U-I-108-91
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D E C I S I O N

At the meeting of 13 July 1993 the Constitutional Court assessed the constitutionality of the second paragraph of Article 145.b of the Companies Act, and

e s t a b l i s h e d t h e f o l l o w i n g:

The second paragraph of Article 145.b of the Companies Act (Official Gazette of the Socialist Federative Republic of Yugoslavia, no. 46/90) was not in conflict with the Constitution when applied for transfer of socially-owned capital between legal persons which, at the time of the coming into force of the Companies Act (1 January 1989), had been organized into composite organizations of associated labour or work organizations, in reference with any transfer by which a socially-owned holding company became permanent owner, in an incorporated, socially-owned company, of a portion of capital or shares proportionate to the amount of transferred capital, and effected with the intention of pooling, on the basis of agreed upon transfer, socially-owned capital and of making possible capital-based linkages within the framework of composite organizations in the sense of Section V.a of the Companies Act.

R E A S O N S

At the meeting held on 28 November 1991 the Constitutional Court of the Republic of Slovenia had resolved, in reference with the application of the Executive Council of the Assembly of the Republic of Slovenia of 25 November 1991, that it should itself start the procedure for the assessment of constitutionality of Article 145.b, paragraph 2, of the Companies Act, and that, until a final decision had been reached, it should stay all acts implementing individual enactments and measures passed or initiated on the basis of Article 145.b, paragraph 2, of the Companies Act. This Resolution had been published in the Official Gazette of the Republic of Slovenia, no. 28/91, of 6 December 1991.

At the meeting of 10 September 1992 the Constitutional Court had resolved that Clause 2 of the disposition (sentence) of the Resolution of 28 November 1991 should be modified and amended so as to read as follows: "Until a final decision has been reached, the Constitutional Court shall stay all acts implementing individual enactments and measures passed or initiated on the basis of Article 145.b, paragraph 2, of the Companies Act, except such individual enactments and measures passed or initiated within the framework of socially-owned holdings and the companies incorporated in such holdings, in cases when the capital has been transferred to the holding company investing the so transferred capital back into the incorporated company." This Resolution had been published in the Official Gazette of the Republic of Slovenia, no. 52/92, of 30 October 1992.

In its reply, the Assembly of the Republic of Slovenia had submitted the opinion of its Law-Giving and Legal Matters Commission dated 17 December 1991, whose essential positions had been as follows: The provision of the second paragraph of Article 145.b of the Companies Act is in conflict with applicable provisions of Articles 14, 16 and 28 of the Constitution of the Republic of Slovenia, as amended by the Constitutional Amendments IX through XC (Official Gazette of the Republic of Slovenia, no. 32/89), which regulate the control and appropriation of the results of labour by the workers in socially-owned companies. The provisions of Article 145.b of the Companies Act allow the assets of a company to be divided between two or more companies, or even transfer, without any payment, of the capital of a company to another company without the right of control of that company. In this way, companies can transfer all or a part of their assets to another existing or newly established company, thus decreasing their capital stock. Through the activities and operations referred to in the second paragraph of Article 145.b of the Companies Act, the companies which are wholly or partly socially-owned, may effect their ownership transformation or transfer their property into mixed or private ownership. For this reason, the Commission proposes to the Constitutional Court, to find the second paragraph of Article 145.b of the Companies Act contrary to the Constitution.

At the meeting of 16 December 1991, the adjudication on the matter had been postponed until the time when the composition of the Constitutional Court would be complete. This was because the composition of the Constitutional Court, which at that time had consisted of six judges, had not ensured enough votes for a decision to be made. Not long afterwards, the new Constitution had been adopted, and in November 1992 the Companies Ownership Transformation Act had been passed (Official Gazette of the Republic of Slovenia, no. 55/92 of 20 November 1992 - hereinafter abbreviated to: COTA). The transitional provision of Article 51 of this Act, according to which, starting with 5 December 1992, Article 145.b of the Companies Act shall in the case of socially-owned companies and companies in mixed ownership no longer apply to the disposing with socially-owned capital, implies that concerning the second paragraph of this Article, which is under consideration in the present procedure of the Constitutional Court, with 5 December 1992 this paragraph had ceased to be in force completely (while this is not necessarily so, at least not for the same reason, in case of all the other paragraphs of this Article). Namely, the application of this paragraph to the socially-owned companies and companies in mixed ownership is expressly prohibited by Article 51 of the COAT (and by analogy also to the public enterprises in existence up till then), while this paragraph had not even been intended to apply to private companies (nor to those in mixed ownership) or to allow such application, which is evident from the disposition and further explanation of this interpretative and statement-of-fact Decision of the Constitutional Court. Since it is clear from the context and the meaning of the before mentioned provision of Article 51 of the COTA, that the term "socially-owned company" should be understood in its wider sense, standing for all kinds of companies in social ownership, this including joint stock companies and limited liability companies, since only the last two had allowed such transfer of capital, it follows that the controversial second paragraph can under no circumstances continue to apply and that, although not formally abrogated, is had actually ceased to be in force on 5 December 1992. For this reason, the Constitutional Court issued its statement-of-fact Decision on the basis of analogical application of the first paragraph of Article 422 of the former Constitution (in accordance with the authorization granted in Article 7 of the Constitutional Law on Execution of the Constitution, in which it established that in the period of its validity the controversial provision had not been in conflict with the Constitution in as far as it had been applied in a manner found to be in conformity with the Constitution by this Decision

Since interpretative decisions, which are know to other Constitutional Courts in the world, have up till now been foreign to us, it needs to be clarified that such

interpretative decisions are necessary and reasonable when an impugned regulation may in practical cases be understood and applied in various ways, of which some may be allows by the Constitution and others not. The abrogation of such a regulation would not be reasonable, since it would affect those also who have applied it in conformity with the Constitution. An interpretative decision must in such cases be used, since it allows the Constitutional Court to keep the impugned regulation in the legal system in the scope or meaning which is not controversial or contrary to the Constitution, while at the same time removing indirectly (through the obligation of all government authorities to act in accordance with the decisions of the Constitutional Court) any such application of a regulation which might be contrary to the Constitution from the legal system.

In the case under consideration such an interpretative decision had to be issued even in the circumstances when the impugned regulation had ceased to be in force already during the procedure of assessment. This is because the revision procedure in accordance with Article 48 of the COTA will also examine whether socially-owned property had in any way been damaged through irrecoverable transfer of socially-owned capital.

The Constitutional Court established that irrecoverable transfers of socially-owned resources to other socially-owned legal persons had been allowed on the basis of the provisions of Article 246 of the Associated Labour Act, and could, in accordance with the provision of Article 196 of the Companies Act, have been effected at least until 5 November 1992, when the COTA had become effective. For Article 196 of the Companies Act had stipulated that this portion of the Associated Labour Act should continue to be in force "until the passing of special federal legislation regulating these issues". Since no such legislation - either federal or Slovenian - was passed for the purpose of regulating the matter of irrecoverable transfer of socially-owned capital until the appearance of the COAT, until the latter became effective, the provision of Article 246 of the Associated Labour Act had continued to be in

force. Since the coming into force of the COTA, however, companies may only include irrecoverable transfers of socially-owned capital in their programmes of ownership transformation subject to the approval of the Agency of the Republic of Slovenia for Restructuring and Privatization - while the question of whether they could continue to use it outside the scope of the procedure of ownership transformation in accordance with this Act is a separate question concerning which the Constitutional Court did not take any view in the course of the present procedure.

However, the second paragraph of Article 145.b of the Companies Act - viewed in the context of the provisions of the entire Article on the methods of creating holding companies - does not at all relate to the question of transfer of capital or assets of a company, although some interpreted this paragraph also in this way, but deals with transfer of capital, that is, sources of funds or operating capital fund (liabilities), which is also the interpretation which has prevailed in practice. The controversial provision refers to transfer of capital without compensation and acquisition of right of control "to another company", while it is quite obvious from the position of the second paragraph in the context of Article 145.b, which in its entirety only regulates the method of establishing capital-based linkages, that is, holding companies, that the term ""another company" used in the second paragraph could only refer to the holding company and not to any other company. Thus, the second paragraph of Article 145.b did nor allow transfer of capital to any other companies - and if they should have occurred, they should be considered as illegal. This interpretation, however, follows already from the content of the Act itself, and would in the case under consideration not necessitate a separate interpretative decision of the Constitutional Court.

Article 145.b, then, could only be used as a whole, which means that, even on the basis of the substance dealt with by the Act, its constituent paragraphs could not be used individually, taken out of their contextual interrelation with the rest of the paragraphs in the Article as a whole. All of the provisions of this Act could, if taking into consideration the content of the Article as well as the heading and content of the Section incorporating it (Section V.a - Changing of the Forms of Organization of Composite Entities) - with the same applying analogically to the former Article 145.g of the first statute on modifications and amendments to the existing Companies Act, whose Section V.a had still borne the heading "Pooling and Organizing of Companies into Composite Entities" - only serve as the basis for establishing and expanding capital-based linkages of companies forming holding companies (or corporations, although this term is not explicitly mentioned in the Act).

In assessing the constitutionality of the content of the controversial legal provision so understood, the

Constitutional Court concluded that all transfers of capital allowed by the legal provision so understood would not have been (and had not been, if actually having occurred) at the same time also allowable by the Constitution, and that not the entire range of possible meanings of the controversial legal provision was in conformity with the Constitution, but only the part of it specified as such by this interpretative Decision of the Constitutional Court. Such transfers of socially-owned capital between companies which would no longer have been entirely in social ownership would have been contrary to the Constitution, since they could have lead to the damaging of socially-owned property, whose continued existence until the effecting of ownership transformation would in the companies with mixed ownership no longer have been ensured. Also not allowed by the Constitution would have been (and had been) any transfers effected between socially- owned entities, unless these had been entities organized already at the time of the coming into force of the Companies Act (1 January 1989) into composite organizations of associated labour or work organizations. From these two forms of organizations, which, however, had not possessed their "own" resources, were supposed, in the process of

transformation of former organization of associated labour into entrepreneurial organizations, to develop (and actually did develop) "composite entities" referred to in Section V.a of the Companies Act, which had thus good reasons to be provided with a legally stipulated method of transformation from non-ownership (self-management) forms of association, in which such associations had tried to carry out their economic functions by using different kinds of instruments, into associations linked on the bases of capital, with a view to ensuring their survival and operation in the period prior to privatization.

In this connection, one should also take into consideration the fact that the socially-owned capital was in individual cases, in particular where basic organizations of associated labour had on the basis of the Associated Labour Act of 1976 developed from individual parts of unincorporated work organizations, dispersed and not concentrated. One of the intentions of the controversial provision was thus also in the period of transition from socially-owned property to one whose owners would be known to allow again the concentrating of the socially-owned capital which had been dispersed unnaturally and contrary to the laws of economy.

This, in the opinion of the Constitutional Court,

constitutionally allowed reason (cause) for such an exceptional transaction is briefly referred to in the disposition (sentence) of this Decision by the words "with the intention of making possible capital-based linkages within the framework of composite entities in the sense of Section V.a of the Companies Act". If privatization of such an owned portion or of the shares of the holding company in the incorporated company would have taken place subsequent to the effecting of transfer under the above mentioned conditions and prior to ownership transformation carried out in accordance with the COTA, and if, with special circumstances relative to each particular case taken into consideration, from this it would have been evident that the transfer was not effected with the above mentioned intention, the conclusion following from this could be that the transfer was not legal and not effected in the manner defined in accordance with this Decision to be in conformity with such a meaning of the second paragraph of Article 145.b of the Companies Act as is allowed by the Constitution.

Remains to clarify the meaning of the term "transfer of capital without compensation": it means that with such a transfer a holding company obtained a permanent share of capital in a company - daughter without actually investing into it as appropriate (obtaining of a real share of capital on the basis of a fictitious investment). With this legally allowed fiction, however, the law-giver at the time of collapse of the self-management system only allowed a more or less appropriate correction of an anomaly deriving from the previous system, the anomaly being that, for example, composite organizations of associated labour were in fact associations without their (own) resources. It may be assumed that members of such an association had, in the case when the incorporated economic entities wanted to maintain such a form of association also after the enforcement of the Companies Act, their economic and business interest to do so. Thus, the term "transfer of capital without compensation" should not be understood to mean transfer without reason (cause) or economic interest. "Compensation" or equivalent of the share acquired without adequate investment of capital should thus be seen in economic benefits, which an entity incorporated in such an association derived from such incorporation already prior to such transfer, or in such benefits as it may have hoped to obtain from maintaining such an association and from its transformation on the basis of capital in the new situation.

In case of such association of socially-owned companies into socially-owned holding companies, the scope of socially-owned capital did not change, only the location of the later did: initially, it had been located in the first company which had become the company - daughter, and then its location was transferred to another company, which became the holding company, and this capital acquired the form of permanent capital investment in the former company. Thus, the structure of permanent sources of capital of the company - daughter underwent a change.

The application of the second paragraph out of the context of the entire Article 145.b implied transfer of capital, without compensation and acquisition of the right of control, to another company, which did not result in the association into a holding (or corporation) in accordance with the above mentioned examples, which was the sole reason for which the said provision had been designed. This paragraph had to be used in conjunction with the first paragraph of Article 145.b, according to which a holding could be established by dividing the property of a company between two or more companies, or by investing own capital into a new company, as well as "through the acquisition of capital in another company". The term "acquisition of capital" of the first paragraph should, due to the fact that other ways of establishing a holding are in the first paragraph indicated by the use of other terms, be understood to refer to the way which is further detailed by the provision of the second paragraph of Article 145.b ("transfer of capital without compensation"), but this is not expressly stated anywhere in the first paragraph, or the entire Article 145.b, whose text is, as a matter of fact, unclear in parts and

also technically controversial at least in as far as the use of terminology is concerned. The second paragraph of Article 145.b thus also made possible - in addition to the established ways of creating a holding by investing or dividing the property of the holding company or through the purchase of shares or capital share in another company by the holding company - this specific and quite exceptional way of establishing a holding company, which the present interpretative Decision of the Constitutional Court finds to be allowed by the Constitution only within the context of associations of companies - the former

organizations of associated labour within the framework of composite organizations of associated labour or work organizations incorporating such basic organizations, where there was the before mentioned cause (reason) for such exceptional transfer of capital, which was allowed by the Constitution.

The controversial paragraph, then, allowed the companies - daughters to transfer the whole or a part of their capital (operating capital fund) to the holding company without any compensation and acquisition of the right of control of over the holding company, thus making possible capital-based linkage and the establishing of a holding structure created on the basis of transfer of capital, which entitled the holding company to a permanent portion of investment capital or share capital. Only such transfer of capital, without acquisition of the right of control, was reasonable and allowed in the context of Article 145.b. The cause (reason) for such transfer was not donation (causa donandi), as in the case of deed of donation, but the establishing (or subsequent consolidation) of capital-based linkages within the framework of companies as "composite entities" in the sense of Section V.a of the Companies Act" on the basis of mutual business interest, with business interest of the company - daughter, as a rule, being its anticipated advantages deriving from its membership in a bigger business system.

In this case, such transfers of capital, effected prior to the new Constitution, were not in conflict with the transitional and changing constitutional system of that period, neither were such subsequent transfers contrary to the new constitutional system (or, to be more precise: to the constitutional system in transitional period, when, in accordance with Article 1 of the Constitutional Law on Execution of the Constitution, conformity of the Acts, passed prior to gaining independence, with the new Constitution was until the expiry of the period for harmonization, as a rule, not to be assessed - but if it should be assessed, as in the present case, in which the procedure had been started already prior to the adoption of the new Constitution, nonconformity with the new Constitution, which does not recognize socially- owned property any more but still allows it to exist in the period set for harmonization, can also not be established), since this was the only case, when such transfer of socially- owned capital - and the transactions implied in the second paragraph of Article 145.b can only refer to socially-owned capital, because such transfers of private capital would be unreasonable and contrary to the essential nature of private capital - was in conformity with the social role of the socially-owned property in the entire transitional period: it kept its scope from decreasing until ownership transformation would have been carried out in accordance with the COTA, while, at the same time, it also allowed the transformation of previous forms of association of economic entities, which were not based on capital and were not adapted to real market economy, into new forms of association on the basis of capital, and thus - with economically efficient use of these possibilities - also economic survival and improved operation in the period prior to ownership transformation. Substantially the same findings had been used in reference with this case by the Constitutional Court as the basis for its resolution of 10 September 1992, which had partly modified the original temporary injunction and in which the Constitutional Court had also been guided by the position of the Government, that "in the opinion of competent institutions (Agency of the Republic of Slovenia for Macroeconomic Analyses and Development) any prolonged freezing of transactions within socially-owned holdings could severely reduce entrepreneurial efficiency as well as that of the branches of economy themselves".

The transfers of capital not in conformity with the before described role of socially-owned property in the transitional period of its gradual abolishing and, consequently, with the constitutional system of the entire transitional period, then, included any such transfers which, while effected in accordance with the provisions of the Companies Act Article 145.b itself, that is, with a view to establishing or consolidating capital-based linkages within the framework of companies associated in a holding, were nevertheless not effected between companies exclusively in social ownership, and also not between

socially-owned companies, if such transfer was not made with a view to transforming former linkages between self-management organization of associated labour into new forms of association based on capital in accordance with the Companies Act. If such an association of socially-owned companies developed only after the Companies Act had provided for such new forms of associations in its Article 145.g, and then also in Article 145.b, such association lacked the sole reason (cause), when such exceptional transfers would have been in conformity with the Constitution according to the present Decision, the intention being to ensure that subsequent associations on the basis of capital could be established, not in this quite extraordinary, but only in the ordinary way.

In such transaction, the scope of socially-owned capital was not reduced, since the transferred operating capital fund appeared, in the form of socially-owned capital, on the liabilities side of the balance sheet of the holding company instead of the first company, however, subject to the condition of ensuring the legally stipulated method of management of the holding company, as one in social ownership, with a view to safeguarding and maintaining unaltered scope of socially-owned property until the time of effecting ownership transformation. This is possible in the socially-owned holding company, even though the companies - daughters have transferred all or a portion of their operating capital fund to the holding company without in this way acquiring any right of control in the holding company. The right of control over the holding company, can, as is evident from some practical cases, be exercised by these companies on the basis of prior or concurrent investing of a portion of their assets into the holding company - or, this not being so, the way of controlling the holding company is arranged in other legal ways. However, if the holding company were one in mixed ownership, the safeguarding of the scope of socially-owned property until the time of carrying out ownership transformation would not be possible or sure, since even the transfer of the socially-owned assets which would grant the representatives of socially-owned property the right of control would not necessarily ensure their dominant position in the company in mixed ownership even in case of their majority share, while the sole transfer of capital without the right of control could ensure this to an even lesser degree, which is the reason why the transfer of capital to a holding company in mixed or even private ownership in accordance with the second paragraph of Article 145.b was not allowed, as follows from the logical and systematic interpretation of the meaning of the provision in the context of the entire legal and constitutional regulating of the matter of socially-owned property.

For the above mentioned reasons it was also not possible to accept the view that the controversial provision was entirely contrary both to the present as well as to the former constitutional system and, as a consequence, at the time when Slovenia became independent did not even become an integral part of our constitutional system in accordance with the provision of Article 4 of the Enabling Statute for the Implementation of the Basic Constitutional Charter. In particular, such a view can not be accepted because the provisions of Article 5 of the Enabling Statute for the Implementation of the Amendment XCVI to the former Constitution, dated October 1990, undoubtedly imply that the Companies Act was incorporated, with minor corrections, into the legal system of Slovenia, and that this was effected even by means of a document of the nature of constitutional law and of constitutional rank.

According to this view, the already amended constitutional system, which was in effect at the time when Slovenia gained its independence, still incorporated the entire system of self management and socially-owned property and, consequently the inalienable right of workers to self management, in particular in the part of the Constitution entitled "The Position of Man in Associated Labour, and Socially-Owned Property", especially in Articles 12-18 and 28. The establishing of composite entities, within which the controversial transfers of capital were allowed on constitutional basis, was always subject to workers' approval obtained trough a referendum, and the transfers of capital themselves to the resolutions of competent administrative bodies of socially-owned companies, so that permissible transfers were effected in accordance with the legally stipulated ways of decision making in socially-owned companies (concerning the doubts about conformity with Constitution of such decision making see below). It would be unrealistic, however, to think that in the legal and economic mechanism of transition from the former, inefficient socialist system it was possible to ensure an effective way of establishing a new system while still retaining all of the characteristics of the former system and all the rights of its agents in the former, complete scope.

Also unacceptable from the point of view of constitutional law are, for the same reasons, the claims that, while in the process, in which the constitutional position of socially- owned property gradually became weaker (developing from the sole foundation of the social system into a form of ownership, which was equal to other forms of ownership, was rendered unconstitutional by the Constitutional Amendments XCIX and ultimately abolished), the content and scope of the rights with respect to socially-owned property, including the right to self-management, should be considered to have remained all the time unchanged and untouched. If the well-known inconsistency and contradictory nature of using amendments to gradually change the former Constitution based on self- management socialism into a new constitutional system was also not accompanied by explicit changing of provisions dealing with self management in socially-owned companies, this does not mean that, in the radically modified circumstances those provisions still had to be understood as formerly; on the contrary, they should have been understood in the context of the changing provisions concerning the socially-owned property and the context of changes in the constitutional system.

For this reason it was impossible, even on the basis of its substance, to accept the proposal that the procedure started against the second paragraph of Article 145.b of the Companies Act should, ex officio, be extended by the Constitutional Court so as to encompass the entire Article 145.b, as well as some other Articles of the Companies Act, in particular Articles 3, 36, 122 and 131, that is, a proposal which was unacceptable also from the formal point of view. Namely, according to the principle of connexity, as interpreted and understood by the Constitutional Court, the latter can of itself extend a procedure to other Articles of an impugned regulation only in the case when this is so essential in the process of reaching a decision concerning a procedure which has already been started, that such a decision can not in fact be reached without proceeding in this manner. It is clear, however, that in this case such a condition was not fulfilled.

Finally, it remains to be said why also in September 1989, when the Constitutional Amendments IX and XC were adopted and enforced, the controversial provision of the second paragraph of Article 145.b of the Companies Act was not in conflict with Article 14 of the Enabling Statute for the Implementation of the Amendment. According to this Article, "no party entitled to ownership of socially-owned property in existing operating capital funds and company welfare funds shall be designated until property and legal relations in organizations of associated labour and companies have been regulated by law".

Even if considering that it was the intention of the law-giver with this provision to prevent premature transition of socially-owned property into other forms of ownership, as well as its "reallocation" or its movement between various socially-owned entities, and even if considering that with the transaction stipulated in the second paragraph of Article 145.b of the Companies Act it was actually the holding company which was assigned as the "party entitled to ownership of socially-owned property in existing operating capital funds and company welfare funds", this is not infringing of the before mentioned Article 14, since the intention of the latter was obviously to prevent that any such thing could happen outside the legal framework (prohibition of designating parties entitled to ownership "until" the matter has been "regulated by law", and not that this should not have been allowed by law.

For the above mentioned reasons the Constitutional Court established that the second paragraph of Article 145.b of the Companies Act was not in conflict with the constitutional regulating of socially-owned property in the period of its gradual abolishing or transformation only within the limits of the explanation given in this interpretational Decision, and that any other interpretation and application of this provision was contrary to the constitutional system.

With the date of making this Decision, the Resolution to stay all acts implementing individual enactments and measures passed or initiated on the basis of Article 145.b, paragraph 2, of the Companies Act until a final decision has been reached shall also cease to be in force.

The Constitutional Court made this Decision on the basis of the first paragraph of Article 161 of the Constitution, Article 7 of the Constitutional Law on Execution of the Constitution and by applying the second sub-paragraph of the third paragraph of Article 25 of the Law of Procedure at the Constitutional Court of the Socialist Republic of Slovenia (Official Gazette of the Socialist Republic of Slovenia, nos. 39/74 and 28/76). The Decision was reached at the meeting of the Constitutional Court

in the following composition: Dr. Peter Jambrek, President, and Dr. Tone Jerovšek, Matevž Krivic, M.L., Janez Snoj, M.L., Dr. Janez Šinkovec, Dr. Lovro Šturm, Franc Testen, Dr. Lojze Ude and Dr. Boštjan M. Zupančič, the judges. The Decision was reached with six votes in its favour and three votes against it. A negative separate opinion concerning the Decision will be prepared by the judges Dr. Jambrek, Dr. Jerovšek and Dr. Šturm, and a positive separate opinion by Mr. Krivic and Dr. Ude.

P r e s i d e n t:
Dr. Peter Jambrek