

Number: U-II-1/12-24
U-II-2/12-23
Date: 17 December 2012

On the basis of the first paragraph of Article 30 of the Rules of Procedure of the Constitutional Court (Official Gazette RS, Nos. 86/07, 54/10, and 56/11), the Constitutional Court hereby issues the following

PRESS RELEASE

I.

The Decision

By Decision No. U-II-1/12, U-II-2/12, dated 13 December 2012, the Constitutional Court decided that unconstitutional consequences would occur due to the suspension of the implementation or the rejection of the Slovene National Holding Company Act (SNHCA) and the Measures of the Republic of Slovenia to Strengthen the Stability of Banks Act (MSSBA) in referenda. The decision was reached by eight votes against one. Judge Korpič – Horvat voted against and submitted a dissenting opinion. Judge Petrič submitted a concurring opinion.

The Constitutional Court decided that priority must be given to the constitutional values that due to the calling of referenda and even more so due to the possible rejection of the SNHCA and MSSBA would remain unprotected to such an extent that the balance between different constitutional values would be jeopardised. Therefore, the right to request a call for a legislative referendum must give way. The values emphasised by the National Assembly that in the assessment of the Constitutional Court have priority over the right to request a call for a referendum in the present circumstances of severe economic crisis are the following:

- efficient exercise of state functions, including the creation of conditions for the development of the economic system;
- exercise of human rights, in particular the rights to social security, security of employment, and free enterprise;
- respect for the binding international law obligations of the state; and
- ensuring the effectiveness of the legal order of the European Union in the territory of the Republic of Slovenia.

The National Assembly demonstrated that immediate implementation of the statutory measures is necessary in order to protect the mentioned values in the present circumstances

of the economic crisis. Submitting the adopted laws for decision-making in referenda and their potential rejection at such referenda would therefore constitute unconstitutional consequences. Therefore, the referenda regarding the SNHCA and MSSBA are not constitutionally admissible.

II.

The Principal Grounds for the Decision

1. The National Assembly requested that the Constitutional Court decide that unconstitutional consequences would occur due to the suspension of the implementation or the rejection of the SNHCA and MSSBA in referenda.

2. The right to request a call for a referendum is an important constitutional right enabling an individual issue regulated by a law to be decided on by voters in a referendum. By such, they directly exercise the power which they otherwise exercise indirectly through elected representatives in the National Assembly (the second sentence of the second paragraph of Article 3 of the Constitution). However, this constitutional right is not absolute in the sense that a referendum is always admissible if the conditions determined in the second paragraph of Article 90 of the Constitution are fulfilled.

3. There may exist other values that are equally protected by the Constitution that must be ensured constitutional protection along with the right to request a call for a referendum. Therefore, in a situation in which the right to request a call for a referendum is in collision with other constitutional values, on the basis of weighing the constitutional values at issue, the Constitutional Court must determine which of them should be given priority in order to maintain their constitutional balance. Constitutionally protected rights and other constitutional values are at the focus of such review and the criteria according to which the Constitutional Court reviews the constitutional admissibility of a legislative referendum must be adapted to the nature of these rights and values.

4. In the hitherto constitutional case-law regarding the admissibility of a legislative referendum, the focus of such review has been the issue of whether there exists an unconstitutionality regarding the law in force and the issue of whether the newly adopted law that is to be decided on in a referendum remedies this unconstitutionality in accordance with the Constitution. If the National Assembly failed to demonstrate the unconstitutionality of the law in force, the Constitutional Court concluded the review already in the first stage of establishing the potential unconstitutional consequences, i.e. at the stage of establishing whether the current regulation is unconstitutional, without reviewing on the merits whether there exist other constitutionally guaranteed rights besides the right to request a call for a legislative referendum to which the Constitutional Court must also ensure constitutional protection. The predominate common denominator of these cases was the fact that there already existed a decision of the Constitutional Court regarding the unconstitutionality of a law to which the legislature should have responded. If there is no such prior decision, such a focus can cause other values equally protected by the Constitution to be overlooked. Thus,

when the situation to be reviewed does not concern remedying an existing unconstitutionality of a law, the issues of the constitutionality of the statutory regulation in force and of the constitutionality of the newly adopted statutory regulation that is to be submitted for approval in a referendum are not in the foreground. The important constitutional values that the legislature intends to protect with the newly adopted law must be in the foreground. Only by putting these values at the focus of the review can it be ensured that the constitutional law arguments of both parties to the proceedings, i.e. the National Assembly and the proposers of the request to call for the legislative referendum, are given constitutionally appropriate weight. Therefore, the Constitutional Court is to a certain extent amending its position regarding the focus of its review and expanding its understanding of the concept of unconstitutional consequences. If the constitutional values opposing the right to request a call for a legislative referendum have, on the basis of their importance and nature, such constitutional weight that requires urgent implementation of a newly adopted law, such values must be given priority over the right determined in the second paragraph of Article 90 of the Constitution. In such circumstances, the Constitutional Court establishes that unconstitutional consequences would occur due to the suspension of the implementation or the rejection of the law in a referendum.

5. Therefore, the National Assembly, which alleges the existence of unconstitutional consequences, must demonstrate the existence of constitutional values which may influence the limitation of the right to request a call for a legislative referendum, and present the arguments why the consequences of the legislative referendum will allegedly be unconstitutional. In the cases at issue, the National Assembly alleges that the suspension of the implementation or the rejection of the SNHCA and MSSBA in referenda would jeopardise the efficient functioning of a state governed by the rule of law and a social state in guaranteeing the exercise of its vital functions and ensuring the rights to social security (the first paragraph of Article 50 of the Constitution), health care (the first and second paragraph of Article 51 of the Constitution), the rights of disabled persons (Article 52 of the Constitution), and other human rights, *inter alia*, the right to free enterprise (the first paragraph of Article 74 of the Constitution) and to security of employment (Article 66 of the Constitution). It also cited the constitutionally protected values of the responsibility of the state to implement the international law obligations it has adopted (Article 8 of the Constitution) and to ensure the effectiveness of the legal order of the European Union in its territory (the third paragraph of Article 3.a of the Constitution).

6. The values emphasised by the National Assembly require adequate constitutional law protection. The National Assembly assesses that at this precise time we are confronted with the fact of these constitutional values being either already in jeopardy or significantly restricted if the state does not adopt urgent measures to ensure the fiscal sustainability of its activities in the circumstances of the current economic crisis. Due to the arguments presented by the National Assembly and the generally known facts regarding the fiscal positions of the state, which is also confirmed by important international entities (e.g. the International Monetary Fund, the European Union Commission, the Organisation for Economic Co-operation and Development – the OECD), and the financial situation of state owned banks, as well as the fiscal situation of other euro-area Member States, the

Constitutional Court did not have reasonable grounds to doubt the assessment of the National Assembly.

7. Ensuring the efficient functioning of the state, which also includes ensuring the exercise of human rights and fundamental freedoms, has an important weight under constitutional law. Such applies also to respecting the fundamental principles of international law and international treaties, which influences the credibility of a state in international law. Ensuring the effectiveness of European Union law, which the state has committed itself to on the basis of the first and third paragraphs of Article 3.a of the Constitution, is also of special constitutional importance. It must also be taken into account that in the event a law were to come into force if the Constitutional Court decides that other constitutionally protected values must be given priority over the right to request a call for a referendum, such does not entail that a constitutional review of the newly adopted law cannot be requested and that any eventual unconstitutionality can also be remedied on the basis of an appropriate decision of the Constitutional Court.

8. In this regard, the Constitutional Court points out that in accordance with the principle of the separation of powers, the Constitutional Court has not reviewed the adequacy and appropriateness of the SNHCA and MSSBA. Therefore, these two issues cannot influence the decision regarding the existence of unconstitutional consequences. As the Constitutional Court has repeatedly emphasised, the National Assembly and the Government are, in this respect, wholly responsible for the substance of the statutory regulation, in the case at issue, the substance of the two economic policy measures regarding the functioning of the banking system and the management of the assets of the state.

9. On the basis of weighing the constitutional values at issue and taking into account the mentioned circumstances, the Constitutional Court held that it is necessary to give priority to ensuring the undisturbed exercise of state functions, including the creation of the conditions for the development of the economic system and ensuring respect for the rights guaranteed by the Constitution, in particular the rights to free enterprise, social security, health care, the rights of disabled persons, and security of employment, together with respect for the fundamental principles of international law and international treaties, and ensuring the effectiveness of the legal order of the European Union, over the right to request a call for a legislative referendum. Accordingly, the Constitutional Court agreed with the petitioner that unconstitutional consequences would occur due to the suspension of the implementation or the rejection of the SNHCA and MSSBA in referenda.

Dr. Ernest Petrič
President