means of a special authorisation, has been granted the exclusive right to carry on that activity;
- (iii) pursuant to which the Organisation must fulfil the EPR obligations on a non-profit-making basis, and
- (iv) that prohibits capital links and family ties between the Organisation and Contractors and prohibits such links and ties between members of the Organisation's governing body or supervisory body or its representative and Contractors,

bearing in mind that the petitioners claim that those measures undermine the freedom to conduct a business (Article 16 of the Charter), the right to property (Article 17 of the Charter), freedom of establishment (Article 49 TFEU) and the freedom to provide services (Article 56 TFEU) and infringe the Services Directive and Articles 8 and 8a of the Framework Directive on Waste.

18 The interpretation of Article 106 TFEU will also be decisive for the purposes of the assessment if a Member State claims that waste management is an SGEI, and the petitioners maintain that the conferral upon the Organisation of the exclusive right to carry on the collective fulfilment of EPR obligations is contrary to Article 106 TFEU, read together with Article 102 TFEU.

19 Similarly, interpretation of the principles of legal certainty and of the protection of legitimate expectations will be essential for the purposes of the decision. Indeed, the petitioners maintain that, by modifying the EPR system, the legislature has

arbitrarily and unexpectedly undermined their acquired right to carry on the collective fulfilment of EPR obligations.

- 20 The interpretation of the abovementioned rules of EU law will be essential in assessing whether the contested provisions of the ZVO-2 are consistent with the Slovenian Constitution because of the particular way in which EU law becomes part of the Republic of Slovenia's legal system, which the Constitutional Court must also take into consideration in the present proceedings for reviewing the constitutionality of the provisions of the ZVO-2. When assessing regulations that implement EU law, the Constitutional Court must, in accordance with the Slovenian Constitution also, take into consideration primary and secondary EU legislation as well as the case-law of the Court of Justice. In its ruling on the present petition for a review of constitutionality, the Constitutional Court will also have to assess the petitioners' arguments concerning the content and meaning of certain provisions of EU law, and assess their merits. Those rules of EU law, as well as other rules of EU law to which the petitioners do not expressly refer, appear to be decisively related, in terms of their content, to the subject matter of the decision, which is to say the question of the constitutionality of the contested provisions of the ZVO-2. In assessing the petitioners' arguments, the Constitutional Court will have to take the abovementioned rules into account in its interpretation of the disputed legislation and of the Slovenian Constitution.

The reasons for the questions referred for a preliminary ruling

- 21 The questions referred for a preliminary ruling may be divided into four groups. The first group (comprising the first and second questions) concerns the issue of whether the collective fulfilment of EPR obligations may be classified as an SGEI. The second group of questions (comprising the third, fourth and fifth questions) concerns the lawfulness of the change in the legal regime of the EPR system and the previous regimes. The third group (comprising the sixth, seventh, eighth and ninth questions) concerns the assessment of the consistency with the TFEU and the Services Directive of the statutory provisions governing the holding of shares in the Organisation. The fourth group (the tenth question) concerns contractual autonomy.

The first question

- 22 According to Article 1 of Protocol No 26 on services of general interest, the Member States enjoy a broad discretion in providing, commissioning and organising SGEIs as closely as possible to the needs of users. The Member States can, therefore, while complying with EU law, define the scope of their own SGEIs and how they are organised, in particular, taking their own national policy objectives into account. In this context, the Member States have a broad discretion which the European Commission may challenge only in cases of manifest error. In accordance with the case-law of the Court of Justice, a service will be one of

general economic interest if the activity in question is of particular importance by comparison with other economic activities.

- 23 Since the Court of Justice has not yet ruled on the question of whether the collective fulfilment of EPR obligations may be defined, from the perspective of EU law, as an SGEI, the Constitutional Court raises this first question, aware of the fact that, ultimately, it will be for it, as the referring court, to decide whether the tasks in question are associated with an SGEI.
- 24 It is apparent from the contested legislative framework that the Organisation will be the only body entitled to carry on the collective fulfilment of EPR obligations in respect of products of the same type. That is clear both from the ZVO-2 and from the authorisation which, under the ZVO-2, the Organisation must obtain in order to carry on that activity. The Organisation will therefore be granted the exclusive right to carry on the collective fulfilment of EPR obligations in relation to products of the same type, an activity which the Constitutional Court considers to be an economic activity. The Organisation concludes contracts with producers under which it undertakes to fulfil, on their behalf, the EPR obligations and receives appropriate remuneration for doing so. This is therefore an offer of services supplied for consideration. Given that, it does not matter whether or not the offeror of the services aims to make a profit. Thus, even though the Organisation is required to operate on a non-profit basis, that can have no influence on the definition of the nature of the activity in question.
- 25 The Services Directive established, in Article 17(1)(e) thereof, that waste management in a Member State may be defined as an SGEI, provided that the criteria mentioned in recital 70 of the directive are met. In addition, it is apparent from the Court of Justice's case-law to date that the Court has acknowledged the existence of SGEIs in various areas of waste management, such as the collection of building waste, the disposal or incineration of waste, including hazardous waste, and the disposal and treatment of household refuse. Moreover, recital 24 of Directive 2018/851 states that public authorities too may be responsible for organising the operational aspects of managing waste from products that are subject to EPR systems, which suggests that it is *a fortiori* possible to describe a system for the collective fulfilment of EPR obligations as an SGEI.
- 26 The Constitutional Court considers that the Organisation has been entrusted with an SGEI within the meaning of Article 106(2) TFEU. In Slovenian law there is no definition of SGEIs, although there is the widely used concept of public services of an economic nature, which are not necessarily the same thing as SGEIs. Public services of an economic nature are activities by means of which certain material goods, such as products and services, are guaranteed the continuous and regular supply of which is in the public interest. That public interest is reflected in the fact that public needs are satisfied whenever and to the extent that the products or services in question cannot be guaranteed in the market, and in the fact that, in ensuring the supply of these goods or services, making a profit takes second place to the satisfaction of public needs.

- 27 The present case is different. Although the characteristics of the regime for the collective fulfilment of EPR obligations (for example, the absence of a profit-making objective, open access for all producers) might suggest that the legislature intended to institute a public service of an economic nature, that expression is never used in the ZVO-2.
- 28 According to the settled case-law of the Court of Justice, the State's intervention on the market, in the sense of its intervention in the functioning of the market, admittedly impedes the creation of a market open to competition. However, such intervention may be lawful if three conditions are satisfied. First, the intervention must be intended to achieve general economic interest objectives; secondly, the principle of proportionality must be observed; thirdly, the public service obligations established as a result of the State's intervention must be clearly defined, unambiguous, non-discriminatory and verifiable.
- 29 In the settled case-law of the Court of Justice, environmental protection and health protection are recognised as overriding reasons of general interest, including where waste management issues are involved. Given that, the Constitutional Court considers that the designation of the collective fulfilment of EPR obligations as a special task of public interest is in the general (economic) interest. The Court of Justice has not yet ruled on the question of what circumstances must be taken into account in defining the collective fulfilment of EPR obligations as an SGEI for the purpose of assessing whether the application of the TFEU rules would impede, in fact or in law, the performance of that activity or prevent the Organisation from carrying out the specific tasks assigned to it, or whether the maintenance of such rights is necessary to enable the Organisation to carry out SGEI tasks under economically acceptable conditions.
- 30 The Constitutional Court considers that a measure designating the activity of collective fulfilment of EPR obligations as a special task in the public interest could ensure the attainment of the general economic interest objective pursued. In order for it to comply with the principle of proportionality, the State's intervention must be confined to what is necessary in order to attain the objective pursued. For that reason, the necessity of the measure adopted must be verified regularly. It is apparent from the contested legislation that, for the grant of an exclusive right to the Organisation, no limit on the duration of the obligation to carry on the collective fulfilment of EPR obligations is specified, and so the Constitutional Court considers that obligation to be a permanent one. The method used must not go beyond what is necessary in order to attain the general economic interest objective pursued. Restrictions of competition, to the detriment of other economic operators, must be permitted if they are necessary in order to enable an undertaking entrusted with a task of general importance to carry out that task. In that context, consideration must be given to the economic conditions under which the undertaking operates and, in particular, the costs it must bear, as well as the legislation that applies to it, and specifically environmental legislation. The Constitutional Court therefore wonders what circumstances it should take into account in assessing whether the method of intervention used does not go beyond

what is necessary to attain the general economic interest objectives pursued, and whether there are no less restrictive measures.

The second question

- 31 The Constitutional Court takes the view that the national legislation at issue falls within the scope of Articles 16 and 17 of the Charter, Articles 49, 56 and 106 TFEU, the Services Directive and the Framework Directive on Waste. In light of the Court of Justice’s case-law, the Constitutional Court considers that national legislation under which exclusive rights to carry on an economic activity are conferred on a single private or public operator constitutes a restriction of freedom of establishment (Article 49 TFEU) and the freedom to provide services (Article 56 TFEU). The Court’s case-law also suggests that national legislation of this kind also constitutes a restriction of the freedom to conduct a business enshrined in Article 16 of the Charter. Similarly, such national legislation could be responsive to the requirements mentioned in Article 15(2)(d) of the Services Directive. Even if the collective fulfilment of EPR obligations is defined as an SG EI, account will still have to be taken of the Services Directive, in connection with freedom of establishment.
- 32 It does not appear from its case-law that the Court of Justice has yet addressed the question of whether the fact that an activity must be carried out on a non-profit-making basis, such that income does not exceed actual expenditure incurred in carrying out the activity and any profits are used solely for the pursuit of certain objectives, constitutes a restriction on the freedom to conduct a business (Article 16 of the Charter), freedom of establishment (Article 49 TFEU) and the freedom to provide services (Article 56 TFEU).
- 33 Although it will be for the Constitutional Court to decide, in the proceedings for a review of constitutionality, whether the restrictions in national law are appropriate to the attainment of the objective pursued and whether they do not go beyond what is necessary in order to attain that objective, it is nevertheless for the Court of Justice, on the basis of the information available, to provide the Constitutional Court with the guidance necessary for that purpose, with reference to EU law. It is apparent from the case-law that the Court of Justice has already delivered various judgments ruling on the conditions that must be satisfied, by virtue of Article 16 of the Charter, Articles 49 and 56 TFEU and Article 15(3) of the Services Directive, in order to justify national measures that could impede the exercise of freedom of establishment or the freedom to provide services. However, there are no rulings to be found in the Court’s case-law specifically concerning the collective fulfilment of EPR obligations.
- 34 The question arises of whether the contested measures are capable of ensuring the attainment of the objective pursued. Although legislation may, in principle, achieve a general interest objective, it is also necessary for it to pursue that objective coherently. Indeed, according to the Court’s case-law, national legislation is appropriate to ensuring the attainment of a stated objective only if it

genuinely reflects a concern to attain that objective in a consistent and systematic manner. The Constitutional Court therefore wonders what circumstances it should take into account in assessing whether the legislation, pursuant to which the collective fulfilment of EPR obligations must be carried out on a non-profit basis by a single organisation, is capable of ensuring in a consistent manner the attainment of the abovementioned general interest objectives.

- 35 There is also the question of whether the restriction satisfies the condition relating to the existence of less restrictive national measures by means of which the desired objective might be attained. The Court of Justice has not yet ruled on the question of what circumstances might justify the need for restrictions that could impede or make less attractive the collective fulfilment of EPR obligations.

The third, fourth and fifth questions

- 36 By means of the rules laid down in the ZVO-2, the legislature has substantially altered the EPR system. With those rules it has also significantly affected the positions of all the parties that participate in that system. The collective fulfilment of EPR obligations has been transformed from a normal market activity into an activity that only one organisation is allowed to carry out, and only on a non-profit-making basis. That means that some ZVO-1 operators that have been carrying out the collective fulfilment of EPR obligations on the basis of an EA or an open-ended decision approving a collective project will no longer be able to carry on that activity. Account must also be taken of the fact that all the contracts that ZVO-1 operators concluded with producers and Contractors will be terminated *ex lege*. It must also be noted that the legislature only altered the conditions under which the collective fulfilment of EPR obligations is carried out; it did not alter the conditions for the performance of the economic activity of waste management.
- 37 The Constitutional Court considers that the national legislation, which transforms an activity that has been carried on in the market with the aim of making a profit into a non-profit-making activity that only one organisation is authorised to carry on throughout the national territory, and which makes it impossible for the current providers of the service in question to continue to do so, constitutes a restriction of the freedom to conduct a business enshrined in Article 16 of the Charter and of the freedoms referred to in Articles 49 and 56 TFEU. However, in addition to that, such a situation is also protected by the principle of legal certainty, the corollary of which is the principle of the protection of legitimate expectations, which requires, in particular, that legal rules be clear and precise and have foreseeable effects, especially when they might have adverse consequences for individuals or undertakings. According to the case-law of the Court of Justice, the principle of the protection of legitimate expectations may be invoked by any economic operator that a national body has caused to entertain legitimate expectations. Nevertheless, where a prudent and circumspect economic operator could have foreseen the adoption of a measure likely to affect its interests, that principle cannot be invoked if the measure is adopted.

- 38 The Constitutional Court does not agree with the petitioners' claim that the modification of the EPR system described above is in no way lawful from the perspective of Article 16 of the Charter and Articles 49 and 56 TFEU. It is clear from the case-law of the Court of Justice that an economic operator may not assume that there will be no changes in the law of any type and may solely contest the manner in which such changes are implemented. That case-law also shows that contracting parties are free to define, subject to the observance of mandatory and public policy provisions, the content of their legal relationships, including the consequences flowing from termination or a failure to fulfil respective obligations.
- 39 The Constitutional Court considers that the amendment of the legislation – by virtue of which the conditions under which the collective fulfilment of EPR obligations is carried on are significantly altered, while at the same time existing EAs and decisions approving joint projects cease to be valid, along with the contracts concluded between ZVO-1 operators and producers and between ZVO-I operators and Contractors – is lawful if it is necessitated by overriding reasons in the public interest. However, any amendment of the legislative framework calls for either a transitional regime of reasonable duration or a system of reasonable compensation.
- 40 The principle of legal certainty does not prohibit changes in the law, but does require the legislature to take account of the particular situation of economic operators and provide, where necessary, for adaptation to the application of the new legal rules. The Court of Justice has indeed held, with reference to producers and distributors, that, when an existing system for the management of packaging waste is modified, a reasonable transition period must be ensured, so that producers and distributors can adapt, and so that, when the packaging waste management system is modified, every producer and distributor can actually participate in the operational system. Similarly, the Court has already clarified that, when a national legislature revokes authorisations which enable the holder to carry on an economic activity, it must allow those parties either a sufficiently long transition period in which to adapt or a system of reasonable compensation. However, there are conflicting opinions in the Court's case-law and, in certain circumstances, a transition period has not been regarded as necessary. The Court has held that, although the principle of the protection of legitimate expectation is one of the fundamental principles of EU law, economic operators can have no justified expectations regarding the preservation of an existing situation, which may be altered by the EU institutions or by the national authorities exercising their own discretionary powers, in particular in connection with the functioning of the market, which is constantly adapting to changes in economic relations. Moreover, a prudent and circumspect economic operator may not, on every occasion that it is able to foresee the adoption of an EU measure or a national measure likely to affect its interests, invoke that principle in the event that the measure in question is adopted.
- 41 As regards the transition period, the Court has already held that, even if the EU has previously created a situation capable of giving rise to legitimate expectations,

which is to say, whenever an EU body gives precise, unconditional and consistent assurances originating from authorised and reliable sources, an overriding public interest may preclude transitional measures from being adopted in respect of situations which arose before the new rules came into force but which are still subject to change. Given that, the Constitutional Court wonders whether, in the circumstances described in the order for reference, a transition period is really necessary and, if it is, what criteria determine the reasonableness of the transition period or of a system of compensation.

The sixth question

- 42 The Constitutional Court does not believe that the Court of Justice has yet ruled on the question of whether national legislation pursuant to which producers must establish an organisation and only producers may hold a share in that organisation constitutes a restriction of the freedom to conduct a business (Article 16 of the Charter), of freedom of establishment (Article 49 TFEU) and of the freedom to provide services (Article 56 TFEU). If it is held that such a measure does constitute a restriction of the freedom to conduct a business, of freedom of establishment and of the freedom to provide services, then the Constitutional Court will have to address the question of whether the measure can be justified.
- 43 The next question that arises is whether such a restriction is capable of ensuring the attainment of the objective pursued. Measures whereby a Member State restricts the ownership of an undertaking, because of a belief that there is a risk that persons who are not producers might influence the organisation's management, in such a way that it adopts economic strategies that could imperil the objective of ensuring high quality management of waste resulting from products to which EPR obligations apply and would reduce management costs, could probably be appropriate measures for attaining the objective of an EPR system that operates effectively.
- 44 Then there is the question of whether the restriction satisfies the condition relating to the existence of less restrictive national measures by means of which the desired objective might be attained. Since the Court of Justice has not yet ruled on the question of what circumstances might necessitate restrictions that could impede or make less attractive the collective fulfilment of EPR obligations, the Constitutional Court raises that question.

The seventh, eighth and ninth questions

- 45 The Constitutional Court wonders whether legislation that establishes the characteristics that must be possessed by producers holding a share in the Organisation, members of the Organisation's governing body, members of its supervisory body and its representatives could constitute a restriction of the freedom to conduct a business (Article 16 of the Charter), of freedom of establishment (Article 49 TFEU) and of the freedom to provide services (Article 56 TFEU). The Constitutional Court considers that such national

legislation could be responsive to the requirements mentioned in Article 15(2)(c) of the Services Directive.

- 46 The contested legislation also affects the position in the Organisation of producers that have EPR obligations and at the same time also carry on the collection or treatment of waste resulting from products to which the collective fulfilment of EPR obligations applies. Such producers will not be able to hold a share in the Organisation and may only have the status of producers that join an organisation that has already been set up, by concluding a contract with it. That in effect means, inter alia, that a producer that has EPR obligations in connection with packaging waste and is also engaged in the collection or treatment of such waste may not hold a share in the organisation that carries out the collective fulfilment of EPR obligations.
- 47 The Constitutional Court does not believe that the Court of Justice has yet ruled on the question of whether legislation as described in the previous paragraph constitutes a restriction of the freedom to conduct a business (Article 16 of the Charter), of freedom of establishment (Article 49 TFEU) and of the freedom to provide services (Article 56 TFEU). The Constitutional Court considers that such national legislation could reflect a requirement as contemplated by Article 15(2)(c) of the Services Directive.
- 48 If it is held that the measure in question does constitute a restriction of the freedom to conduct a business, freedom of establishment and the freedom to provide services, or reflects requirements referred to in Article 15(2) of the Services Directive, the Constitutional Court wonders whether such national measures, which might impede the exercise of the freedoms referred to in Articles 49 and 56 TFEU or make the exercise of those rights less interesting, fulfil the necessary conditions to be regarded as justified.
- 49 The question also arises of whether the restrictions in question could be directly or indirectly discriminatory. The Constitutional Court considers that the requirements at issue are neither directly nor indirectly discriminatory, since the requirements that apply to producers that are shareholders, to members of the Organisation's governing body or supervisory body and to the Organisation's representatives apply regardless of the location of the registered office or the nationality of the person in question. The Constitutional Court does not, therefore, consider that the requirements are discriminatory within the meaning of Article 15(3)(a) of the Services Directive.
- 50 The next question is whether the restrictions are capable of ensuring the attainment of the objective pursued. The Constitutional Court is of the opinion that a measure whereby a Member State restricts reciprocal relationships between an organisation, its shareholders, its governing bodies and contractors could be appropriate for attaining the objective of reducing conflicts of interests between those parties in the interests of environmental protection and the protection of competition.

- 51 The last question is whether the restrictions satisfy the condition relating to the existence of less restrictive national measures by means of which the desired objective could be attained. The Constitutional Court raises this question because the Court of Justice has not yet addressed the issue of what circumstances might necessitate restrictions that could impede or make less attractive the collective fulfilment of EPR obligations.

The tenth question

- 52 It is clear from the contested legislation that producers that have EPR obligations and place on the market products intended for household use must without exception conclude a contract under which they entrust the legal person that holds the authorisation to carry on the collective fulfilment of EPR obligations (the Organisation) with the task of fulfilling their EPR obligations. Thus, the law compels them to conclude a contract. If they fail to conclude such a contract, they risk a fine of between EUR 40 000 and EUR 75 000. The Constitutional Court therefore considers that the imposition of an obligation to conclude a contract constitutes a substantial interference with the freedom to conclude contracts which, in principle, economic operators enjoy. Indeed, having regard to the Court's position, the contractual freedom of producers is so diminished that this restriction could undermine the very substance of their right to free economic initiative. The Constitutional Court therefore raises the question of whether this restriction is consistent with EU law.
- 53 The next question is whether the restrictions of freedom of establishment, of the freedom to provide services and of freedom of economic initiative caused by the contested legislation can be justified on grounds of general (economic) interest, that is to say, reasons relating to the protection of the environment.
- 54 54 As stated, the contractual freedom of producers is so diminished that the restriction in question could undermine the very substance of their right to freedom of economic initiative. However, it should be noted that the obligation of collective fulfilment of EPR obligations applies only to products subject to EPR that are intended for household use, while for other products subject to EPR that are not intended for household use the ZVO-2 permits the fulfilment of EPR obligations to be carried out autonomously. For this reason, the Constitutional Court considers that the legislation should probably not be regarded as undermining the very substance of the freedom of economic initiative. The Constitutional Court therefore wonders at what point it is possible to consider that contractual freedom is so compromised that the restriction in question undermines the very essence of the right to freedom of economic initiative.