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Senko Pličanič, PhD¹
Professor at Faculty of Law, University of Ljubljana, Slovenia

PACKAGING WASTE MANAGEMENT IN SLOVENIA: CONSTITUTIONALITY OF CURRENT LEGISLATION

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In this paper, the legal regulation of packaging waste treatment in Slovenia is analyzed, in particular the legal position of packaging waste management company. For them the main question in regard of legal regulation of waste packaging treatment is what is the extent of their obligation: are they obliged to pick up all the packaging waste from the public services providers, even though that exceeds the quantity of packaging waste put on market by packaging waste management company.

Key words: *packaging waste, packaging waste management company*

1. BACKGROUND AND OBJECTIVES OF THE ARTICLE

1.1. Introduction

The law regulates the packaging waste management in the context of broader regulation of waste management. The regulation is based on the extended producer responsibility principle.² Proper (sustainable, therefore, environmentally sustainable) waste management, especially product processing, is one of the principal sustainable development goals. This is a specific area within the broader sustainable model, the so-called circular economy.³ The industry has grown into a multi-billion dollar industry globally (Brezavšek, 2019, p. 95).

1.2. European Union law

In the EU, proper waste management is one of the top priorities within the circular economy.⁴ The basis for the system of extended producer responsibility is laid down in the Treaty on the Functioning of the European Union (TFEU), which stipulates,

¹ Senko Pličanič, PhD, senko.plicanic@pf.uni-lj.si, +386 41 637 554

² Some authors see this principle and its implementation as one of the key tools for achieving sustainable development. Cf. Kibert (2018, pp. 503 et seq).

³ It is evolving into a new sustainable paradigm. Cf. Geissdoerfer, Savaget, Boden & Hultink (2017, pp. 757–768).

⁴ See in more detail, European Commission (2020).

inter alia, in Article 191, that environmental policy shall be based on the principle that the polluter should pay. The concept of extended producer responsibility is, therefore, the systematic implementation of the principle that the polluter should pay. The principle of extended producer responsibility was implemented by Directive 2008/98/EC on waste, and the extended producer responsibility system is analysed in detail in the OECD (2016) and the European Commission guidelines (2014).

EU law relating to the packaging waste management consists of:

- European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste;
- Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives; and
- Draft Directive of the European Parliament and of the Council amending Directive 2008/98/EC on waste, Directive 94/62/EC on packaging and packaging waste, Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste, Directive 2000/53/EC on end-of-life vehicles, Directive 2006/66/EC on batteries and accumulators and waste batteries and accumulators and Directive 2012/19/EU on waste electrical and electronic equipment.

Directive 94/62/EC on packaging and packaging waste regulates the collection of packaging waste in Article 7, the essence of which is to require the Member States to set up and regulate appropriate systems to facilitate the return, collection and processing of packaging waste.

Directive 2008/98/EC of the European Parliament and of the Council on waste does not have specific provisions for the collection of packaging waste but sets out the rules of conduct for all waste in general.

Draft Directive of the European Parliament and of the Council amending Directive 2008/98/EC on waste, Directive 94/62/EC on packaging and packaging waste, Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste, Directive 2000/53/EC on end-of-life vehicles, Directive 2006/66/EC on batteries and accumulators and waste batteries and accumulators and Directive 2012/19/EU on waste electrical and electronic equipment has no specific provisions relating to the collection of municipal packaging waste or to the obligation of packaging waste management company (PWMC) to collect from the providers of municipal waste management services also municipal packaging waste for which they do not receive packaging fee.

These directives, as is usual for directives as one of two types of EU legal instruments (the other is regulation),⁵ do not contain any provisions governing the manner in which the packaging waste is collected. This is left to the Member States. Slovenia has transposed the requirements of the directives listed above regarding the packaging waste management, *inter alia*, in the Decree on Packaging and Packaging

⁵ A directive is a legislative act on a specific aim that EU Member States must achieve, but each state itself sets its own rules on how that aim will be achieved. This Regulation is a legally binding instrument and is in its entirety directly applicable in all Member States.

Waste Management,⁶ whereby its Article 39 (if interpreted as such) completely autonomously (without being bound by any of the directives mentioned above) prescribes the obligation of PWTCs to collect the municipal packaging waste from public utility providers for which they do not receive packaging fee. As elaborated in this article, I do not agree with such interpretation of the Decree.

1.3. Slovenian law

In Slovenia, the system of packaging waste management is based on the principles of extended producer responsibility or the polluter pays principle (Article 10 of the Environmental Protection Act – ZVO-1).⁷ Pursuant to the Decree on Packaging and Packaging Waste Management, the reporting agents introducing into circulation (placing on the market) more than 15 tonnes of packaging annually are obliged to ensure the packaging waste management, which is usually accomplished by contracting a PWMC with an environmental permit. These entities are also under obligation for payment of the environmental tax. The packaging waste management system deviates significantly from this principle due to the rule that packaging waste management does not have to be provided by those sources or entities who introduce into circulation less than 15 tonnes of packaging a year ('small sources'). These entities are also exempt from the obligation to pay the environmental tax.

PWMCs provide services to their customers (entities who introduce into circulation more than 15 tonnes of packaging per year) by receiving non-municipal packaging waste from their customers and receiving municipal packaging waste from public utility providers (*Snaga Ltd.*, etc.). The Decree stipulates that PWMCs are required to collect from the public utility providers all the packaging waste collected by them, at proportion rates fixed by the Government each year. The proportions are determined according to the reported quantities of packaging that their generators—the reporting agents introduce into circulation and according to the scheme in which the generators are included, taking into account only the quantities of packaging waste of major generators. This means that under provisions of the Decree on Packaging and Packaging Waste Management and the Government resolution the PWMCs must collectively collect greater quantity of packaging waste than is introduced into circulation by the reporting agents, or that the PWMCs must collect packaging waste that exceeds the quantities for which they are remunerated in the form of packaging fee.

The packaging waste management is also governed by Act Regulating Emergency Measures for Handling Waste Packaging and Graveside Candle Waste

⁶ Decree on Packaging and Packaging Waste Management (Official Gazette of the Republic of Slovenia, Nos. 84/06, 106/06, 110/07, 67/11, 68/11 – corr., 18/14, 57/15, 103/15, 2/16 – corr., 35/17, 60/18, 68/18 and 84/18 – ZIURKOE).

⁷ Official Gazette of the Republic of Slovenia, Nos. 41/04, 17/06 – ORZVO187, 20/06, 28/06 – CC Dec., 49/06 – ZMetD, 66/06 – CC Dec., 33/07 – ZPNačrt, 57/08 – ZFO-1A, 70/08, 108/09, 48/12, 57/12, 92/13, 38/14, 37/15, 56/15, 102/15, 30/16, 42/16, 61/17 – GZ, 68/17 and 21/18 – ZNOrg.

(ZIURKOE),⁸ which entered into force on 29 December 2018. In Article 14, the Act amends some provisions of the Decree on Packaging and Packaging Waste Management, and in Article 15, it amends or supplements Article 20 of ZVO-1, whereby the said changes do not modify the foundations of the system of packaging waste management as they had been regulated by the Decree before the enactment of this Act.⁹

1.4. The purpose of the article

In this article, I will analyse the current legislation on packaging waste collection in the Republic of Slovenia and demonstrate that the interpretation of the Decree on Packaging and Packaging Waste Management according to which the PWMCs must collect greater quantity of packaging waste than is introduced into circulation by the reporting agents, or that the PWMCs must collect packaging waste that exceeds the quantities for which they are remunerated in the form of packaging fee is contrary to the Constitution of the Republic of Slovenia.

2. PWMCS' LEGAL POSITION UNDER THE DECREE ON PACKAGING AND PACKAGING WASTE MANAGEMENT

In Article 39, the Decree on Packaging and Packaging Waste Management sets out PWMCs' obligations regarding packaging waste management. The fundamental requirement of PWMCs is that they must regularly collect packaging waste throughout the entire territory of Slovenia, namely:

- Municipal packaging waste from public utility providers; and
- The rest of the packaging waste (i.e. non-municipal waste) from distributors, end-users and end-users without a prior supplier.

In Article 25, the Decree stipulates that PWMCs providing the said service, i.e. to collect packaging waste (from public utility providers, directly from distributors or end-users)¹⁰ shall be paid by:

- Packers for the packaging of goods they themselves use as end-users of the packaged goods or introduce them into circulation (place them on the market);
- Acquirers of the goods for the packaging of goods they themselves use as end-users or introduce them into circulation;
- Manufacturers of packaging for packaging not intended for use by the packers referred to in the first indent of this paragraph and is either introduced into circulation or used by themselves; and

⁸ Official Gazette of the Republic of Slovenia, No. 84/18.

⁹ See Section 5 of this article for more details on ZIURKOE provisions.

¹⁰ Also, reuse, recycle or disposal of the packaging waste.

- Acquirers of packaging for packaging not intended for use by the packers referred to in the first indent of this paragraph and which is either introduced into circulation or used by themselves.

In Article 25 (3), the Decree on Packaging and Packaging Waste Management stipulates that also the merchant who supplies the goods to the distributor must pay for the collection of the packaging waste (from the public utility providers, directly from distributors or end-users) if payment for the collection of the packaged goods has not been taken over by its packer or purchaser of goods.

Article 26 of the Decree stipulates that packers, acquirers of goods, manufacturers of packaging or packaging acquirers and merchants must conclude a contract with a PWMC in relation to fulfilling the obligation to pay for the collection of packaging waste. In this way, these entities are integrated into a common system of packaging waste management. However, the Decree allows these entities to collect the packaging waste themselves, but this applies only to non-municipal packaging waste and originating from the packaging they themselves introduce into circulation (and also they themselves ensure the continued packaging waste management required by the Decree, i.e. its reuse, processing or disposal) if they obtain a certificate of entry into the records of individual systems of packaging waste management maintained by the ministry responsible for the environment. In such a case, these entities are not included in the common system of packaging waste management, but take care of such waste within the individual system of packaging waste management.

Article 34 of the Decree stipulates that end-users with no prior supplier must also conclude a contract with a PWMC (regarding the collection of packaging waste and other regulated packaging waste management, i.e. its reuse, processing or disposal) if they do not themselves provide for the packaging waste management as stipulated by the Decree.

Article 19 of the Decree, which regulates the payment for the delivery or collection of municipal packaging waste, implies that PWMCs and the public utility providers shall regulate the mutual relationship by contract with respect to the obligation of PWMCs to collect municipal packaging waste from the public utility providers.

As mentioned earlier, a PWMC charges its packaging waste collection service to packers, acquirers of goods, manufacturers of packaging or packaging acquirers or merchants - if they join a common system of packaging waste management and contract with the PWMC in this regard.¹¹ One of the main criteria for determining the price for such service (the so-called packaging fee) is the quantity (weight) of the packaging waste that the PWMCs receive from public utility providers and other entities (the second criterion is the type of packaging material).

¹¹ The inclusion of these entities in a common system of packaging waste management is obligatory with regard to the management of the municipal packaging waste.

The amount of packaging fee required to cover all costs arising from the packaging waste management shall be determined by the PWMC. Therefore, it is determined on a commercial basis, with the Decree setting out in Article 19 what are the costs incurred in managing the municipal packaging waste.

Unlike non-municipal packaging waste, where the quantity of packaging waste received is a matter of agreement (contract) between PWMCs and the entities listed above, the Decree regulates the system of collection of municipal packaging waste. The Decree stipulates in this regard that the quantity or share of this packaging waste that 'belongs' to an individual PWMC (if there are more PWMCs or if more PWMCs have contract with these entities in connection with the collection of that packaging waste) or its share with individual public utility providers shall be determined by the Government of the Republic of Slovenia by a decision by 30 June of the current calendar year according to the methodology set out in Annex 2B, which is an integral part of the Decree. Therefore, an individual PWMC (for individual public utility providers) 'is entitled' only to a predetermined amount (share) of municipal packaging waste—of course, only if it has a contract with such entities in connection with the collection of municipal packaging waste.

The activity by PWMCs (the collection and further management of packaging waste) is a commercial activity for which these entities require an environmental permit. Article 40 of the Decree provides that the ministry responsible for the environment shall issue an environmental permit if the legal person fulfils the following conditions:

- Is a company registered for carrying out the activities of collection, removal, brokering and processing of waste in accordance with the regulations governing the classification of activities;
- Has at its disposal, on its own or in conjunction with subcontractors or other entities, the means and equipment and facilities which satisfy the prescribed conditions and ensure the packaging waste management in accordance with the Decree; and
- Alone or together with subcontractors or other entities qualifies for reuse, processing or disposal of packaging waste in accordance with regulations.

Article 41 of the Decree states that the application for an environmental permit must also be accompanied by:

- Plan for packaging waste management; and
- Demonstrating the base of the tariff for billing services to participants in a common system of packaging waste management (e.g. price factors of collecting, sorting, recycling, energy recovery, and other processing or disposal of packaging waste and system management).

The Decree stipulates in Article 42 that such plan for packaging waste management shall, *inter alia*, contain information on:

- The types of packaging material in the packaging for which the waste management company organises a common waste management system;

- Packers, acquirers of goods, manufacturers of packaging or packaging acquirers and merchants or end-users for whom it intends to provide for packaging waste management;
- The envisaged method of collecting packaging waste regularly from public utility providers; and
- The envisaged manner and extent of packaging waste collection from distributors and end-users.

Therefore, in view of the provisions of the Decree listed above, a PWMC is not in a position to negotiate the amount of municipal packaging waste. Therefore, it will be collected by the public utility providers. A PWMC can only agree on the method of packaging waste collection and its cost. The amount or share of such packaging waste that will be collected by PWMC from the individual public utility provider, as I have already mentioned, is decided by the Government. Notwithstanding this peculiarity, which applies only to municipal packaging waste, it follows from the Decree that PWMCs are under the obligation to collect this type of packaging waste only if they have concluded contracts with these entities in that regard—if they, thus, transferred their obligation of packaging waste management to PWMCs.

This is also the position of the Administrative Court of the Republic of Slovenia as expressed in judgment I U 260/2018-10. The Court notes that it is clear from the environmental permit of the plaintiff (procuring entity) that the latter must ensure the regular acceptance and collection of packaging waste the managing of which was contracted to him by packers, acquirers of goods, manufacturers of packaging, packaging acquirers or merchants and end-users without a prior supplier. This means that the plaintiff (the procuring entity) is under an obligation to accept such amount of packaging waste that the reporting agents listed above, which contracted with the plaintiff, introduced into circulation. This is not affected by the fact that the plaintiff (the procuring entity) is under an obligation to accept the packaging waste from the public utility provider according to the shares determined by the Government of the Republic of Slovenia since these shares can only relate to packaging waste introduced into circulation by the reporting agents, with which the plaintiff (the procuring entity) concluded contracts for the acceptance of the obligation of packaging waste management. The Court further notes that the Decree's normative regulation implies that the responsibility for waste management lies with the waste producer, which the plaintiff (the procuring entity) as a PWMC is not. According to the Court's opinion, his obligation is based solely on the contract in which he assumed that obligation from the actual generator of waste.

The Decree also implies that the payers of the PWMC services (i.e. collection of packaging waste and other forms of waste management) shall be entities mentioned above for all types of packaging waste, i.e. also for municipal packaging waste. As already mentioned, one of the main criteria for determining the price for such service is the quantity (weight) of packaging waste that the PWMCs receive from public utility providers and other entities.

Therefore, the Decree implies that PWMCs are legal entities which instead of the reporting agents listed above—if the producers so decide and contract with PWMCs—ensure the proper management of the packaging waste as prescribed by the Decree, i.e. its collection, reuse, disposal, etc., and are remunerated for their service accordingly (by collecting the so-called packaging fee).

The Decree, therefore, stipulates that PWMCs shall accept from the public utility providers the municipal packaging waste produced by the entities listed above. For such service, i.e. accepting waste instead of the entities listed above, the PWMCs are financially compensated by them in the form of a packaging fee. Given the regime from the Decree and given that PWMCs' activity is a commercial activity, it is logical that PWMCs can only charge these entities for accepting that amount of municipal packaging waste that they have collected from the public utility providers. It is clear, thus, that these facts need to be taken into account also by the Government in determining the proportions (quantities) of packaging waste that 'belong' to individual PWMCs. The sum of all quantities (proportions) for individual PWMCs must be equal to the amount of municipal packaging waste produced by the entities listed above. Namely, these are under obligation to manage their own packaging waste in the manner prescribed by the Decree.

3. DO PWMCS HAVE TO ACCEPT ALL THE PACKAGING WASTE FROM PUBLIC UTILITY PROVIDERS, EVEN IF THE QUANTITY EXCEEDS THE QUANTITY INTRODUCED INTO CIRCULATION BY THE REPORTING AGENTS—THE PWMCS' CUSTOMERS

In considering this issue, the provisions of Articles 36 and 39 (1) of the Decree on Packaging and Packaging Waste Management are essential.

Article 36 of the Decree stipulates that packers, acquirers of goods, manufacturers of packaging or packaging acquirers and end-users without a prior supplier are not required to provide packaging waste management as prescribed by the Decree (i.e. its collection, reuse, processing and disposal) if the annual quantity of packaging does not exceed 15,000 kilograms.¹² This means that these entities are not required to contract with a PwMC for the collection of municipal packaging waste and to pay PWMCs for their service of collection of such packaging waste, even though such packaging waste is collected at municipal waste landfills by the public utility providers.

Article 39 (1) of the Decree stipulates that PWMCs in the entire territory of the Republic of Slovenia must provide prescribed management for all packaging,

¹² This exemption does not apply to plastic bags, plastic packaging made of polymers of vinyl chloride or other halogenated olefins, packaging in which dangerous goods are packaged, or where the handling of packaging is governed by specific rules.

which is introduced into circulation, and for all packaging waste, which is produced in industry, craft, trade, services and other activities, in households or elsewhere, irrespective of the packaging material, except for non-municipal packaging waste for which the entities concerned themselves provide the prescribed treatment (i.e. its reuse, processing or disposal).

Regarding the management of municipal packaging waste, the Decree in Articles 25 and 26, therefore, establishes the contractual and repayment system described above, under which PWMCs shall collect the municipal packaging waste by the entities listed above with whom it has contracts, at the public utility providers. Besides, it follows from Article 39 (1) that the PWMCs have to collect from the public utility providers **all** municipal packaging waste. Namely, the Decree prescribes the PWMCs an obligation of management of all packaging waste, except for the one for which the reporting agents themselves provide for the prescribed treatment (i.e. its reuse, processing or disposal). Thus, this applies also to such municipal packaging waste, for which Article 36 of the Decree provides an exception.

Therefore, the Decree does not clearly regulate the legal status of PWMCs or their obligations in relation to the collection of municipal packaging waste from the public utility providers. It is unclear whether the system governed by Articles 25 and 26 of the Decree should be applied or whether Article 39 (1) of the Decree stipulates an exception to the described system, i.e. prescribing the PWMCs an obligation to collect all municipal packaging waste, thus also the waste referred to in Article 36, for which they have no contracts and are not remunerated for their services.

Comparing the original text of Article 39 of the Decree¹³ with the one in force today, we can conclude that the Government's goal was obviously to impose such an obligation upon PWMCs by Article 39 (1). In the original text, Article 39 of the Decree stipulated that a PWMC should for the type of packaging for which the said entities [the reporting agents] have contractually waived their obligations for the management of packaging waste, to ensure the prescribed management of packaging waste throughout the area in which packaging waste is generated.

Such an arrangement in the original Article 39 of the Decree was clear and consistent with the provisions of its Articles 25 and 26. However, as I mentioned earlier, the current arrangement stemming from Article 39 (1) is not clear. To interpret the Decree, which stipulates that PWMCs must also accept the packaging waste generated by the entities referred to in Article 36 from the public utility providers, despite the lack of a contractual grounds and thus without receiving any monetary compensation for their services (the packaging fee) it should clearly stipulate that regime from Articles 25 and 26 of the Decree has an exception (namely packaging waste of the entities referred to in Article 36 of the Decree) and that the condition for carrying out the PWMCs activities (among other things) is that they must also collect such packaging waste and that such service has to be performed free of charge.

¹³ Official Gazette of the Republic of Slovenia, No. 84/06.

The Decree, however, does not stipulate this, so I believe that its Article 39, in conjunction with Article 36, should be interpreted as requiring PWMCs to collect only municipal packaging waste of the entities (reporting agents) with whom they have contracts and for which they are financially compensated. With such an interpretation, the question naturally arises as to who is responsible for the management of municipal packaging waste as set out in Article 36 of the Decree if those responsible are not PWMCs. As the Decree does not provide legal grounds for imposing upon the PWMCs such obligation, I believe that it should be interpreted as the responsibility for the management of such packaging waste lies on the State under the principle of subsidiary action, governed by the ZVO-1. In this context, of course, the State can agree with PWMCs to collect this sort of packaging waste, as well, based on an appropriate contract and accompanying financial compensation.

4. IS THE DECREE IN CONFORMITY WITH ZVO-1 AND THE CONSTITUTION?

The Ministry of the Environment and Spatial Planning modified some PWMCs their environmental permits and imposed upon them the obligation to collect the entire amount of packaging waste collected by the contractors of public utility providers, i.e. even those quantities of packaging waste that are not included in the system, the procuring entity does not have a contract with them on collection of such waste from public utility providers and for these quantities also do not receive any financial compensation (a packaging fee).¹⁴

It is clear from the decisions of the Environmental Agency of the Republic of Slovenia (ARSO) mentioned above and the Ministry of the Environment and Spatial Planning (MESP) that these two state bodies, in the mentioned modifications of the environmental permits, interpret the provisions of Article 39 of the Decree as to provide the legal basis for the described modification of the environmental permits, i.e. for the imposition of such (public-law) obligation to a private-law entity.¹⁵ In modifying the environmental permits, the Agency and the Ministry interpret Article 39 of the Decree as requiring a PWMC to collect all packaging waste (including one that was not introduced into circulation by the reporting agents listed above with whom PWMCs have contracts for collecting of packaging waste) as a condition for performing the activity of collecting municipal packaging waste (from the public utility providers). Based on such an interpretation, the Agency and the Ministry, by

¹⁴ Decision of the Environmental Agency of the Republic of Slovenia No. 35472-41/2017-3 of 10 July 2017 and Decision of the Ministry of Environment and Spatial Planning No. 35402-31/2017/2 of 20 December 2017.

¹⁵ Such an interpretation can be deduced from a letter from the Ministry of the Environment and Spatial Planning to the Administrative Court concerning the case of I U 260/18 and (request for urgent hearing and legal clarification) No. 35402-31/2017/8 of 2 July 2018.

modifying the environmental permits, imposed upon some PWMCs the obligation to meet such condition.¹⁶

I believe that such an interpretation of the Decree by which the Agency or the Ministry (and the Government, which by decision determines the scope of this obligation) provides a basis for imposing obligations, is contrary to ZVO-1 and the Constitution. In my opinion, Article 39 of the Decree, or its interpretation, according to which it provides the Ministry with a legal basis for modifying the environmental permit so that the Ministry may impose upon a PWMC an obligation to collect municipal packaging waste in quantities exceeding the quantity introduced into circulation by the reporting agents (PWMCs' customers) without a financial compensation (a packaging fee) for such excess quantities, has no legal basis in the ZVO-1.

Pursuant to the provision of Article 21 of the Government Act, the Government may, by a decree, regulate and break down certain relationships defined by laws or other normative act of the National Assembly in accordance with the purpose and criteria of the law. Only based on an express authorisation by law can the Government regulate the manner of exercising the rights and duties of citizens and other persons.

For this reason, I also believe that the Decree is also inconsistent with the constitutional principles of legality as defined in Articles 120 and 153 of the Constitution. Namely, the Constitution stipulates that the functioning of all those state bodies issuing general by-laws must be legally dependent on the content, and therefore, the law may only be technically supplemented, broken down and interpreted by its decrees. It should in no way interfere with the law's content, since in this case legislative functions would be transferred to the Government or the state administration.

The Decree was delivered based on the provisions of Articles 17, 19 and 20 of ZVO-1.

ZVO-1 generally regulates emissions in Article 17, while its Article 19 regulates, in general, the rules of conduct regarding emission prevention. In Article 20 (5) and 20 (7), it regulates the powers of the Government in relation to waste management and authorises the Government:

- To lay down in by-law the rules of conduct and other conditions for waste management, which shall concern in particular:
 1. prevention of waste;
 2. sorting of waste into the lists;
 3. waste management methods;
 4. the conditions for obtaining the permit referred to in paragraph three of this Article;

¹⁶ The proportion of this packaging waste that 'belongs' to individual PWMCs is determined by the Government.

5. the conditions for obtaining the prescribed permits;
 6. design, construction and operation of waste management installations;
 7. qualifications necessary for waste management;
 8. measures related to cessation of operation of waste management installations; and
 9. keeping of records on waste and waste management and the manner of reporting to the ministry responsible for the protection of the environment.
- To lay down in by-law the cases and conditions of where a legal or natural person who develops, produces, processes, treats, sells or imports products (hereinafter referred to as ‘the producer of products’) shall be a subject to the extended producer responsibility. The producer of products must, in whole or in part, provide for such treatment of the products and waste resulting from the use of those products to promote the reuse and prevention of waste and their recycling and other recovery operations, in particular as regards:
1. Taking overused products and waste resulting from the use of the products and ensuring that they are properly handled;
 2. The manner and conditions for the individual or joint fulfilment of the obligations of the producers of products;
 3. The extent of the obligations of the producers of products or their associations or other economic operators with which the producers of the products fulfil their obligations and the objectives, which they must attain in fulfilling their obligations;
 4. Establishment and provision of an information system to monitor the implementation of the producer of products’ obligations; and
 5. Informing and publicizing the possibilities of product reuse and recycling, as well as other methods of recovery of waste arising from the use of products.

With the statutory powers listed above, the ZVO-1 authorises the Government only generally to set the waste management rules. ZVO-1 does not regulate the management of packaging waste in these provisions of Article 20, and therefore does not regulate criteria on the basis of which the Government could regulate in more detail the manner of packaging waste management, including the determination of the PWMC’s obligation to collect all municipal packaging waste from public utility providers (at ratios determined by the Government) collected by the municipal waste management service providers, despite such quantity exceeds the amount introduced into circulation by the reporting agents—the PWMC’s customers.

I believe that in the provision of Article 39 of the Decree, the Government acted in violation of Article 21 of the Government Act and contrary to Articles 120 and 153 of the Constitution of the Republic of Slovenia, from which it is clear that the Government can regulate the manner of the exercise of the rights and duties of citizens and other persons only on the basis of express legal authority, which is why

I believe that the Decree on Packaging and Packaging Waste Management is illegal and contrary to the Constitution.

According to the established constitutional case law,¹⁷ the principle of legality must be particularly rigorously assessed when it is necessary to prevent the enforcement of autonomous regulation of social relations by autonomous determinations of rights and duties. In the provision of Article 87 of the Constitution, the legislator specifically stipulated that the rights and duties of citizens and other persons might be determined by the National Assembly only by law. The notion of rights and duties under Article 87 does not only encompass rights (or duties) in the Constitution since Article 87 does not use the term of human rights and fundamental freedoms but also includes legal rights that do not have a direct basis in the Constitution. As already mentioned above, only based on an express authorisation by law can the Government regulate the manner of exercising the rights and duties of citizens and other persons.

According to the settled Constitutional Court case law, the principle of legality in relation to the regulations of the executive-administrative branch of state power (Government and state administration) means, in particular:

1. In adopting regulations (decrees), the Government shall be bound by the Constitution and laws both in terms of its purpose or objectives and in the content of its regulation (Article 153 of the Constitution);
2. Only based on an express authorisation by law can the Government regulate the manner of exercising the rights and duties of citizens and other persons;
3. The rights and duties of citizens and other persons may be determined by the National Assembly only by law (Article 87 of the Constitution); and
4. The principle of the protection of human rights and fundamental freedoms (Article 5 (1) of the Constitution) requires that, in accordance with the principle of democracy and the rule of law, the human rights and fundamental freedoms may be restricted only by the legislature, where and to the extent permitted by the Constitution, and not by the executive.

Neither the provisions of Article 20 of the ZVO-1 nor any other provision of the ZVO-1 or any other law contains an explicit authorisation for the Government to determine, by a by-law, the obligation of PWMCs to collect the entire amount of packaging waste collected by the contractors of public utility providers, i.e. even those quantities of packaging waste that are not included in the system, the procuring entity does not have a contract with them on collection of such waste from public utility providers and for these quantities also do not receive any financial compensation (a packaging fee).

As I have already demonstrated, these provisions of the ZVO-1 authorise the Government only generally to determine, by a by-law, the extent of the obligations

¹⁷ See Decision of the Constitutional Court of the Republic of Slovenia U-I-326/97 of 4 June 1998. See systematically on the Constitutional Court case law regarding the principle of legality of administration in Šturm (1997).

of the producers of products or their associations or other economic operators with which the producers of the products fulfil their obligations, and the objectives, which they must attain in fulfilling their obligations. Thus, I believe that by the provision of Article 39 of the Decree (if one would interpret it in such a way), the Government acted in violation of Article 21 of the Government Act and contrary to Article 153 of the Constitution of the Republic of Slovenia, from which it is clear that the Government can regulate the manner of the exercise of the rights and duties of citizens and other persons only based on express authority provided by law, which is why I believe that the Decree is illegal and contrary to the Constitution.

In the absence of such authority in the law, only the law itself can determine the manner of exercising rights and duties. In the present case and in compliance with the principle of legality would be such regulation, in which the law (ZVO-1) prescribed that performing the activity of collecting the municipal packaging waste (with the public utility providers) was subject to condition of collecting the entire quantity of such packaging waste (even those not introduced into circulation by the reporting agents) and that PWMCs not performing such activity had to provide collecting also for this part (this quantity) of packaging waste, despite the lack of a financial compensation for this part (a packaging fee).

It should be noted that the determination of such a condition in the law should be in accordance with the principles of the rule of law (Article 2 of the Constitution), namely, those principles which prohibit excessive interference by the state (the general principle of proportionality). The Constitutional Court shall determine the existence of undue interference with the application of a proportionality test. This test involves assessing three aspects of the interference:

1. Is the interference at all necessary (needed) to achieve the objective pursued;
2. Is the interference appropriate to achieve the objective pursued in the sense that such an objective could be actually achieved by such interference; and
3. Is the weight of the consequences of the assessed interference with the affected human right proportional to the value of the objective pursued, or to the benefits that will result from the interference (the principle of proportionality in the narrow sense or the principle of proportionality). Only if the interference passes all three aspects of the test can it be declared constitutionally permissible.¹⁸

Based only on such substantive framework for establishing the obligation of the PWMCs could then be such obligation and the procedure for imposing it further regulated by the Government in the Decree. Besides, it should be emphasised that duties could be forcibly imposed upon legal or natural persons only by an individual legal act. Such an act, however, can only be based on law and must fulfill some other conditions. An individual legal act of a state body, local authority body or holder of public authority is any legal act that contains individual and specific norms,

¹⁸ See, e.g., Decision of the Constitutional Court of the Republic of Slovenia U-I-18/02 of 24 October 2003 and U-I-40/06 of 11 October 2006.

regardless of its form. Typical forms of individual acts are rulings and decisions, which may also have a different designation, such as a permit, a license, etc. For individual acts of administrative bodies, the term administrative act is usually used. Article 2 (2) of the Administrative Disputes Act (ZUS-1)¹⁹ designates an administrative act as an administrative decision and other individual act issued under public law, unilaterally, by a government authority as part of the execution of an administrative function, whereby an authority has decided on a right, obligation or legal benefit of an individual or legal entity, or of any other entity who may be a party in the procedure of issuing the act.

Although in individual acts, both their substantive legality as well as their procedural legality, i.e. the legality of the procedure of issuing an act, are important, we are interested here in substantive legality. In addition to Article 120 (2) of the Constitution mentioned above, the substantive legality is regulated in more detail by the Article 153 (4) of the Constitution, which stipulates that individual acts and actions of state authorities, local community authorities, and bearers of public authority must be based on a law or regulation adopted pursuant to law. Substantive legality is also highlighted as a special principle of legality by Article 6 (1) of the General Administrative Procedure Act (ZUP).²⁰

To be a substantive basis for the issue of an individual act, the law must:

1. Set out the right of the authority to issue an individual act (authorisation);
2. Clearly define the abstract statutory definition to which the decision-making relates;
3. Set out the conditions for one decision or another; and
4. Define the content of the decision.

Of course, law or regulation cannot always define in detail the statutory definition and content of a decision, so it often uses vague terms, in a legal theory called fuzzy legal concepts. When issuing an individual act, the administrative body must determine, by legal interpretation, their content in the specific case.

It follows that the requirement of the administration's boundness by the law (and regulation in line with law) when issuing individual legal acts means that the administrative body may not issue a decision or other individual act for which it is not authorised to issue, for which it has not found the necessary relevant facts that make up a statutory definition, and the content of which is not provided for by the law, subject to the conditions laid down by it.

In the present case, therefore, the ZVO-1 should stipulate that the Ministry of the Environment and Spatial Planning may modify the environmental permit by imposing such obligation on PWMCs to clearly state (on an abstract level) the facts which it must establish in the administrative procedure to modify the environmental

¹⁹ Official Gazette of the Republic of Slovenia, Nos. 105/06, 26/07 – CC dec., 119/08 – CC dec., 107/09 – CC dec., 62/10, 98/11 – CC dec., 109/12 and 10/17 – ZPP-E.

²⁰ Official Gazette of the Republic of Slovenia, Nos. 24/06 – official consolidated text, 105/06 – ZUS-1, 126/07, 65/08, 8/10 and 82/13.

permit, and the conditions to be fulfilled for its modification. The Government could then further regulate such contents by a decree.

I believe, therefore, the interpretation of Article 39 of the Decree (i.e. that performing the activity of collecting the municipal packaging waste with the public utility providers is subject to condition of collecting the entire quantity of such packaging waste, even the waste not introduced into circulation by the reporting agents, and that PWMCs performing such activity based on contractual relationships with those agents have to collect also this part of packaging waste, despite the lack of a financial compensation for this part) is a manner of enjoying property so as to ensure its economic, social, and environmental function in accordance with the provision of Article 67 of the Constitution.

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UPRAVLJANJE AMBALAŽNIM OTPADOM U SLOVENIJI: USTAVNOST POSTOJEĆEG ZAKONODAVSTVA

U radu se analizira pravna regulativa postupanja s ambalažnim otpadom u Sloveniji, posebno pravni položaj tvrtke za upravljanje ambalažnim otpadom. Za tvrtke je glavno pitanje pravnog uređenja postupanja s ambalažnom otpadom i opseg njihovih obveza: pitanje je - jesu li iste dužne pokupiti sav ambalažni otpad od pružatelja javnih usluga, iako to premašuje količinu ambalažnog otpada tržište od tvrtke za gospodarenje ambalažnim otpadom.

Ključne riječi: *ambalažni otpad, tvrtka za upravljanje ambalažnim otpadom*