Concurring Opinion of Judge Dr Ernest Petrič

1. Let me first underline that in cases U-II-1/12 and U-II-2/12 what is at issue is, of course, not an assessment by the Constitutional Court regarding whether the measures implemented by the Slovene National Holding Company Act (EPA 516-VI – hereinafter referred to as the SNHCA) and by the Measures of the Republic of Slovenia to Strengthen the Stability of Banks Act (EPA 637-VI – hereinafter referred to as the MSSBA) – which in the opinions of the National Assembly and the Government form an integral part of the urgent reform package – really constitute the best possible solutions or not. An assessment regarding this issue would be an assessment of the suitability of these statutory solutions, which cannot be subject to assessment by the Constitutional Court. The applicants, i.e. the National Assembly and the Government, bear responsibility for whether the SNHCA and the MSSBA are appropriate measures or the best possible solutions. The issue of the quality and appropriateness of these two reform measures remained disputable among the applicants and a part of the profession, on one hand, and the opposition and a part of the profession, on the other. The Constitutional Court is not in the position to act as an arbitrator thereon.

2. In conformity with Article 21 of the Referendum and Popular Initiative Act (Official Gazette RS No. 26/07 – official consolidated text – hereinafter referred to as the RPIA) and at the request of the National Assembly, the Constitutional Court was only obliged to adjudge whether the referenda on these Acts (one or both) must be allowed. However, I would like to add a few considerations. But first, let me stress that in the [Court's] assessment, the upgrade (or modification) of the test whose essence is the weighing, on one side, of constitutionally protected values (i.e. fundamental human rights, especially the right to social security (Article 50 of the Constitution), the right to health care (Article 51 of the Constitution), and the obligation of the state to provide opportunities for employment and work and to ensure their protection (Article 66 of the Constitution)), and, on the other side, the right to a referendum (Article 90 of the Constitution), constitutes an important step in the development of the doctrine of the Constitutional Court regarding future decision-making on the admissibility of referenda. Hitherto – especially because the Constitutional Court has been faced with such requests – the Constitutional Court assessed whether the rejection of an act in a referendum would lead to the continued existence of unconstitutionalities that the new act would eliminate. The Constitutional Court again followed such an approach also when assessing the act regulating pensions because, among other reasons, in that case the urgency aspect, i.e. the existence of a direct and actually existing threat to constitutionally protected values, was not in the foreground.

3. In the case at hand, with an accentuated sense of urgency, the Constitutional Court had to take an approach to weighing the right to a referendum (Article 90 of the Constitution) and other constitutionally protected values or rights. I concur with the outcome of this weighing, which is expressed in the operative provisions and in the reasoning of the Decision. While weighing between constitutionally protected values by means of this new or improved test, the Constitutional Court, in my opinion, failed to attribute enough weight to the allegations of the National Assembly that the subsequent postponement of the reforms which the SNHCA and the MSSBA are a part of, may lead to the restriction of our country's sovereignty, as by applying for assistance (from the EU and the International Monetary Fund – hereinafter referred to as the IMF), which in the opinion of the National Assembly would be a consequence of a standstill as regards the reform efforts, the state would have to welcome the arrival of the so-called "troika" and its control. I believe that these arguments of the National Assembly are well-founded and should be taken into consideration.

4. Sovereignty is not only a legal category (legal supremacy and the independence of the state power), but it also has content. Such stems already from the right of the nation to self-determination, which is, as a general rule, realised in the form of its sovereign state. Undoubtedly – and such is explicitly expressed in all the most important international acts that determine the right of peoples to self-determination – this includes the determination of its own will (i.e. free!), not only regarding its own political status, but also regarding its economic, cultural, and social development.[1] Such is the essence of the content of the right to self-determination and, subsequently, the content of the sovereignty of the state, after a nation has realised the right to self-determination by establishing its own sovereign state. A sovereign state can, of course, by entering an international organisation and by concluding international treaties, of its own will, transfer a part of its sovereignty. However, when a state finds itself in a position wherein either an international organisation which it is a member of, or other members of the same international organisation, or future contractual partners therein actually dictate the content of the agreement, or in a position wherein it has to accept required conditions, and when such external requirements interfere with the sphere of its internal policy (for instance, the determination of a reduction in salaries and pensions, limitations on budgetary expenditures, etc.), its internal autonomy and independence regarding the determination of the economic, cultural, and especially social policy is undoubtedly damaged. Such "freedom", which is the primary content and meaning, the *raison d'être*, first of self-determination and then of sovereignty, is limited. The position of Greece, as such is in relation to those in fact dictating (even though in the form of negotiations) its conditions of assistance and then controlling (together with the parliaments of other members of the EU or of the euro group) the exercise of such agreement, entails, from a substantive point of view, an actual limitation of its sovereignty regardless of the fact that it formally remains a sovereign state. Sovereignty, its actual content, not only its form, is, however, an important constitutionally protected value (Article 3 of the Constitution).

5 Sovereignty is one of the fundamental rights of the state under international customary law and, at the same time, on the basis of the Charter of the United Nations (the right to sovereign equality – Article 2 of the Charter), one of the fundamental principles of modern international law. Precisely for such reason, its limitation is only admissible if such is stated by express provisions of international treaties or decisions of international organisations, which must be interpreted restrictively. If the Republic of Slovenia, due to the postponement of the reform efforts, which could – according to the allegations of the National Assembly and Government, and also to a series of international institutions – be a consequence of the realisation and result of the referenda at issue, entered into a position where international forums (i.e. the EU and the IMF) determined its conditions as well as limitations on its internal economic, financial, social, etc., policy, even if in the form of an agreement, such would entail an evident reduction or limitation of its sovereignty, which is an important constitutionally protected value.

6. In separate opinions to the Decisions of the Constitutional Court regarding the admissibility of a referendum (Decisions Nos. U-II-1/11, dated 10 March 2011, Official Gazette RS No. 20/11, U-II-2/11, dated 14 April 2011, Official Gazette RS No. 30/11, and U-II-3/11, dated 8 December 2011, Official Gazette RS No. 109/11), I substantiated that Article 21 of the RPIA in fact represents an interference of the judicial branch of power, namely the Constitutional Court, with the course of the legislative procedure, which I believe is unacceptable from the viewpoint of the separation and equality of the three branches of power (Article 3 of the Constitution). I am still of the opinion that the Constitutional Court should, under the “principle of correlation”, approach the constitutional assessment of Article 21 of the RPIA from the viewpoint of Article 3 of the Constitution. I hope nonetheless that this question will be resolved in the framework of the planned amendment of the Constitution (and subsequently of the legislation) regarding the regulation of referenda. What would be definitely constitutionally clear and politically appropriate would be a regulation that would sensibly determine and appropriately limit exercise of the right to a referendum. The possibility of abusing the institution of the referendum in order to effect political blockades and to transfer responsibility to the Constitutional Court and to the bearers of the constitutional right to a referendum, i.e. the voters, with regard to matters which should lie in the competence and be the responsibility of the political institutions, i.e. the legislature, the Government, and also the opposition, would thus be eliminated.

Prof. Dr Ernest Petrič

Note:
[1] Article 1 of the International Covenant on Civil and Political Rights (Official Gazette SFRY No. 7/71 and Official Gazette RS No. 35/92, MP, No. 9/91 – ICCPR) reads as follows: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” The

eighth indent of the Helsinki Final Act on security and cooperation in Europe from 1975 reads similarly.