U-I-249/10
15 March 2012

DECISION

At a session held on 15 March 2012 in proceedings to review constitutionality initiated upon the requests of the Confederation of Trade Unions of Slovenia PERGAM, Ljubljana, represented by Dr Janez Posedi, President, the Slovene Public Authorities Trade Union, Ljubljana, represented by Ivan Stošič, attorney in Ljubljana, and the Slovene Veterinaries Trade Union, Ljubljana, represented by Bojan Grubar, attorney in Maribor, the Constitutional Court

decided as follows:

1. **The first to tenth paragraphs of Article 42 of the Public Sector Salary System Act (Official Gazette RS, No. 108/09 – official consolidated text, 13/10, 59/10, 85/10, 107/10, and 35/11) and Article 2 of the Act Amending the Public Sector Salary System Act (Official Gazette RS, No. 85/10) insofar as it refers to the aforementioned provisions are inconsistent with the Constitution.**

2. **The National Assembly of the Republic of Slovenia must remedy the established inconsistency within two years from the publication of this Decision in the Official Gazette of the Republic of Slovenia.**

3. **The first to tenth paragraphs of Article 42 of the Public Sector Salary System Act and the Collective Agreement for the Public Sector (Official Gazette RS, Nos. 57/08, 23/09, 91/09, and 89/10) continue to apply until the established inconsistency is remedied.**

REASONING

A

1. The Confederation of Trade Unions of Slovenia PERGAM (hereinafter referred to as the first applicant) has lodged a request to review the constitutionality of the second, third, fourth, sixth, seventh, eighth, ninth, and tenth paragraphs of Article 42 of the Public Sector Salary System Act (hereinafter referred to as the PSSSA) and Article 2 of the Act amending the Public Sector Salary System Act (hereinafter referred to as the PSSSA-O). It states that it is a representative confederation of trade unions for the entire national territory that unites representative sectoral and occupational trade unions, including trade unions that primarily unite public sector employees. It has enclosed decisions on representativeness for the national territory and for several activities. The first applicant explains, *inter alia*, that the challenged amendment to the conditions that are required to be met in order for a collective agreement to enter into force, or to be amended, interferes with the rights of the members of the seven representative trade unions who are signatories of the Collective Agreement for the Public Sector (hereinafter referred to as the CAPS[1]), and that it also directly affects the rights of civil servants who are members of the first applicant. In this way, two annexes to the CAPS (Official Gazette RS, No. 89/10) have already been concluded on the basis of the amended conditions and without the involvement of the trade unions of the first applicant; in the opinion of the first applicant these annexes interfered retroactively with the rights of civil servants.

2. It is alleged that, contrary to Article 76 of the Constitution, the PSSSA interfered with the applicable CAPS, which is an autonomous source of law. The PSSSA allegedly now provides that the collective agreement for the public sector may be amended in a manner which is different from that which was freely agreed upon by the parties to the CAPS in Article 4 thereof. It emphasises that the autonomy of collective bargaining, which is also an international standard, is a constitutional right derived from the freedom of trade unions determined in Article 76 of the Constitution. In the opinion of the first applicant, the measures through which the state unilaterally replaces the adopted and established autonomous legal norms of collective agreements limit the autonomy of collective bargaining and are inconsistent with Article 4 of the Convention of the International Labour Organization concerning the Application of the Principles of

the Right to Organise and to Bargain Collectively (Official Gazette FPRY [Federal People's Republic of Yugoslavia], MP, No. 11/58 – hereinafter referred to as ILO Convention No. 98). The first applicant alleges that the challenged regulation, which interferes with the part of the CAPS regarding the obligations of the parties to the agreement, is also inconsistent with the requirement of conformity of legal acts. The first applicant further believes that all the challenged provisions that determine to the manner of establishing whether the signatory trade unions meet the conditions regarding the number of members that is required in order to conclude and amend the collective agreement for the public sector to be inconsistent with Article 76 of the Constitution. The fact that employers may count the number of members of a trade union among their employees allegedly entails an inadmissible and disproportionate interference with the freedom of action of trade unions and the freedom to join trade unions. The first applicant adds that access to the membership forms of trade union members involves the processing of particularly sensitive personal data, which is also protected by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23 November 1995, pp. 31–50). In its opinion, the tenth paragraph of Article 42 of the PSSSA actually prevents trade unions that do not consent that their members be counted from representing their members' interests, which is contrary to Article 76 of the Constitution.

3. The first applicant points out that, on the basis of the second paragraph of Article 42 of the PSSSA, a collective agreement for the public sector could be adopted or amended by trade unions, the membership of which includes more than 40% of public sector employees, even though trade unions, the membership of which includes more than 50% of public sector employees, were opposed thereto. In its opinion, this would be illogical, undemocratic, and conceptually inconsistent with the regulation of the Representativeness of Trade Unions Act (Official Gazette RS, No. 13/93 – hereinafter referred to as the RTUA), according to which a representative trade union represents all employees to the extent to which it acquired representative trade union status. It is therefore alleged that, contrary to the RTUA and Article 76 of the Constitution, the above-mentioned provision inadmissibly and disproportionately restricts the possibilities of trade unions to represent employees' interests in the areas for which they have acquired the status of a representative trade union.

4. In its opinion, the second paragraph of Article 42 of the PSSSA and Article 2 of the PSSSA-O are unclear and therefore inconsistent with Article 2 of the Constitution. The first applicant takes the view that, by adopting the challenged regulation, the legislature abused the rules of the legislative procedure and the state acted fraudulently because, by amending the law, it retroactively reduced the quorum. Therefore, in its opinion, the challenged regulation is inconsistent with one of the principles of a state governed by the rule of law enshrined in Article 2 of the Constitution, to be precise the principle that obligates bearers of authority to respect the law. Lastly, the first applicant alleges that the challenged provisions are also inconsistent with Article 155 of the Constitution, which prohibits legal acts from having retroactive effect. The PSSSA-O, which amended Article 42 of the PSSSA, allegedly amended the conditions that have to be met in order to amend the collective agreement for the public sector during the on-going negotiations [for its amendment], which indicated that the majority required for the amendment according to the CAPS will not be achieved.

5. The Slovene Public Authorities Trade Union (hereinafter referred to as the second applicant) challenges Article 42 of the PSSSA and Article 2 of the PSSSA-O on the grounds that they are inconsistent with Articles 2, 76, and 155 of the Constitution. In its opinion, both provisions affect the existing CAPS as they changed the quorum that was determined in the CAPS for amendments thereto. Such was allegedly enacted during the negotiations in order to deceive the social partners, while the conditions for the urgent legislative procedure were not met. It further adds that an “interference with the actual number of members” entails an inadmissible interference with Article 76 of the Constitution.

6. The Slovene Veterinaries Trade Union (hereinafter referred to as the third applicant) challenges the eighth paragraph of Article 1 of the PSSSA-O. It claims that it is inconsistent with Articles 38 and 76 of the Constitution. The challenged regulation allegedly requires that sensitive personal data regarding the membership in a trade union be submitted without the explicit consent of its members. The disclosure of the data regarding membership allegedly also interferes with the right of individuals to freely decide on whether or not they want to become members of a trade union.

7. The Constitutional Court served the first applicant’s request on the National Assembly. The National Assembly did not respond thereto; however,

the Government of the Republic of Slovenia submitted an opinion thereon. In this opinion, the Government explains that the allegations of an unconstitutional interference with the CAPS are unfounded. By referring to several positions of the Constitutional Court and the European Court of Human Rights (hereinafter referred to as the ECtHR),[2] the Government deems that the freedom of trade unions, determined in Article 76 of the Constitution, does not provide for the right to effectiveness and therefore the right to conclude any collective agreement. On the contrary, in its opinion, it is possible to infer from Article 76 of the Constitution, Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94 – hereinafter referred to as the ECHR), Article 6 of the European Social Charter – revised (Official Gazette RS, No. 24/99, MP, No. 7/99 – hereinafter referred to as the ESC), and ILO Convention No. 98 that collective agreements are to be concluded freely and voluntarily. In the Government's opinion, Article 76 of the Constitution does not prevent the state from amending, without the trade unions' consent, the conditions under which the collective agreement applies to the non-signatories and non-members of the trade unions. In relation to such, the Government stresses that, according to the PSSSA (and, in particular, Articles 7 and 13 thereof), the collective agreement for the public sector applies to all employers and employees in the public sector and therefore has the same effects as a collective agreement with *erga omnes* applicability pursuant to the Collective Agreements Act (Official Gazette RS, No. 43/06 – hereinafter referred to as the CAA). The Government deems that only a law may determine the conditions for the *erga omnes* applicability of a collective agreement, meaning that it also applies to trade unions that did not sign it, to employees that are not trade union members, and for sectors from which no representative trade union participated in the conclusion of the collective agreement. As the amendments to the collective agreement for the public sector also have *erga omnes* effect, the same also applies with regard to determining the conditions for the applicability of the amendments. In its opinion, ILO Convention No. 98 does not apply to civil servants, and the challenged regulation is not inconsistent with the Convention of the International Labour Organization concerning the Promotion of Collective Bargaining No. 154 (Official Gazette RS, No. 46/08, MP, No. 12/08, Official Gazette RS, No. 121/05, MP, No. 22/05 – hereinafter referred to as ILO Convention No. 154), which regulates this subject matter. The Government further deems that the prescribed manner in which the quorum is determined is not inconsistent with the freedom of trade unions or with the right of individuals to freely join trade unions determined in Article 76 of the Constitution. Allegedly,

it only prescribes a counting of the submitted membership forms that are returned to the trade union after the authorised person has inspected them, while it does not require that members are specifically verified by name.

8. The Government also dismisses the allegations regarding vagueness, the violation of the principle of legal certainty, retroactive effect, misuse of its role in the legislative procedure, and the deceit of the social partners. In its opinion, the urgent procedure in which the PSSSA-O was adopted was consistent with the Rules of Procedure of the National Assembly (Official Gazette RS, No. 972/07 – official consolidated text, and 105/10); the reason underlying this procedure was to avoid the occurrence of consequences for the operation of the state that would be difficult to remedy. Such consequences would have allegedly ensued as the collective agreements for the public sector, due to inadequate provisions regarding the adoption of amendments thereto, could not have been concluded. As a result, it would have allegedly been impossible to implement measures regarding public sector salaries for 2011 and 2012, which are crucial in terms of achieving fiscal sustainability. In the conclusion of its opinion, the Government describes in detail the negotiations with the representative trade unions regarding the salary policy for the public sector, which it initiated due to the requirement to strike a balance between salary trends in the public and private sectors and because of fiscal sustainability. Such allegedly illustrates that the state attempted to maintain social dialogue, which had been seriously jeopardised and even blocked because a specific group of trade unions was not prepared [to co-operate], and the state was therefore forced to find other solutions to facilitate further social dialogue.

B – I

9. The first applicant challenges the second paragraph of Article 42 of the PSSSA which, in a subsidiary manner, determined the conditions for concluding and amending the collective agreement for the public sector. It stated that it also challenges the third and fourth, and sixth to tenth paragraphs of Article 42 of the PSSSA. It follows from the grounds for this part of the request that the first applicant opposes the manner in which one of the conditions determined in the second paragraph of Article 42 of the PSSSA is established, i.e. the number of members of representative trade unions that signed the collective agreement for the public sector. Therefore, the Constitutional Court deemed that, in addition to

the second paragraph of Article 42 of the PSSSA, the first applicant challenges all the provisions of the same article that refer to establishing the fulfilment of the condition regarding the number of members and the consequences that follow if a trade union does not give its consent thereto. Those provisions are the third and fourth paragraphs of Article 42 of the PSSSA to the extent that they refer to its second paragraph, and the sixth, seventh, eighth, ninth, and tenth paragraphs of the same article of the PSSSA. The first applicant further states that it challenges Article 2 of the Act amending the PSSSA. The first paragraph of this Article determines that the provisions of the Act apply to the conclusion of a collective agreement for the public sector or amendments thereto which have been adopted after the Act entered into force. The second paragraph, however, provides that the Government shall, within three days after the Act enters into force, invite representative trade unions for the public sector to sign Annex No. 4 to the CAPS and that the provisions of the Act shall apply in order to determine if the conditions for its conclusion are met. It is clear from the content of the request that the first applicant opposes this article only insofar as it refers to those provisions of Article 42 of the PSSSA that have been challenged by this request.

10. The second applicant states that it challenges Article 42 of the PSSSA and Article 2 of the PSSSA-O. It follows from the grounds of its request that, in terms of content, it only challenges the second paragraph of Article 42 of the PSSSA, the third and fourth paragraphs of Article 42 of the PSSSA only insofar as they refer to its second paragraph, and the sixth to tenth paragraphs of Article 42 of the PSSSA. Furthermore it also challenges Article 2 of the PSSSA-O insofar as it refers to the entry into force of the aforementioned provisions.

11. The third applicant states that it challenges the eighth paragraph of Article 1 of the PSSSA-O, which constitutes the content of the eighth paragraph of Article 42 of the PSSSA.

12. The Constitutional Court joined the requests for joint consideration and decision. The Constitutional Court did not send the requests lodged in cases No. U-I-259/10 and No. U-I-51/11 to the opposing party in order for that party to respond thereto. In those two cases there are in fact no substantive allegations that have not already been included in the request in case no. U-I-249/10, of which the National Assembly was already informed.

13. On the basis of an analysis of the challenged provisions and their position within the broader legislative context, the Constitutional Court estimates that the first paragraph of Article 42 of the PSSSA, although not challenged by the applicants, also has the same constitutionally significant effect as the challenged provisions. More specifically, both, the first and second paragraphs of Article 42 of the PSSSA, enable the collective agreement for the public sector to enter into force, even though it was not signed by all the representative trade unions representing the civil servants to whom the collective agreement refers. As the first and second paragraphs of Article 42 of the PSSSA have the same effect, i.e. both determine the quorum, and as they are mutually significantly related (the provisions are subsidiary to each other), according to Article 30 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA), the Constitutional Court expanded the proceedings for the review of constitutionality to include the first paragraph of Article 42 of the PSSSA and the other provisions related thereto. On this basis it reviewed the first to tenth paragraphs of Article 42 of the PSSSA and Article 2 of the PSSSA-O in sofaras they refer to these provisions.

B – II

14. The first and second paragraphs of Article 42 of the PSSSA read as follows:
"(1) The collective agreement for the public sector, or amendments thereto, are concluded when signed by the Government of the Republic of Slovenia and the majority of the representative trade unions for the public sector, representing at least four different public sector services.
(2) In the event that the collective agreement for the public sector, or amendments thereto, are not concluded in accordance with the previous paragraph, the collective agreement for the public sector, or amendments thereto, may also be concluded if they are signed by the Government of the Republic of Slovenia and representative trade unions for the public sector of at least four different public sector services, the total membership of which must exceed 40% of all the public sector employees to whom the collective agreement for the public sector applies."

15. Even though a collective agreement for the public sector is concluded[3] only between the Government and the groups of trade unions defined in the first and the second paragraphs of Article 42 of the PSSSA, it is binding upon not

only all civil servants, regardless of whether or not they are members of the trade unions that signed the collective agreement, but also all their employers. The PSSSA thus determined *erga omnes* applicability of the collective agreement for the public sector, as its normative provisions have a wider effect than only on the parties to the agreement or their members.[4] It is true that the PSSSA does not explicitly provide for such *erga omnes* effect of the collective agreement for the public sector. However, the *erga omnes* applicability of the collective agreement derives from the provisions, in which the PSSSA defines the content and scope of the collective agreement for the public sector; the prescribed majority required for its conclusion corroborates this. The collective agreement for the public sector namely regulates how benchmark positions are determined and how they are classified into pay grades,[5] how the criteria for job performance are determined,[6] how the various allowance amounts are determined (e.g. for years of service, mentoring, specialisations, master's degrees, or doctorates)[7], etc. Together with the PSSSA, the collective agreement for the public sector therefore contributes significantly to determining the salaries of all civil servants. The effect of the collective agreement on the public sector regarding how the salaries for all civil servants are determined is unconditional and binding. More precisely, no agreement on a different (i.e. higher) payment from that which is agreed in the collective agreement for the public sector may be reached in a lower ranked collective agreement or an individual employment contract.[8]

B – III

16. The first applicant alleges that the challenged regulation is inconsistent with Article 76 of the Constitution as it inadmissibly and disproportionately restricts the possibilities of trade unions to represent employees' interests in the areas for which they have acquired representative status.

17. Article 76 of the Constitution (freedom of trade unions) guarantees the freedom to establish, operate, and join trade unions. The freedom of trade unions is therefore a special form of freedom of association, which is guaranteed by the second paragraph of Article 42 of the Constitution.[9] This entails that the constitution framers explicitly underlined the constitutional importance of the free association of workers, i.e. an association established with the aim to set standards for workers' socio-economic rights, as well as to implement those standards and endeavour to raise them. Moreover, Article 76 of the Constitution

does not form part of Chapter II, entitled “Human Rights and Fundamental Freedoms”, but is instead included in Chapter III, which is entitled “Economic and Social Relations”. However, with regard to the content and purpose of the mentioned provision, the freedom of trade unions also constitutes a human right protected by the Constitution that may only be interfered with if the conditions determined in the third paragraph of Article 15 of the Constitution have been met.[10]

18. The freedom of trade unions with regard to their activities, i.e. the freedom of action of trade unions, is of crucial importance in the case at issue. The Constitutional Court has already held that the right to collective bargaining that is based on the free and voluntary conclusion of collective agreements, and on the autonomy of the parties to the agreement, is one of the aspects of this freedom (Decision No. U-I-61/06 and No. U-I-159/07).[11] The value of collective bargaining is also protected as a fundamental right by international instruments that are binding upon Slovenia. Article 4 of ILO Convention No. 98 provides that measures shall be taken to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to regulating terms and conditions of employment by way of collective agreements. It does not regulate the position of public servants [the text refers to Article 6 of the English text of the Convention][12], and leaves it to the state to decide on the extent to which the Convention’s guarantees shall apply to the armed forces and the police. The mentioned Convention is complemented by ILO Convention No. 154, which obligates the State Parties to adopt measures to promote collective bargaining, and specifies the objectives to be achieved by these measures. It applies to economic activities and enables that special modalities of the application of this Convention may be fixed by national regulation as regards “public service” [the text refers to the third paragraph of Article 1 of the English text of the Convention], and leaves the regulation with regard to the armed forces and the police to the state. The International Labour Organization Convention concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service (Official Gazette RS, No. 55/10, MP, No. 10/10 – hereinafter referred to as ILO Convention No. 151) promotes, *inter alia*, the adoption of measures to encourage and promote procedures for negotiation of terms and conditions of employment between the public authorities concerned and public employees' organisations for all those employees to whom more favourable provisions in the other conventions do not

apply. According to this Convention, it is possible to limit the extent to which the guarantees apply to the police, the armed forces, high-level employees, and those persons whose duties are of a highly confidential nature.

19. By signing the above-mentioned ILO Conventions, the state therefore undertook to recognise the right to collective bargaining in the private and public sectors. However, it may provide special modalities for the implementation of the guarantees referred to in ILO Convention No. 154 for the employees in “public service”. The state may determine the extent to which it will recognise the right of specific categories of civil servants (the police, the armed forces) to collective bargaining.

20. The second paragraph of Article 6 of the ESC obligates the Contracting States to ensure that the right to bargain collectively is exercised effectively and, *inter alia*, to promote, where necessary, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements. In the opinion of the European Committee of Social Rights, Article 6 of the ESC refers not only to employees in the private sector but also to public officials, taking into account the modifications that are clearly required for those who are not bound by contractual provisions, but by public-law regulations.[13] With regard to those persons (i.e. civil servants), the scope of the collective bargaining guarantees may therefore be limited. Those civil servants whose terms of employment are regulated to a certain extent by the law and not by an employment contract, and to whom the regular procedures of collective bargaining do not apply according to the national regulation, must have the right to participate in the adoption of the laws that regulate their position (this right derives from the first paragraph of Article 6 of the ESC).[14]

21. Similarly, Article 28 (Right of collective bargaining and action) of the Charter of Fundamental Rights of the European Union (OJ C 83, 30. 3. 2010, p. 389), which became legally binding when the Treaty of Lisbon entered into force, provides that workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels.

22. Therefore, the right of trade unions to voluntarily, autonomously, and collectively negotiate with the employers' representatives on behalf of their member workers and conclude collective agreements on social and economic issues in connection to labour relations arises from Article 76 of the Constitution, if this is construed also in relation to the provisions of the above-mentioned international instruments[15]. The regulation of the position of workers through collective bargaining mitigates the structurally subordinate position of each worker when concluding employment contracts and, in such manner, the negotiated rights and working conditions may become relatively balanced. Consequently, it acquires greater value as it contributes to securing social justice and social peace, which are embedded in the principle of a social state (Article 2 of the Constitution), and to enhancing the democratic character of social regulation. However, there is no requirement in Article 76 of the Constitution for the state to guarantee the conclusion of a collective agreement. Such obligation would result in denying its voluntary nature, which is an essential defining element of the freedom of trade unions determined in Article 76 of the Constitution.[16] However, the freedom of action of trade unions obliges the state to provide for a legal framework that facilitates an effective collective bargaining system.

23. The right of trade unions to collective bargaining, which derives from the freedom of action of trade unions, thus involves several aspects. The substantive aspect delineates the range of autonomy of the trade unions and the employers. It therefore defines the subject matter that falls under the autonomy of the social partners, and the employment relationship issues that may be regulated autonomously in a collective agreement by the parties thereto. The employment relationships of civil servants are marked significantly by the fact that the employers are state or other public entities. The state is, at the same time, a bearer of authority and is required to protect the public interest. In order to achieve this objective, it must determine terms and conditions for performing a public service, measures ensuring a reasonable fiscal policy, etc. It must ensure that its competences are exercised effectively, and that the entire public sector functions effectively. Therefore it must also ensure that the freedom of collective bargaining, which includes the possibility that no consensus for the conclusion of a collective agreement is reached, does not seriously threaten the exercise of the mentioned essential functions. In this context, the employment relationships of public sector employees are, in general, by their very nature subject to wide, unilateral authoritative (heteronomous) regulation, and the substantive aspect of

the autonomy of collective bargaining is accordingly limited. In particular, this applies to the employment relationships of certain categories of public sector employees (e.g. the military, police, and civil service) and for specific elements of the employment relationships (e.g. salaries). These particularities are also taken into account by the binding rules of international law. Despite such, through the PSSSA the legislature provided the possibility of autonomous collective bargaining regarding the elements of salaries for all civil servants uniformly. Therefore, in the case at issue, the Constitutional Court was not required to take a position on the question as to where the boundaries lie between the constitutionally guaranteed substantive autonomy for regulating socio-economic issues with regard to different categories of civil servants, on the one hand, and the authoritative regulation of these issues on the other.

24. The substantive aspect is not the only dimension of the right to collective bargaining guaranteed by Article 76 of the Constitution. It also protects the fundamental procedural elements of that process, such as freedom, the voluntary nature and fairness of collective bargaining. Even though the substantive aspect of the autonomy of collective bargaining, which is protected by Article 76 of the Constitution, does not necessarily require the possibility of collective bargaining on a specific subject, the legislature must, if it regulates the mechanism of collective bargaining with regard to that subject, take into account the procedural aspect of the freedom of action of trade union. Where the state envisages collective bargaining in the public sector and adopts the rules for such, the requirement of fairness in the negotiation procedure demands from the state, *inter alia*, that it advances its own interest as an employer in accordance with the determined rules of that process and without unjust recourse to its authoritative power. This guarantee would be infringed if the state, during a negotiation process in which it participated as a party on an equal footing with the other parties, authoritatively changed the rules governing that process in order to be able to achieve the implementation of its interests as an employer in the collective bargaining process. Such, however, does not prevent the legislature from interfering with the subject matter of the collective regulation in a time-limited manner if it assessed that this was appropriate, necessary, and proportionate, and based on constitutionally admissible grounds.[17]

25. An independent procedural element of the freedom of action of trade unions is the possibility of trade unions to voluntarily (i.e. in accordance with their own will) represent the interests of their members when concluding collective

agreements, the substance of which may be – although perhaps not necessary from a constitutional law perspective – the subject of autonomous collective regulation. A regulation which allows for a collective agreement to be concluded, regardless of the opposition of a representative trade union which brings together civil servants whose position is regulated by such collective agreement, therefore interferes with the voluntary nature of such as an element of the freedom of action of trade unions referred to in Article 76 of the Constitution.

26. A collective agreement may also apply to employees that have not formed a trade union, if the legislature so decides. Given the content of the requests and the fact that they were lodged by trade unions, this is not subject of this review. However, the premise of the first and the second applicants that the parties to the collective agreement, the effects of which also apply by law to non-members (third parties), may themselves determine the quorum for an amendment of the collective agreement therein is erroneous. In the event that a collective agreement is more than just an autonomous regulation of the position of the parties to the collective agreement and their members, as it also determines the rights and obligations of third parties, such effects and the preconditions for such effects may, according to Article 87 of the Constitution, only be determined by law.

B – IV

27. The first and second paragraphs of Article 42 of the PSSSA allow for the salaries of civil servants to be regulated by a collective agreement against the will of a representative trade union representing these civil servants. Therefore, both paragraphs interfere with the freedom of action of trade unions determined in Article 76 of the Constitution. The Constitutional Court subsequently reviewed whether such regulation of the conditions for the conclusion (or amendment) of a collective agreement pursue a constitutionally admissible aim (the third paragraph of Article 15 of the Constitution) and whether the limitation is consistent with the general principle of proportionality (Article 2 of the Constitution).

28. The legislature decided that specific elements of the public sector salary system shall be determined uniformly for all civil servants by way of a collective agreement for the public sector. It is possible to infer from the conclusion of the

Government's opinion that the objective of the challenged regulation was to render this system effective. The effectiveness of the collective bargaining process, i.e. the creation of realistic opportunities for actually concluding (or amending) a collective agreement on the elements of the salaries of civil servants, is a constitutionally admissible aim. Social justice and social peace that are created and promoted by an operative social dialogue are undoubtedly in the public interest. The aim of the interference, i.e. to avoid demanding, ambitious conditions for the conclusion of the collective agreement that would obstruct the collective bargaining process and therefore reduce its effectiveness, is also in line with the assumed international obligations to encourage autonomous collective bargaining.

29. As the interference with the freedom of trade unions pursues a constitutionally admissible aim and is therefore not inadmissible in this respect, it is necessary to further review whether the challenged regulation is consistent with the general principle of proportionality, i.e. whether it is necessary, appropriate, and proportionate in the narrower sense.

30. The Constitutional Court deems that the interference is disproportionate in the narrower sense, without reviewing its appropriateness and necessity. When reviewing this element, the Constitutional Court assesses whether the gravity of the consequences of the interference under review with the affected human right is proportionate to the importance of the pursued aim or the benefits arising from the interference. The Constitutional Court based its assessment on the existing regulation and practice of concluding collective agreements for the public sector. It follows therefrom that representative trade unions for the public sector may participate in the conclusion of a collective agreement regardless of the level at which they are organised: as a trade union confederation, as sectoral trade unions (that are not identical to sectors within the meaning of Article 7 of the PSSSA) or even as occupational trade unions.[18] With regard to such, the Constitutional Court was not required to take a position in this case on whether, in the event of a different regulation of representativeness with regard to the conclusion of a collective agreement for the public sector, a trade union of a higher level were able to "outvote" the trade union of a lower level, and if so, under which conditions.

31. On the one hand, the opportunity for the representative trade unions to represent the interests of their members during the conclusion of a collective

agreement that will apply to them is affected (which also affects the civil servants who have formed trade unions to represent their interests). It has to be taken into consideration that trade unions that oppose the conclusion of the collective agreement for the public sector are not allowed to participate in any further collective bargaining process in which they would attempt to negotiate for their members a different (in their opinion a more favourable) regulation of salaries from the one agreed upon in the collective agreement for the public sector. On the other hand, there is a public interest in not making the conclusion of a collective agreement on civil servants' salaries excessively difficult. When searching for the constitutionally acceptable balance between the level of the impairment of the right of trade unions and the importance of the aim, it must be taken into account that by increasing the intensity of the interference (i.e. by increasing the number of civil servants who are represented by trade unions that oppose the conclusion of a collective agreement), the general benefit of the pursued aim diminishes (the benefit arising from the effectiveness of concluding such collective agreements). This is all the more true when a trade union that is the only one to represent a specific category of civil servants opposes the conclusion of a collective agreement. The challenged regulation therefore enables the representative trade unions, which represent a significant part of all civil servants, to conclude a collective agreement that is binding on all the civil servants, regardless of two essential circumstances. The conclusion of such an agreement is possible regardless of the fact that it is opposed by a representative trade union which is the only one uniting civil servants from a specific public sector category, to whom *inter alia* this collective agreement will apply. Furthermore, a collective agreement may also be concluded although it is opposed by representative trade unions which have a greater number of members who are civil servants from a specific category than representative trade unions which also represent this category and support the conclusion of the collective agreement. The right balance between limiting the possibilities of representative trade unions to represent the interests of their members when a collective agreement is being concluded and the effectiveness of the collective bargaining has thus been exceeded.

32. The first and second paragraphs of Article 42 of the PSSSA therefore entail an excessive interference with the right of representative trade unions to, according to their will, represent their members in the collective bargaining process, which is one of the dimensions of the freedom of action of trade unions determined in Article 76 of the Constitution. Consequently, they are inconsistent

with this provision. All the other challenged provisions of Article 42 of the PSSSA which, in terms of content, are exclusively connected with the conclusion of a collective agreement for the public sector with the challenged majority, have therefore become irrelevant. The same applies to Article 2 of the PSSSA-O insofar as it refers to the mentioned provisions of Article 42 of the PSSSA. Therefore the Constitutional Court also established the unconstitutionality of these provisions (Point 1 of the operative provisions).

33. The Constitutional Court issued a declaratory decision as an abrogation is not possible due to the complexity of the issues regulated by the PSSSA and taking into account the premises outlined in Paragraph 30 of the reasoning of this Decision. For the same reason, it determined a longer, two-year deadline to remedy the established unconstitutionality (Point 2 of the operative provisions). During this period, the legislature will be required to establish a legal framework of collective bargaining on public sector salaries which will be consistent with the Constitution.

34. The Constitutional Court also determined the manner in which its decision was to be implemented (the second paragraph of Article 40 of the CCA). It determined that, until the unconstitutional situation is remedied, the first to tenth paragraphs of Article 42 of the PSSSA and the CAPS and its annexes continue to apply (Point 3 of the operative provisions). By doing so, it ensured that collective bargaining on civil servants' salaries will continue to be possible until the established unconstitutionality is remedied. Another reason why the Constitutional Court did not decide to establish unconstitutionality without determining the manner of the implementation of the Decision, which might have also resulted in the invalidity of the already concluded annexes to the CAPS, was that it could not foresee the financial consequences such might have had for the budget.[19] The manner of implementation therefore entails that the already concluded CAPS and its annexes, or any future annexes or a new collective agreement for the public sector, cannot be invalid only because of the unconstitutionalities established in this Decision (Point 3 of the operative provisions).

35. As the Constitutional Court established the unconstitutionality of the challenged provisions already due to the above-mentioned reasons, it did not review other alleged unconstitutionalities.

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36. The Constitutional Court adopted this Decision according to Article 48 and the second paragraph of Article 40 of the CCA, composed of: Dr Ernest Petrič, President, and Judges Dr Mitja Deisinger, Dr Dunja Jadek Pensa, Mag. Marta Klampfer, Dr Etelka Korpič – Horvat, Mag. Miroslav Mozetič, Jasna Pogačar, Mag. Jadranka Sovdat, and Jan Zobec. It adopted the Decision by five votes against four. Judges Jadek Pensa, Klampfer, Pogačar, and Petrič voted against. Judge Pogačar submitted a dissenting opinion.

Dr Ernest Petrič
President

Notes:
[1] The abbreviation CAPS is used to refer to the specific collective agreement for the public sector that was applicable at the time the Constitutional Court decided on the case at issue. The text uses the term “collective agreement for the public sector” is used as a generic term for such collective agreements.
[2] Namely the positions expressed in Constitutional Court Decision No. U-I-57/95, dated 5 February 1998 (Official Gazette Republic of Slovenia, No. 13/98, and OdlUS VII, 21), and the judgments of the ECtHR summarised therein: *National Union of Belgian Police v. Belgium*, Judgment dated 27 October 1975; *Swedish Engine Drivers’ Union v. Sweden*, Judgment dated 6 February 1976; *Schmidt and Dahlström v. Sweden*, Judgment dated 6 February 1976.
[3] The same applies to the amendments to that collective agreement. That which applies to the conclusion of the collective agreement for the public sector also applies to its amendments, even though this is not always explicitly stated in this Decision of the Constitutional Court.
[4] In this Constitutional Court Decision, the term “*erga omnes* applicability” (or *erga omnes* effect) is used in general to describe that the collective agreement is also binding upon persons and entities who are not members of the parties to the agreement, and not as a synonym for the concept of *erga omnes* applicability of a collective agreement in accordance with Articles 12 and 13 of the CAA.

[5] The fourth paragraph of Article 12 of the PSSSA thus provides that the collective agreement for the public sector determines the benchmark positions and the titles, and the first paragraph of Article 13 of the PSSSA provides that the same collective agreement determines how the evaluated benchmark positions and titles are graded. The basic salaries of civil servants are determined according to the grade into which their position or title is classified (the first paragraph of Article 9 of the PSSSA); the classification of concrete positions and titles is performed by taking into account how the benchmark positions and titles are classified (the first paragraph of Article 13 of the PSSSA).

[6] See the second paragraph of Article 22a of the PSSSA.

[7] See, for example, the second paragraph of Article 25 and Articles 26 and 27 of the PSSSA.

[8] It follows from several provisions of the PSSSA that important criteria for determining the salaries of civil servants are specified by the collective agreement for the public sector (see notes 5 and 6), which entails that the same issues cannot be regulated by another (narrower) collective agreement. In addition, the third paragraph of Article 13 of the PSSSA provides that the employment contract, decision or resolution regarding a civil servant may not determine a salary that differs from that determined by statute, regulations or other acts issued on the basis of regulations, or collective agreements.

[9] In the context of freedom of association, the first paragraph of Article 11 of the ECHR explicitly refers to trade unions: “Everyone has the right to freedom of peaceful assembly and freedom of association with others, including the right to form and join trade unions for the protection of their interests.”

[10] The Constitutional Court first indicated that the content of Article 76 of the Constitution entails a human right in Decision No. U-I-57/95, wherein it interpreted this right together with the human right to freedom of association enshrined in Article 11 of the ECHR. In Decisions No. U-I-61/06, dated 11 December 2008 (Official Gazette RS, No. 120/08, and OdlUS XVII, 72), and No. U-I-159/07, dated 10 June 2010 (Official Gazette RS, No. 51/10), however, the Constitutional Court clearly held that the content of this constitutional provision constituted a human right.

[11] In support of the fact that collective bargaining is a constituent part of Article 76 of the Constitution also M. Blaha in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije* [Commentary to the Constitution of the Republic of Slovenia], Fakulteta za podiplomske državne in evropske študije, Ljubljana, 2002, p. 750. Similarly, in relation to the German constitutional order, the Federal Constitutional Court emphasises the premise of the constitution framers,

according to which the parties to a collective agreement can better align their conflicting interests than the state because the subject of regulation is more familiar to them (BVerfGE 92, 26). The freedom of trade unions is conceptualised more narrowly by the ECtHR, which wrote in its Judgment in *Wilson, National Union of Journalists and others v. United Kingdom*, dated 2 July 2002, *inter alia*, that collective negotiations are not necessary for the effectiveness of the freedom of trade unions.

[12] Scholars interpret this term, used by the Convention, as "officials employed by the authorities of state or local administration" (see K. Kresal Šoltes, *Oblastni posegi v kolektivna pogajanja* [Authoritative interference with the collective bargaining process], Delavci in delodajalci, Vol. X, No. 4 (2010), p. 580) or as "civil servants in state administration" (see P. Končar in: M. Novak, P. Končar, and A. Bubnov Škoberne (Eds.), *Konvencije Mednarodne organizacije dela s komentarjem* [International Labour Organization Conventions with Commentary], Inštitut za delo pri Pravni fakulteti Univerze v Ljubljani and GV Založba, Ljubljana 2006, p. 59). The same follows from the Report of the Committee on Freedom of Association of the International Labour Organization with regard to the scope of ILO Convention No. 98 (329th Report, Case No. 2177/2183, para. 644, adapted from: Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, International Labour Office, Geneva 2006, p. 179, para. 892). The report emphasises, *inter alia*, that the mere fact that civil servants are white-collar employees does not in itself suffice to consider them employees engaged in the administration of the state; if this were not the case, the scope of ILO Convention No. 98 would be significantly narrowed. However, in the opinion of the Committee, all employees in public service enjoy the rights of collective bargaining, with the sole possible exception of the armed forces, the police, and state officials that are directly engaged in the administration of the state.

[13] Conclusions III, p. 33, Federal Republic of Germany, adapted from L. Samuel, Fundamental social rights, Case law of the European Social Charter, Council of Europe Publishing, Strasbourg 2002, p. 137.

[14] Conclusions III, p. 34, Federal Republic of Germany, and Conclusions IV, p. 45, Austria, adapted from L. Samuel, *ibid.*, p. 140.

[15] According to the fifth paragraph of Article 15 of the Constitution, no human right or fundamental freedom regulated by legal acts in force in Slovenia may be restricted on the grounds that the Constitution does not recognise that right or freedom, or recognises it to a lesser extent.

[16] In the same manner, the Constitutional Court emphasised in Decision No. U-I-57/95 that trade unions are not guaranteed the right to effectiveness as it would necessarily imply the obligation of employers to conclude a collective agreement. The European Commission of Human Rights also came to a similar conclusion in *Association A v. Federal Republic of Germany*, dated 14 July 1983.
[17] With regard to the criteria for unilateral authoritative interference with collective bargaining autonomy, as specified by the bodies of the International Labour Organization and the Council of Europe, see K. Kresal Šoltes, *Vsebina kolektivne pogodbe: Pravni vidiki s prikazom sodne prakse in primerjalnopravnih ureditev* [The Content of Collective Agreements: Legal Aspects Illustrated by Case Law and Comparative Law Regulations], GV Založba, Ljubljana 2011, pp. 192–199.
[18] See, for example, the collective agreement and its annexes, published in the Official Gazette RS, Nos. 57/08, 23/09, 91/09, and 85/10.
[19] *Cf.* Paragraph 151 of Constitutional Court Decision No. U-I-60/06, U-I-214/06, U-I-228/06, dated 7 December 2006 (Official Gazette RS, No. 1/07, and OdlUS XV, 84).