REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE

U-I-113/04
7 February 2006

D E C I S I O N

At a session held on 7 February 2007 in proceedings to examine the petition of the companies Jata Emona, Inc., Ljubljana, Perutnina Ptuj, Inc., Ptuj, Pivka Perutninarstvo, Inc., Košana, Tovarna močnih krmil Črnci, Inc., Apače, and cooperative Kmetijska zadruga Krka, C. Ltd., Novo mesto, all represented by Aton Marolt, attorney at law in Ljubljana, the Constitutional Court

d e c i d e d a s f o l l o w s:

1. The petition to commence proceedings for the review of the constitutionality and legality of Art. 14.5.a of the Rules on the Quality, Labelling, and Packing of Feedingstuffs in Circulation (Official Gazette RS, Nos. 34/03, 110/05, and 80/06) is dismissed.

2. The proceedings to examine the petition to commence proceedings for the review of the constitutionality of Art. 12.1.I of the Rules on the Quality, Labelling, and Packing of Feedingstuffs in Circulation are discontinued.

R e a s o n i n g

A.

1. The petitioners – business companies which manufacture and sell feedingstuffs and mixtures of feedingstuffs – proposed the review of the constitutionality of Art. 12.1.I of the Rules on the Quality, Labelling, and Packing of Feedingstuffs in Circulation (hereinafter the Rules), which provides that mixtures of feedingstuffs that are not intended for pet animals must be labelled in circulation in a manner such that they contain a statement of where it is possible to obtain data on the precise percentage of every separate feedingstuff in the mixture of feedingstuffs (the name, address, telephone number, and e-mail of the legal entity or natural person). Furthermore, the petitioners proposed the review of the constitutionality of Art. 14.5.a of the Rules, which provides that the contents of mixtures of feedingstuffs intended for all kinds of animals, except for pet animals, must be labelled so that separate feedingstuffs are stated together with their proportions in descending order of quantity, provided that allowed deviations amount to +/– 15 percent at most. They opined that the

challenged provisions were inconsistent with Arts. 33, 60, 67, 69, 74, and 87 of the Constitution.

2. According to the petitioners, the composition of a particular mixture of feedingstuffs (the proportion of the separate feedingstuffs that compose such a mixture of feedingstuffs) is a result of continuous research and the investment of large resources in development. Thus, the precise composition of mixtures of feedingstuffs embodies "know-how", a type of intellectual property and a business secret. Continuous investment in the development of the effectiveness of mixtures of feedingstuffs allegedly allows the petitioners to maintain or increase their market share. The challenged provisions of the Rules nullify any economic value of their intellectual property , as the investment would allegedly provide them no advantages or benefits. With the publication of the data on the precise percentage of the contents of the individual feedingstuffs in a mixture of feedingstuffs, the competition could entirely nullify the value and protection of intellectual property, as competitors would market the same products at lower prices, without the expenses of investment in research and development, and without compensation. Thereby the petitioners will lose market share, which entails irreparable damage. Moreover, the petitioners stated that the challenged provisions are otherwise in conformity with Items (d), (e), and (l) of Art. 5 and Item (a) of Art. 5c.2 of Directive 2002/2/EC of the European Parliament and of the Council of 28 January 2002 amending Council Directive 79/373/EEC on the circulation of compound feedingstuffs, and repealing Commission Directive 91/357/EEC (hereinafter the Directive). However, what is allegedly disputed is the legal validity of the mentioned provisions of the Directive. This was allegedly established by the European Association of Feedingstuffs Producers (FEDEC) in its letter to the President of the EU Council, by several member states, and also by certain courts which have in their concrete proceedings allegedly suspended the internal acts adopted for the assumption of obligations determined for member states by the Directive. To that effect, they allegedly initiated proceedings for a preliminary ruling before the Court of Justice of the European Community (hereinafter the ECJ). The petitioners proposed that the Constitutional Court suspend the implementation of the challenged Directive provisions pending the final decision of the ECJ on the validity of the disputed Directive provisions, and annul *ab initio* the challenged Rules provisions after the decision of the ECJ on the legality of the mentioned Directive provisions.

3. In its reply dated 6 May 2004, the Ministry of Agriculture, Forestry, and Food (hereinafter the Ministry) rejected the petitioners' assertions, and stated that the challenged provisions of the Rules entirely restate Items (d), (e), and (l) of Art. 5 and Item (e) of Art. 5c.2 of the Directive. It explained that the field of feedingstuffs is closely related to ensuring the appropriate health level of food, as feedingstuffs could lead to the remnants of harmful materials ending up in food [for humans], resulting in unhealthy food. Furthermore, it warned that, concerning the assumed obligations, in conformity with Article 3.a of the Constitution, Slovenia is obliged to fully implement the principles and provisions of European Union (hereinafter the EU) regulations. Not following Community regulations could result in the sanctions of a prohibition on or limitation of trading in the Community market.

B. – I.

4. By Order No. U-I-113/04, dated 8 July 2004 (Official Gazette RS, No. 83/04), on the basis of Art. 39 of the Constitutional Court Act (Official Gazette RS, No. 15/94 – hereinafter the ZUstS), the Constitutional Court suspended the implementation of Art. 12.1.I and Art. 14.5.a of the Rules until the final decision of the ECJ on the validity of Art. 1.1.b of Directive 2002/2/EC of the European Parliament and of the Council of 28 January 2002 amending Council Directive 79/373/EEC on the circulation of compound feedingstuffs and repealing Commission Directive 91/357/EEC (OJ L No. 63 of 6 March 2002, p. 23) and Art. 1.4 of the same Directive, in the scope of amending Article 5c.2.a of Council Directive 79/373 on the marketing of compound feedingstuffs (OJ L No. 86 of 6 April 1979, p. 30).

5. By the judgment of 6 December 2005 in the case of ABNA and others, C-453/03, C-11/04, C-12/04 and C-194 (ZOdl., pp. I-10423 – hereinafter the ABNA judgement), the ECJ inter alia decided that Art. 1.1.b of the 2002/2 Directive, which imposes on feedingstuffs producers the obligation to make available the precise components of feedingstuffs at the request of a consumer, was invalid due to the violation of the principle of proportionality, however, it decided that Art. 1.4 of the mentioned Directive was not invalid.

6. The petitioners proposed the appointment of an expert. They substantiated their proposal by stating that the Constitutional Court could thereby obtain an expert opinion regarding the assertion that stating the particular ingredients of individual feedingstuffs in the mixtures of feedingstuffs suffices for the purpose of health protection, and that there is no need to mention their proportion in percentages. The Constitutional Court establishes that the state of facts which is the basis for the examination of the petition has been sufficiently explained already on the basis of the documents submitted. Therefore, it decided not to appoint an expert.

B. – II.

7. By the Rules on the Amendment to the Rules on the Quality, Labelling, and Packing of Feedingstuffs in Circulation (Official Gazette RS, No. 80/06), the challenged provision of Art. 12.1.I of the Rules ceased to apply during the proceedings for the examination of the petition. Thus, in accordance with Art. 47 of the ZUstS, the Constitutional Court called on the petitioners to state whether they still wished to pursue the petition filed in this part, and if they do, to demonstrate their legal interest.

8. The petitioners informed the Constitutional Court by their letter of 30 August 2006 that in the mentioned part they no longer wished to pursue the petition. The Constitutional Court

considered such statement to be a withdrawal of the petition, thus it discontinued the proceedings in this part (Item 2 of the operative provisions).

B. – III.

9. Consequently, what is still challenged by the petitioners is just Art. 14.5.a of the Rules, which provides that the contents of mixtures of feedingstuffs intended for all kinds of animals, except for pet animals, must be labelled so that separate feedingstuffs are stated together with their proportions in descending order of quantity, provided that allowed deviations amount to +/– 15 percent at most.

10. Art. 3a of the Constitution determines that pursuant to a treaty ratified by the National Assembly by a two-thirds majority vote of all deputies, Slovenia may transfer the exercise of part of its sovereign rights to international organizations which are based on respect for human rights and fundamental freedoms, democracy, and the principles of the rule of law and may enter into a defensive alliance with states which are based on respect for these values. An example of such treaty is the Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union (OJ L No. 236 dated 23 September 2003 and Official Gazette RS, No. 12/04, MP, No. 3/04 – MPPEU), by which Slovenia transferred part of its sovereign rights to the EU. This simultaneously entails that in certain areas it also transferred normative regulation to the EU. Member States have namely mutually agreed that henceforth they would consider certain of their powers to be matters of common interest, concerning which activities carried out within the organization or those carried out through such will be much more effective and beneficial than if performed individually (see the opinion in Rm 1/97 dated 5 June 1997, Official Gazette RS, No. 40/97 and OdlUS VI, 86).

11. The legal basis for the adoption of Directive 2002/2 was Art. 152.4.b of the Treaty establishing the European Communities (consolidated text, OJ C 321/E/06 of 29 December 2006 and Official Gazette RS, No. 27/04, MP, No. 7/04 – hereinafter the TEC), which determines that the Council, acting in accordance with the procedure referred to in Art. 251 and after consulting the Economic and Social Committee and the Committee of Regions, contributes to the achievement of the objective referred to in this article through the adoption

of measures, by way of derogation from Art. 37, in the veterinary and phytosanitary fields, which have as their direct objective the protection of public health. In the ABNA judgment the ECJ established that Art. 152.4.b of the TEC is a correct and appropriate legal basis for taking measures necessary for the protection of public health[1]. In conformity with Art. 249.3 of the TEC, for every Member State to which it is addressed[2] a directive is obligatory concerning the objective that is to be achieved, however, it leaves it to the Member States to choose the form and methods for such. Thus, a directive always requires that Member States transpose such into their legal systems. Art. 3 of the mentioned 2002/2 Directive requires that by 6 March 2003 Member States adopt and promulgate regulations which are necessary for the implementation of the 2002/2 Directive, and begin to apply such on 6 November 2003. As regards Art. 53 of the Act, concerning the conditions of accession, cited already in note 2, for new Member States this obligation has existed since 1 May 2004. In the concrete case it is necessary to consider that the Rules were adopted due to the transposition of an EU directive into the Slovene legal system, and are therefore a so-called implementing regulation.

12. Neither Art. 3.a of the Constitution nor Art. 249.3 of the TEC determines by which legal act EU law is to be transposed into the Slovene legal system. Thus, the fact that the Rules are an implementing regulation does not exclude the jurisdiction of the Constitutional Court, or limit such. This in the considered case entails that both the Constitution and the principle of the separation of legislative, executive, and judicial powers regulated in such (Art. 3.2) are to be respected. This principle namely excludes the possibility that administrative authorities would amend or independently regulate legislative matters. The relevant question of constitutionality that the Constitutional Court considered in this case referred to the question of the existence of a statutory basis for regulation in the challenged Rules, and consequently to the question of its conformity with Art. 120.2 of the Constitution (and not with Art. 87 of the Constitution, as erroneously asserted by the petitioners).

13. In accordance with Art. 120.2 of the Constitution, administrative authorities perform their work independently within the framework and on the basis of the Constitution and laws. The principle of the binding effect of the Constitution and laws on state authorities and, in the framework of such, the legality principle in the adoption of regulations are, as basic constitutional principles, closely connected with the principles of a democratic and law-governed state (Arts. 1 and 2 of the Constitution). Concerning the normative activity of the state administration, these principles entail that in the adoption of regulations the state administration is substantively bound by the Constitution and laws. Accordingly, administrative authorities do not have the right to adopt regulations without them being substantively based on a law – however, it is not necessary that the explicit authority for the implementation of which regulation is adopted be determined in the law. The so-called executory clause (a statutory provision that a regulation is to be adopted by a certain time limit) only entails that the legislature did not (entirely) leave the adoption of regulations to the judgment of the executive power, but it imposed on such the obligation to regulate certain issues, and determined a time limit for such (see also Constitutional Court Decision No. U-I-305/96, dated 22 April 1999, Official Gazette RS, No. 36/99 and OdlUS VIII, 82 and Decision No. U-I-264/99, dated 28 September 2000, Official Gazette RS, No. 97/2000 and OdlUS IX, 226). Regarding the imposition of obligations or the granting of authority to adopt regulations, executory clauses can be general (e.g. not determining precisely what is to be

done in connection with the regulation) or completely precise (precisely determining the subject-matter that the regulation may deal with). It falls within the legislature's discretion which type of executory clause it chooses in a concrete case. Thereby it is only limited by the constitutionally defined relations between the legislative and executive power. As already the principle of the separation of powers (Art. 3.2 of the Constitution) excludes the possibility that administrative authorities amend or independently regulate statutory subject-matter, an executory clause may not contain the authority on the basis of which regulations would contain provisions for which there is no basis already in the law; in particular they must not leave to a regulation the independent determination of rights and obligation.

14. The challenged Rules had an explicit statutory basis in Art. 4 of the Feedingstuffs Act (Official Gazette RS, No. 13/02 et seq. – hereinafter ZKrmi), which in Para. 4.4. determined that feedingstuffs must be labelled in a manner that contains data on raw-material composition, nutritious materials, and additives. Concerning the above-mentioned, it is possible to conclude that ZKrmi already regulated the obligation to label feedingstuffs. In Art. 4.6 of ZKrmi the legislature also authorized the Minister to precisely prescribe the manner of labelling feedingstuffs. During the proceedings for examining the petition the new Feedingstuffs Act was adopted (Official Gazette RS, No. 127/06 – hereinafter ZKrmi-1), which repealed ZKrmi and, for the regulations adopted on the basis of such, determined in Art. 31.2 that they continue to apply until the coming into force of the regulations adopted on the basis of this law. However, also the new ZKrmi-1 regulates the obligation to label feedingstuffs, as in Art. 6.1 it determines that feedingstuffs in circulation must be labelled in a prescribed manner. Furthermore, Art. 6.6. of Zkrmi-1 determines that the Minister prescribe a more precise manner of labelling feedingstuffs if EU regulations do not determine otherwise. Therefore, the new law contains a more general executory clause than was determined in ZKrmi. However, according to the Constitutional Court, the challenged provision of the Rules does not amend or independently regulate the obligations of legal entities or natural persons who circulate feedingstuffs. Thus, the petitioners' allegations are unsubstantiated.

15. Moreover, the petitioners alleged that the challenged provision of the Rules violated Arts. 33, 60, 67, 69, and 74 of the Constitution. As was already mentioned, a directive generally gives Member States a certain degree of discretion in selecting the means for reaching an obligatory result. Nevertheless, in the mentioned case we cannot neglect the finding that the 2002/2 Directive is in the part which also the petitioners emphasized obligatory to such an extent that Member States are given none of the above-mentioned freedom in achieving the objectives of the 2002/2 Directive. In accordance with the 2002/2 Directive, the challenged Rules provision restates in terms of substance what was already determined in the 2002/2 Directive. This entails that by formally requiring the annulment ab initio of the challenged Rules provision, in terms of substance the petitioners challenge the 2002/2 Directive provision which prescribes the obligation to label feedingstuffs. Concerning Art. 1.4 of the 2002/2 Directive, the ECJ already established that from the view of the principle of proportionality there was no element that would affect its validity[3], and that it does not violate fundamental rights, in particular the right to property and the right to freely carry out one's profession[4].

16. Although the founding treaties of the EU [i.e., the EC] were limited to the objectives of economic integration, i.e. to forming a customs union and a common market, in which a political union that would contain a catalogue of human rights was not mentioned, with the aid of the case law of the ECJ a path towards recognizing human rights as an integral part of the EU legal system was gradually built. Upon their formal recognition and the amendments made to the founding treaties, respect for human rights and fundamental freedoms became one of the basic principles on which the EU is based. Thus, from Art. 6.1 and Art. 6.2 of the Treaty on the European Union (consolidated text, OJ C 321 E/06 of 29 December 2006 and Official Gazette RS, No. 27/04, MP, No. 7/04) it follows that the EU is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, i.e. principles which are common to all Member States, and respects the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which as general principles of Community law result from the constitutional traditions common to the Member States. Additionally, one of the key objectives of the EU is to promote the proportionate, balanced, and sustainable development of economic activities, a high level of employment and social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competition and convergence of economic effects, a high level of protection and improvement of the quality of the environment, raising the level and quality of life, and economic and social cohesion and solidarity between Member States by establishing a common market and an economic and monetary union, and by carrying out common policies or activities in the entire Community (Art. 2 of the TEC). In order to achieve this objective, the internal market was established, for which what is typical is the elimination of impediments to the free flow of goods, persons, services, and capital between Member States.

17. Among other rights, EU law also protects the right to property[5], which includes both the right of ownership and the rights of intellectual property, the right to carry out economic activities[5], and in particular free competition and the four freedoms connected with such (the free flow of goods, persons, services, and capital). The rights in the mentioned case correspond in terms of substance to the rights determined in Arts. 33, 60, 67, and 74 of the Constitution. As the mentioned human rights do not ensure more rights than are protected by EU law, concerning the case at issue and considering the specific circumstances of this case, i.e., that the challenged provision of the Rules is completely identical to the provision of Art. 1.4. of the 2002/2 which the ECJ by its judgment in the ABNA case already established was valid, the petition is also in this part evidently unsubstantiated.

18. Accordingly, the Constitutional Court dismissed the petition in this part as evidently unsubstantiated (Item 1 of the operative provisions).

19. The Constitutional Court adopted this Order on the basis of Arts. 6 and 26.2 of the ZUstS, composed of: Dr. Janez Čebulj, President, and Judges Dr. Zvonko Fišer, Lojze Janko, Marija Krisper Kramberger, LL.M., Milojka Modrijan, Dr. Mirjam Šrk, and Dr. Dragica Wedam Lukić. The Order was adopted unanimously.

Dr. Janez Čebulj

President

Notes:

[1] See the judgment in the above-mentioned case of ABNA and others, Paras. 52–61 of the reasoning.
[2] In accordance with Art. 53 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ L 236 of 23 September 2003 and Official Gazette RS, No. 12/04 – hereinafter the Act concerning the conditions of accession), upon accession the new Member States are considered to be addressees of directives and decisions within the meaning of Art. 249 of the TEC Treaty, provided that those directives and decisions have been addressed to all the present Member States; the new Member States are thereby considered to have received notification of such directives and decisions upon accession.
[3] *Id,* Para. 85 of the reasoning.
[4] *Id,* Paras. 86–88 of the reasoning.
[5] See, e.g., the ECJ judgment of 13 December 1979, in the case of Liselotte Hauer v. the Land of Rheinland-Pfalz, 44/79, Recueil, p. 3727.
[6] See, e.g., the ECJ judgment of 27 September 1979 in the case of SpA Eridania-Zuccherifici nazionali et SpA Società italiana per l'industria degli zuccheri proti Ministre de l'agriculture et des forêts, Ministre de l'industrie, du commerce et de l'artisanat in SpA Zuccherifici meridionali, 230/78, Recueil, p. 2749.