



REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE

U-I-158/94
9.3.1994

D E C I S I O N

At the meeting of 9 March 1995, following a public trial of 1 December 1994, concerning the proceedings for evaluation of constitutionality of a statute started upon the request of one third of the deputies of the National Assembly and on the basis of an initiative of top management and commissioned officers of the Agency for Payment Operations, Control and Information, the Constitutional Court

made the following decision :

I. Abrogated in the Act on the Agency of the Republic of Slovenia for Payment Operations, Control and Information (Official Gazette of the Republic of Slovenia, no. 48/94) shall be :

1. provisions of Article 2 by which the Agency is defined as a public institution,
2. paragraphs 1 and 2 of Article 5,
3. Article 63,
4. paragraphs 6, 7 and 8 of Article 72,
5. paragraph 4 of Article 73, and
6. those provisions of paragraphs 1 and 2 of Article 64, paragraphs 3 and 4 of Article 65, Article 66, paragraphs 1 and 2 of Article 68 and paragraph 3 of Article 77 by which the powers of the Agency are vested in its board, or by which approval by the Government is required.

II. The provision of paragraph 1 of Article 73 is not in conflict with the Constitution if interpreted so as to include in the scrutiny of legality and proper implementation of regulation also the control, inspection and auditing.

R e a s o n s:

A.

1. The initiators and proposers dispute the provision of paragraph 1 of Article 5 of the Act on the Agency of the Republic of Slovenia for Payment Operations, Control and Information (Official Gazette of the Republic of Slovenia, no. 48/94) (hereinafter : "the AARSPOCI"), which makes the Agency for Payment Operations, Control and Information (hereinafter : "the Agency") accountable to the Government, as well as other provisions of the Act relating thereto. Subordination of the Agency to the Government rather than to the National Assembly is in their opinion contrary to the constitutional principles of democracy (Article 1 of the Constitution), the state governed by the rule of law (Article 2 of the Constitution) and separation of powers (Article 3 of the Constitution) because :

- the Government in the capacity of proposer of the Act has failed to provide any reasons whatsoever for the transfer from the National Assembly to the Government of responsibilities of the Agency, and, consequently, for the subordination of the Public Audit Service (hereinafter : "the PAS") and the Agency as its successor, to the Government;

- the mere establishing of the Court of Auditors, and, consequently, the transfer of control over public expenditure from the PAS to the said institution, is not a sufficient reason for transferring the responsibility of the Agency;

- not only the auditing of ownership transformation processes in legal persons but also other tasks of the Agency fall, by their substance, within the competence of the National Assembly rather of the Government; this is why, in accordance with the constitutional principle of separation of powers, the Agency must be autonomous and subordinated solely to the National Assembly;

- the Act fails to explain the meaning of the control by the National Assembly of the execution of auditing procedures relating to ownership transformation under paragraph 4 of Article 73, considering that the responsibility for, and the major means of control over the Agency have been transferred by the Act from the National Assembly to the Government;

- the executive branch with its departments and agencies (Agency of the Republic of Slovenia for Restructuring and Privatization, Development Fund etc.) is the agent of restructuring and transformation of socially-owned property; thus, the subordinating of the Agency, whose major tasks is to control the legality and appropriateness of disposal of socially-owned property, would imply that the Government would control its own controllers;

- the Act does not assign to the Government any tasks or powers in connection with the conducting of payment operations in the country; since substantial control over the conducting of the payment operations has been entrusted to the Bank of Slovenia, the Agency, also, is accountable, in as far as the execution of these tasks is concerned, in the same way as the Bank of Slovenia, solely to the National Assembly;

- until the method of tax control remains unchanged, with tax control linked with the carrying out of payment operations, and until tax inspection remains an integral part of the control of legality of the disposal of socially-owned property and will be included in the process of auditing ownership transformation, the conditions required for subordinating tax control to the Government will not be fulfilled;

- on the basis of information in, and relating to statements of accounts and business reports and payment operations, as well as on the basis of tax assessment information and other records the Agency will make available to other government bodies the data and information required to carry out the economic policy; but objective data and information concerning the realization of the economic policy and other measures of the Government can only be provided by such an institution as will be independent of the executive branch.

2. Supposedly not in conformity with the principles of the state governed by the rule of law, in the opinion of the proposers and initiators, is the provision of paragraph 1 of Article 73 of the Act, because of ambiguity as to the meaning of the word "verification" within the context of this provision. The concept of "verification" is claimed not to be adequately defined, because it is not certain whether it refers also to the process of control, inspection and auditing. This is claimed to have led to terminological confusion which allows major abuse of socially-owned property and major infringement of principles of the state governed by the rule of law.

3. The provisions of paragraphs 6 and 7 of Article 72 of the Act are in the opinion of the proposers and initiators in conflict with Articles 1, 2, 14, 15, 22, 23, 50 and 155 of the Constitution, for allowing the removal of disturbing personnel, arbitrary differentiation and unequal treatment of top management and commissioned officers without specifying any criteria for (non-)approval and without ensuring judiciary or other form of protection in the procedure. As they annul specific acts concerning their appointment for a four-year term, the two provisions are claimed also to interfere with the accrued rights of top management and commissioned officers.

4. In its reply to the request and initiative, the National Assembly states that the new Constitution has provided the basis for transformation of the social and economic system.

Following the transformation of socially-owned property, the tasks which used to be performed by the PAS should be transferred to new institutions, or to such institutions to which they belong by the nature of the activities of the latter. The initial step in the transformation of the PAS is the Court of Auditors Act, which has been passed already, while two statutes dealing with tax control are still in the phase of being reviewed. The task relating to statistics and provision of information should be transferred to an institution which will be responsible on the national level for the programme of statistical research, as well as to a commercial organization which will process and publish business report data of public trading companies for business purposes in accordance with the Public Trading Services Act.

When the reform will have been completed, the method of carrying out payment operations and the control of the latter would no longer be under the control of government authorities but would be controlled by the central bank. The AARSPOCI thus regulates the tasks and competencies of the Agency in transitional period.

5. The national Assembly further states :

- that former statutory regulation, according to which the PAS was accountable to the Assembly of the Republic of Slovenia, was based on the principle of unity of power as enshrined in the former constitution; but the principle of separation of powers between the legislative, executive (including administration) and judicial branches has been definitely established only by the new Constitution;
- that the competencies and tasks of the Agency are not in any respect legislative but administrative and financial in nature and that, consequently, they make part, according to the constitutional classification, of the executive/administrative authorities; that as a public institution, the Agency has been vested with important functions of government administration and public authority; it performs executive, operational tasks through single acts and deeds within the framework of administrative proceedings, and its final decisions are subject to review within the framework of an auditing/administrative lawsuit before the Supreme Court;
- that the control of budget implementation and government expenditure in general falls within the competence of the Court of Auditors, which is why in this sense the Agency would not supervise the Government; in any way, the Government is made accountable by the Constitution to the National Assembly by whom it is appointed and dismissed (also through interpellation), as well as controlled;
- that the National Assembly has a possibility of controlling the Agency indirectly, via all the responsibilities of the Government (relating to the work of the Agency), and through appropriate working bodies of the National Assembly, as well as directly through its representatives in the board of the Agency;
- that examination of legality and appropriate implementation of regulations under paragraph 1 of Article 73 of the Act is not an undefined concept; what is involved is only the use of a synthetic concept in a transitional provision which is entirely comprehensible when related to other concepts used and the substance of the material part of the Act;
- that what is involved is complete reorganization of the former PAS and establishment of a new institution with a different status and altered tasks, which is why the new way of regulating the appointment of appropriate bodies, holders of offices, top management and commissioned officers should not be controversial;
- that a legal remedy and judicial protection are ensured to all employees under the general principles of labour legislation and the rules applying to management bodies, as well as under the current Statutes of the Agency ;
- that the disputed provisions of paragraphs 6 and 7 of Article 72 do not have retrospective effect because of their being in force from the date of their coming into effect on, and that they do not interfere with any accrued rights, because appointments to any management post or other position,

including the specification of the term of office and the possibility of early dismissal provided by statute cannot be deemed to constitute an accrued right.

B.

6. At its meeting of 13 September 1994, the Constitutional Court joined the request of one third of the deputies and the initiative of top management and commissioned officers of the Agency for the purpose of joint consideration and

adjudication. At its meeting of 3 November 1994, it passed a resolution on staying the implementation of the disputed paragraphs 6 and 7 of Article 72 of the Act and carried out a public trial on 1 December 1994. Because the two provisions relate to other disputed provisions, the Court also evaluated, on the basis of Article 30 of the Law on the Constitutional Court (Official Gazette of the Republic of Slovenia, no. 15/94; hereinafter : "the LCC"), the rest of the provisions of the Act referred to in the adjudication hereof.

7. According to the Constitution of 1974, the PAS was a constitutional institute (Article 77 of the Constitution of the SFRY and Article 94 of the Constitution of the SR of Slovenia). According to the Act on Public Audit Service in the SR of Slovenia (Official Gazette of the SRS, no. 1/85), the PAS was an "autonomous and independent organization which carried out, in the capacity of a joint service of organizations of associated labour and other users of public funds, and of the information service of the public information system, the activities and tasks of public auditing and those relating to domestic payment operations".

The tasks of the PAS were defined as activities of special importance to the community, for the performance of which the PAS was vested with appropriate public powers by statute.

8. The AARSPOCI regulates the status, tasks and rights and responsibilities of the Agency as a legal person holding the status of a public institution (Articles 1 and 2 of the AARSPOCI). The Agency has taken over the work and tasks of the PAS as the legal successor of the former (transitional provisions of paragraph 1 of Article 72 and paragraph 2 of Article 73 of the AARSPOCI).

9. The tasks of the Agency are specified in paragraph 1 of Article 4 and paragraph 1 of Article 73 of the AARSPOCI. The Agency shall perform the following tasks :

- payment operations in the country,
- tax control,
- statistics as part of the national programme of statistical research,
- provision of information,
- other control provided for by statute,
- auditing in connection with ownership transformation of legal persons,
- other tasks arising from specific regulations and the contract based thereon, and
- examination of legality and appropriate implementation of regulations governing financial and material transactions of legal persons and the disposal of socially-owned property of legal persons until the completion of ownership transformation in the latter in accordance with the law on ownership transformation.

10. The task of examining the legality and appropriate implementation of the disposal of socially-owned property is in its nature (as well as by the fact of being included among transitional and final provisions of the Act) a temporary one, and will only be performed by the Agency until the completion of ownership transformation in legal persons. Paragraph 3 of Article 73 of the AARSPOCI also

includes among the temporary tasks of the Agency the tasks relating to the control, payment operations and statistics and provision of information, which will be performed by the Agency only for as long as these will not be entrusted to other institutions on the basis of other relevant statutes. In comparison with the tasks performed by the PAS, the Agency will no longer perform the tasks of economic and financial auditing (except for completion of such audits as have already been started - Article 40 of the Auditing Act, Official Gazette of the Republic of Slovenia, no. 32/93), while the control and auditing of government accounts, government budget and of the entire government expenditure is from 1 January 1995 within the competence of the Court of Auditors.

11. While the PAS is no longer a constitutional institute according to the Constitution of 1991, the Agency will still perform those of the tasks of the former which have been vested in the Agency as its successor by the AARSPOCI. This refers to the activities whose unhindered performance is in the public interest, in particular in the transitional period of transformation of socially-owned property and establishment of a new economic system. In principle, we are dealing with the question of what should be the constitutional status of the Agency in the transitional period, where socially-owned property is still in existence and it is obvious that the distribution of socially-owned property should be under control until this process will be completed in accordance with the principles of the law-governed state. From this viewpoint the question arises of whether it is in conformity with the Constitution for the activities of the Agency to be performed by an organizational form which is prescribed in the Institutions Act (Official Gazette of the Republic of Slovenia, no. 12/91, paragraph 1 of Article 3; hereinafter "the IA") for the performance of public services, and in connection with which the AARSPOCI even fails to specify the part of the activities of the Agency to be considered to be of the nature of a public service.

12. This is why the Constitutional Court had to examine in particular to what extent the status of the Agency created by the AARSPOCI was in conformity or disagreement with the constitutional principles of separation of powers, democracy and law-governed state. For this purpose the Constitutional Court will first provide an interpretation of the constitutional principle of separation of powers as it is currently understood in the light of the need to protect fundamental human rights and freedoms and in relation to the principle of a democratic and law-governed state.

13. Already in Article 16 of the French declaration of human and civil rights of 1789 it was pointed out that "the society in which the protection of rights and separation of powers are not guaranteed is without a constitution." Contrary to this tradition of the European legal civilization, the former Yugoslav system of constitution and government institutions, as well as the former Slovenian system within its framework, did not put in the first place human rights and did not define any clear legal restrictions applying to government authorities and their violence. Thus, it made possible arbitrary government, and its constitution was a legal instrument in the full sense as understood by modern European legal civilization.

14. The basic principles contained in the general provisions of the Slovenian Constitution originate in the notion of man as a free individual whose dignity, security and privacy are assets which are especially protected. One of the essential novelties of the Slovenian Constitution currently in force, in comparison with the former constitution, is the transition from the principle of unity to the principle of separation of powers. This constitutional principle should bear on the balance and legitimacy of the holders of power, in particular by defining the relationships between citizens and each branch of government authorities, as well as mutual relationships of independence, control and cooperation between the latter.

From the viewpoint of the democratic system and the possibility of individuals to influence the government the Slovenian Constitution has not stopped at the point of just guaranteeing to such individuals their individual rights but has also established such relationships between the principle branches of government authorities as make it impossible for any of them to prevail and gain monopoly over the others.

15. These constitutional values, however, do not arise only from historical experience of world, and in particular European, legal civilization based on democracy and human rights; they also derive from

specific Slovenian democratic historical experience and traditions of intellectual and public opposition to the former system of dominion of a monopolistic political power.

16. This is why the historical mission of Slovenian Constitution has also been made to comprise the basic objective of preventing any attempt of reestablishment of a totalitarian system; and its most important direct objective remains to be the protection of fundamental human rights and freedoms of every person here and now.

17. The political system of the state as defined by the Constitution prescribes that the state must protect and ensure human rights and freedoms and that the state can only interfere with them in a constitutionally admissible manner and in compliance with statute.

This is why it is provided by the Constitution that Slovenia is a democratic republic (Article 1 of the Constitution), a state governed by the rule of law and a social state (Article 2 of the Constitution), in which the supreme power is vested in the people. Citizens exercise that power directly, and most notably, at elections, and consistently with the principle of the separation of legislative, executive and judicial powers (paragraph 2 of Article 3 of the Constitution).

18. The aims of the constitutional principle of separation of powers are in particular :

- to protect and ensure personal freedom of each individual person,
- to prevent concentration of power and monopoly over it;
- to establish control over authorities, thus preventing their arbitrary acts, misuse of power and lawlessness,
- to organize as appropriate the tasks and powers of the government,
- to establish mutual control of the holders of power, as well as
- to maintain an equilibrium and evenly distributed power between individual branches of government and its agents.

19. The tasks of the government are executed by various government agencies designed for carrying out particular activities and functions of the government. The manner of dividing and assigning government tasks and functions to individual branches of government is regulated by the Constitution. Because the division of power ensures the freedom of individuals and their associations, while on the other hand restricting arbitrary use of power, this constitutional principle is an essential component of any government accountable to its people and any law-governed state.

20. The essence of the constitutional provision dealing with the separation of powers is not in the manner of organizing the relationships between individual branches of government or government organizations but in its fundamental function of protection of individual's freedom and dignity in relation to the government. Democratic efficiency of separation of powers, then, depends primarily on the quality of relations of mutual control, restriction as well as cooperation in the context of collective, balanced and efficient attainment of national objectives. This is why it is possible to have, and why, indeed, there are in existence various organizational forms of implementation of the principle of horizontal, vertical and functional separation of powers in accordance with specific historical and cultural circumstances of the constitutional system actually in force and applied.

21. Modern constitutional systems also incorporate bodies and organizations which, due to their organizational characteristics and formal competencies, cannot be ranged among any of the three branches of government. Such constitutional institutions include for example : the central bank ("monetary authorities"), the ombudsman and the Court of Auditors.

22. In corresponding constitutional systems all these bodies and organizations are indisputably highly autonomous in relation to all standard branches of government. Their autonomy on the one hand and

responsibility on the other are ensured by specific institutional requirements relating to their autonomy, such as : professional and technical responsibility of holders of corresponding public powers, procedural working rules prescribed by statute, system of legal remedies against legal acts, responsibility within the organization, stability and transparency of the mandate of holders of responsible positions, system of financing etc.

23. The National Assembly decided in transitional period, with socially-owned property still existing, to distribute the control tasks of the former PAS among two control institutions - the Agency and the Court of Auditors, and also to empower the Agency for the performance of some other services not relating to the government.

24. The mere fact that in the former system the PAS was autonomous and that its independent status was provided for in the constitution would be the reason enough for this status to be maintained while still dealing with socially-owned property. This is even more so because it is obvious that in the field of control over government expenditure in the new constitutional system the PAS has been succeeded by the Court of Auditors, which has also been granted an independent status by the Constitution. The Court of Auditors, also, is neither a part of judicial nor of executive authorities, but is an institution sui generis, whose control function over government expenditure makes it essential for it to be able to control financial aspects of the three branches of government.

25. The Court of Auditors, then, is obviously such analogous constitutional instance as should be used in assessing the constitutionally transitional status of the former PAS (now the Agency), in so far as the Agency will in the transitional period continue to carry out activities relating to the processes of transformation of socially-owned property into the property whose owners will be known. Directly related to these processes are the tasks of auditing of the process of ownership transformation in legal persons and examining the legality and appropriate implementation of regulations governing financial and material transactions of legal persons and the disposal of socially-owned property of legal persons until in the latter the property will be transformed in accordance with statute. But the disposal of socially-owned property and the scope of the latter are also indirectly affected by other tasks of the Agency, which are specified in Articles 4 and 73 of the AARSPOCI, for as long as these will be carried out in connection with legal persons whose capital is making part of socially-owned property. This is why the National Assembly is bound, by analogy, by the constitutional provision according to which in its work the Court of Auditors, which does not make part of judicial authorities according to the system of separation of powers, is independent and bound by the Constitution and statute.

26. From the materials of the National Assembly concerning the passing of the AARSPOCI and the Court of Auditors Act it follows that it was originally intended for the tasks relating to companies ownership transformation to be transferred from the PAS and the Agency respectively to the Court of Auditors already at the time of starting of the work of the Court of Auditors. Later, however, it was established that, as a body in the process of being established, the Court of Auditors would not be able to ensure the continuity regarding the execution of these tasks, which is why the tasks which came by their substance within the competence of the Court of Auditors, have remained within the competency of the Agency.

In this connection, there seems to be no justified reason whatsoever for the National Assembly to have taken away from the Agency its independent status, analogous to that of the Court of Auditors, which had formally pertained to it already in its PAS phase, and to have regulated its status so as to make the Agency accountable to the Government, when no durable regulation of this institution of systemic kind was in fact required, since the tasks of the Agency and its existence were already defined by statute as only being temporary.

27. On the basis of the foregoing it was the duty of the National Assembly also to provide the Agency with autonomous status and to make it bound by the Constitution. This is why the organizing of this service as a "public institution", the specific forms of subordinating the Agency to the Government and the management and control of activities of the Agency through its board, which has been established as if the Agency were a public institution, are contrary to the constitutional concept of an autonomous and independent entity whose duty under the constitution and statute is to control and audit the manner of disposing of the socially-owned property in the processes of ownership transformation.

28. On the basis of the foregoing the Constitutional Court points out that, if it has decided for the control functions under consideration to be performed by a special organization, the National Assembly should not have vested, by public authorization, with these functions the said organization with the status of a public institution. For in accordance with the Institutions Act a public institution shall be established for the delivery of a public service (which must be defined by statute or local government regulation), and for the performance of an activity other than a public service whenever such activity is performed in such manner and under such conditions as apply to a public service (Articles 3 and 64 of the IA). Thus, public institutions may not be established for carrying out control functions; neither can they be vested with the latter because of the provision of Article 7 of the Administration Act (Official Gazette of the Republic of Slovenia, no. 67/94). With respect to that part of the tasks which relate to the transformation of socially-owned property, then, such autonomy as has been granted to the Court of Auditors should also have been provided for the Agency by the legislator. But, with tax control being a function belonging to the government, the Agency could not be granted the status of a public institution even if it performed this function exclusively. For in such a case the status and form of organization relating to the performance of tax control function should be adapted to the nature and content of the later, which in this context also applies to the status of commissioned officers.

29. Also adapted to the character of the activities for the performance of which a public institution may be established is the system of management and direction of the institution through the board of the institution, in which representatives of the founder and representatives of users and of the public concerned have an important influence, all of which is unacceptable for a control organization, in which the users could control themselves. All of these reasons indicate that the organizational and management system prescribed by the AARSPOCI is contrary to the Constitution.

For this reason the Constitutional Court abrogated those provisions of Article 2 of the AARSPOCI by which the Agency is defined as a public institution; the provisions of the first two paragraphs of Article 5, which make the Agency accountable to the Government for the performance of the work and tasks under Article 4 and by which it is required annually to report to the Government; the provisions of Article 63, which introduce the board of the Agency as a body of a public institution and which specify its composition; and those provisions of paragraphs 1 and 2 of Article 64, paragraphs 3 and 4 of Article 65, Article 66, paragraph 1 and 2 of Article 68, and paragraph 3 of Article 77 which specify the powers of the board of the Agency, or by which approval by the Government is required.

30. With respect to the auditing of the process of companies ownership transformation an administrative procedure, which may be followed by a civil lawsuit, is prescribed by Article 48.b of the Companies Ownership Transformation Act. Paragraph 4 of Article 73 of the AARSPOCI provides that the National Assembly shall control the execution of auditing processes concerning ownership transformation in legal persons. This, however, is control which is constitutionally inadmissible, because with reference to the execution of specific procedures it makes subordinated to the National Assembly commissioned officers to whom autonomy has been granted in their work within the framework and on the basis of the Constitution and statute. It is also difficult to envisage the kind of control over the execution of individual audits in the sense of paragraph 4 of Article 73 of the disputed Act to be performed by the National Assembly, considering that the judicial control is already given. For the foregoing reasons the Constitutional Court also abrogated this provision of the AARSPOCI.

31. The proposers and initiators rightly claim that in the provision of paragraph 1 of Article 73 of the AARSPOCI the term "examination of legality and appropriate implementation of regulations", which is used there, is not defined as appropriate.

The principle of the state governed by the rule of law requires that norms be defined so as to allow their implementation; that grammatical and teleological

interpretations may be used to ascertain the substance of a regulation without any loopholes, which means that the conduct of government authorities is in this way determined. In the AARSPOCI itself the term is interpreted by the fact of defining quite precisely the methods of work separately for each particular area - the payment operations in the country (Articles 6 through 39); tax control (Articles 40

through 45); control procedure as a special form of administrative procedure (Articles 46 through 59); and statistics and provision of information (Articles 60 through 62). Neither is it possible to uphold the view that the issue of auditing of ownership transformation in legal persons has not been regulated. This is a temporary task which has been regulated by a special law in a general manner, and separately for each specific area, which is especially stressed in the AARSPOCI, Article 4, paragraph 1, sub-paragraphs 5, 6 and 7.

On the basis of the foregoing the Constitutional Court found that this disputed provision of the Act was not in conflict with the Constitution, if interpreted so that the term "examination of legality and appropriate implementation of regulations" also included the control, inspection and auditing.

32. The transitional provision of paragraph 6 of Article 72 applies exclusively to the director general and its deputy, and to commissioned officers, but not to other members of top management appointed for a specific term of office (assistant directors, branch directors, heads of local offices and of some organizational units). It cannot be understood as extending the term of office in connection with those persons whose term of office expired prior to the coming into force of the Act on 31 December 1994; neither can it be understood to be a guarantee that their term of office could not be terminated during that period for reasons specified by law or statutes. But the provision should neither be understood in the sense of providing a possible basis for the termination of the term of office of commissioned officers subsequent to 1 January 1995. This could occur if this provision were interpreted in the sense that these workers also could and should be granted "approval of appointment" subsequent to 1 January 1995, regardless of there being no evidence of any such conditions as may be prescribed by law or statutes for early termination of their term of office. Such "approval of appointment" is prescribed in the case of director general and its deputy, assistants to the director general and branch directors in paragraph 7 of Article 72. The matter applies to those members of executive and top management who were in the former system appointed by the National Assembly, and prior to the latter by the Assembly and the board of the PAS respectively.

33. The disputed provision introduces a legally undefined term of "approval of appointment". The legislator has legitimate right on the occasion of modifying the legislation to prescribe such transitional regime as would ensure the continuity of work and ensure the carrying out of those activities which are indispensable to the functioning of the state and its economy. While doing this, however, he must observe the principles of the state governed by the rule of law - in this specific case in particular the principles of legal security, clarity of statutes and prohibition of application of such measures as would exceed the purpose of a statute. One cannot agree with the claim of the National Assembly that the AARSPOCI refers to "a fundamental reorganization of the former PAS and the founding of a new institution having a different status and modified tasks". The ultimate aim of transformation of the PAS, it is true, is a gradual and planned transfer of the functions having been performed by the PAS to such institutions as would be in line with the new social and economic order. But the purpose of the AARSPOCI as defined in the legislative procedure is to ensure in transitional period, until the new institutions will have been established, the carrying out of those functions of the PAS which are urgently required. This clearly follows also from paragraph 1 of Article 72 of the AARSPOCI concerning legal succession and the take-over of the tasks of the PAS.

From the viewpoint of substance we are not dealing with the "establishing of a new institution" but with the modification in the status of an institution which was adapted to the assembly system and the unity of power into such status as would be in line with the requirements of a special control organization in transitional period.

The said provisional regulation of the position and tasks of the Agency, then, cannot be in itself the basis for terminating the term of office of executive and top management staff outside the framework of, and without taking into consideration the generally prescribed conditions relating thereto.

34. According to Article 64 of the AARSPOCI the Agency shall be directed and represented by the director general, and when the latter is absent, by his deputy. A similar though more restricted role is granted to assistants to the director general and branch directors. Appropriate level of autonomy and independence of the Agency cannot be conceived without relative autonomy and professional independence of the said top management in relation to the holders of social and political power and

the authorities at each particular time (which had, prior to the intervention by the Constitutional Court, a majority of representatives in the board of the Agency, this being the body responsible for the management of the latter). The requested independence is legitimately restricted by the method of their election and by their public responsibility for the performance of a public office in the public interest. Their autonomy and independence, however, must be transparent and foreseeable. But these requirements are not fulfilled if their position is dependent upon the composition of the managing body at each particular time and the corresponding distribution of political power within the "founder", or upon such formal changes as may be introduced in connection with the status of the institution at any time by the latter.

35. It is impossible to agree with the proposers and initiators that the disputed provision is in conflict with Article 155 of the Constitution. The provision of paragraph 7 of Article 72 does not have retrospective effect, because of its being in force from the date of its coming into force on.

Neither does it interfere with any of the accrued rights of individual persons. Appointments to a managing or leading post, including the specification of the term of office and a legally stipulated possibility of early dismissal, cannot be deemed to be such an accrued right as is protected in paragraph 2 of Article 155 of the Constitution against interference by the legislator. Neither is the provision in conflict with Articles 14, 15, 22, 23 and 50 of the Constitution, because it does not exclude the provisions of applicable labour and procedural legislation by which the same possibility of enforcement and protection of the rights (including judicial protection) arising from labour relationship on the basis of performing an office, and of social security has been granted also to members of executive and top management and to other employees of the Agency.

36. By reason of partial abrogation of individual provisions of the AARSPOCI in the application of the so modified statute the latter may turn out to be partly deficient and to fail to provide appropriate answers to some specific questions, in particular to those relating to the management and the status of the Agency as a legal person. According to the present Decision of the Constitutional Court, the Agency cannot be a public institution, and any such answers cannot be answered by application, *mutatis mutandis*, of provisions of the Institutions Act. Also inapplicable on a *mutatis mutandis* basis are the provisions on management and status of other known and legally regulated types of legal persons. Having regard to the position to be held by the Agency under this Decision for as long as it will be engaged in activities relating to transformation of socially-owned property such issues shall be solved by applying the provisions relating to the management and status of the Court of Auditors as a government agency. However, if it should turn out that in connection with specific questions such application of the said rules on a *mutatis mutandis* basis is not possible, the legislator shall have to mend such loopholes as may occur by taking into consideration the positions of Constitutional Court expressed herein.

C.

37. This Decision was made on the basis of Articles 43 and 48 of the Law on the Constitutional Court by the Constitutional Court in the following composition : Dr. Tone Jerovšek, President, and Dr. Peter Jambreč, Janez Snoj, M.L., Dr. Janez Šinkovec, Dr. Lovro Šturm, Franc Testen, Dr. Lojze Ude and Dr. Boštjan M. Zupančič, the judges. The decision under sections I./5 and II. was reached unanimously. The decision under sections I./1, 2, 3, 4 and 6 was reached with six votes in its favour and two votes against it. Votes against were cast by the judges Šinkovec and Ude who gave negative separate opinions.

P r e s i d e n t :
Dr. Tone Jerovšek