REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE

U-I-77/93
6/7-1995

DECISION

At a session held on 6.7.1995, after public debate on 31.5.1995, in proceedings for assessing constitutionality, the Constitutional Court

reached the following Decision:

1. The provisions of the first paragraph of article 5 of the Privatisation of Companies Act (hereinafter: ZLPP) are not in conflict with the Constitution.

2. The provisions of the second paragraph of article 5 ZLPP is not in conflict with the Constitution insofar as it is understood such that the Agricultural Lands and Forests Fund of the Republic of Slovenia is bound in accordance with legal conditions and in accordance with reasons cited in the Reasoning of this Decision, to conclude a purchase contract with current holders of rights to agricultural land, or to award to them a concession for agricultural lands and forests which have become state property on the basis of ZLPP.

3. ZLPP is not in accordance with the Constitution insofar as it does not regulate the duration of the transitional period to the conclusion of purchase contracts or to the awarding of a concession and the manner of resolving disputes in connection with this.

4. ZLPP is not in accordance with the Constitution insofar as it does not determine the manner and procedures for determining compensation for the reduction of the value of the role of foreign investors in a company, when and insofar as the State is bound to that by international contracts.

5. The National Assembly is bound to adjust the established discordances with the Constitution by 31.12.1995.

Reasoning

A. PROCEEDINGS

1. The proceedings in this case were initiated with the submission of a proposal by the company Lek d.d., Ljubljana, on 30/3-1993, on the basis of article 7 of the Constitutional Law for Implementing the Constitution (Official Gazette RS, no. 33/91) in connection with point 7 of the second paragraph of article 411 of the 1974 Constitution and the first indent of article 11 of the Law on Proceedings before the Constitutional Court SRS (Official Gazette SRS, no. 39/74 and 28/76). (note)

Article 7 of the Constitutional Law: "The Constitutional Court operates according to this Constitution in relation to questions of proceedings before the Constitutional Court ...., which are not regulated by the Constitution, and until the adoption of the Constitutional Court Act, the current Constitution and legislative provisions shall sensibly be used".

The second paragraph of article 411 of the 1974 Constitution: "Proceedings before the Constitutional Court shall be initiated by a proposal: ... from a company or other organisation, ..., if it effects their right which is determined by the Constitution or statute".

Article 11 of the Law on Proceedings before the Constitutional Court: "Proceedings before the Constitutional Court shall be initiated:

- by the submission of a proposal ... from organisations ..., which the Constitution defines as proposeres of proceedings". (end of note)

2. To this case were joined:

- the proposal of the company Agrogorica p.o., Šempeter pri Gorici; Hmezad p.o., Žalec; Kmetijski kombinat Ptuj p.o., Ptuj, and Mercator Kmetijsko gospodarstvo Kočevje d.o.o., Kočevje, of 22/4-1993 - by Resolution of the Constitutional Court of 20/5- 1993,

- the proposal of the company Bayer Pharma d.o.o., Ljubljana, of 28/5-1993 - by Resolution of the Constitutional Court of 17/6- 1993,

- the proposal of the companies TP Alpinum d.d., Bohinsko jezero, and IRP Alpinum d.d., Bohinsko jezero, of 9/8-1993 - by Resolution of the Constitutional Court of 16/9-1993,

- the initiative of Gozdno gospodarstvo Ljubljana p.o., Ljubljana, of 23/6-1994 - by Resolution of the Constitutional Court of 30/6-1994 and

- the initiatives of Soška gozdno gospodarstvo Tolmin p.o., Tolmin: Gozdno gospodarstvo Postojna p.o., Postojna: Gozdno gospodarstvo Kočevje p.o., Kočevje; Gozdno gospodarstvo Novo mesto n.sub.o., Novo mesto: Gozdno gospodarstvo Nazarje p.o., Nazarje, and Gozdno gospodarstvo Maribor p.o., Maribor, of 4/7- 1994 - by Resolution of the Constitutional Court of 14/7-1994.

3. Lek d.d. is a company in mixed ownership, whose shareholders include employees and foreign and domestic business partners.

The shareholding company was created by the transformation of the socially owned company Lek p.o., to which it is the legal successor. The legal predecessor of the company obtained by payment contracts or decision of an administrative body, the right to use of 67,660 m2 of land, which it used for one of its activities (cultivating medicinal herbs and drugs), although (the land) was also partially purchased as building land.

4. Agricultural organisations are socially owned companies (p.o.) or business associations owned 100 percent socially.

5. Bayer Pharma d.o.o. is a mixed company with known owners: Lek d.d. has 51% of shares, and a foreign partner, Bayer AG, from Leverkusen, has a 49 percent share of the capital. A contract on joint investment was concluded in 1970, and in 1975, the company obtained by payment contract the right to use of 9,949 m2 of building land.

6. The tourist company (TP) Alpinum d.d. has real estate which is situated in the region of Triglav National Park. A shareholding company was created from a socially owned company, and one of the shareholders in the company is IRP Alpinum d.d., which is exclusively privately owned by the workers of TP Alpinum.

7. Gozdno gospodarstvo (Forest Management Units) are organised as socially owned companies (p.o.), thus companies with 100% social capital.

8. All the proposers submitted their proposals for assessing constitutionality prior to the validation of the Constitutional Court Act ((Official Gazette RS, no. 15/94, hereinafter: ZUstS) and according to the provisions of its article 81, retain the position of proposers.

(note)

Article 81 ZUstS: "Proceedings begun prior to the validation of this law shall continue under the provisions of this law, such that proposers under the previous regulations retain the position of proposers".
(end of note)

The proposers demonstrated a legal interest for the submission of an initiative on the basis of the second paragraph of article 24 ZUstS.

(note)
The second paragraph of article 24 of ZUstS: "A legal interest in the submission of an initiative is shown if the regulation or general act for exercising public authority, the assessment of which the initiator proposes directly encroaches on their rights, legal interests or legal position".
(end of note)

9. At a session held on 17/6-1993, on the basis of article 7 of the Constitutional law for Implementing the Constitution in connection with indent 4 of the third paragraph of article 25 of the Law on proceedings before the Constitutional Court,

(note)
Article 25 of the Law on Proceedings before the Constitutional Court (third paragraph):

"The Constitutional Court may also decide at a session without public hearing:

- when it decides about restraining an individual act or individual action ... "
(end of note)

of Constitutional Court rejected the proposal for the temporary restraining of implementation of article 5 ZLPP.

10. The Constitutional Court dealt with the case at sessions on 17/6-1993, 17/3-1994, 31/3-1994, 9/6-1994, 17/11-1994, 8/12- 1994, 1/6-1995, 30/6-1995 and 6/7-1995.

11. The National Assembly replied to the proposal on 6/1-1994.

To the answer was attached the opinion of the Government, or the Ministry of Agriculture and Forestry.

12. The President of the Constitutional Court, on the basis of the second paragraph of article 35 ZUstS,

(note)
Second paragraph of article 35 ZUstS: "The President of the Constitutional Court may call for a public hearing on his own initiative or on the proposal of participants in the proceedings. The President of the Constitutional Court must call for a public hearing on the proposal of three judges".
(end of note)

called a public hearing, to which in accordance with the first paragraph of article 36 ZUstS.

(note)
First paragraph of article 36 ZUstS: "The Constitutional Court shall invite to a public hearing, the participants in the proceedings, representatives, or agents and authorised participants in the proceedings and other persons whose participation in the public hearing it believes is necessary".
(end of note)

he invited representatives or agents and authorised participants in the proceedings and other persons whose particpation in the public hearing the Constitutional Court believed was necessary.

13. At the public hearing on 31/5-1995, the Constitutional Court heard the oral statements of participants or their authorised representatives as well as the statements of representatives of others invited and answers to the questions of the President and judges.

B. LEGAL REGULATION

I. Valid statutory regulation

14. Article 5 ZLPP determines:

"Prior to establishing the social capital of a company, agricultural land and forests shall be separated from the assets of the company, and this shall become on the day of validation of this law the property of the Republic of Slovenia or a municipality, and in accordance with a special law shall be transferred to the management of the Fund for Agricultural Land and Forests of the Republic of Slovenia (hereinafter: the Fund) or the municipality, and the value of real estate of companies which perform tourist activities whose real estate is situated in the region of Triglav National Park shall be separated from the assets of the company and privatised in accordance with special law.

Companies may continue to use and manage agricultural land and forests if they cultivate or exploit them themselves and care for them as good managers, until the issue of a legally binding decision on denationalisation or until the awarding of a concession or the conclusion of a purchse contract in accordnace with the law.

Terms of purchase shall be established or a concession awarded for at least a period which corresponds to the amortization period of the investment in the land or long term planting. In the payment of rent or compensation for the award of the concession shall be respected the purchase price for obtaining the land by payment such that the rent or compensation shall be reconciled to the settlement of this purchase price".

15. ZLPP took effect on 5/12-1992 and regulates "the ownership transformation of companies with social capital into companies with known owners" (article 1 ZLPP). According to the provisions of the first and second paragraphs of article 3 ZLPP, as a company with social capital shall be considered:

- companies in social ownership, companies in mixed ownership and composite forms of companies if they have social capital among their assets in the balance sheet, and

- organisations of associated labour and working communities which perform economic activities and are not yet organised as companies.

In article 2 ZLPP are listed companies and organisations for which ZLPP shall be used only if this is determined by special law.

16. The Fund was established by the Law on the Fund of Agricultural Land and Forests of the Republic of Slovenia (Official Gazette RS, no. 10/93, hereinafter: ZSKZG), which took effect on 11/3-1993. The Fund is a legal person which manages agricultural land, farms and forests owned by the Republic of Slovenia and in its name and on its account. Management embraces administering and disposal (articles 2 and 3 ZSKZG).

In the third paragraph of article 14, ZSKZG determines that: "As agricultural land and forests according to ..., article 5 ZLPP ..., shall be considered also unbuilt building land for which no valid planning permission exists or (for which) no purchase or transfer to the building land fund has been executed ..."

In the fifth paragraph of article 14, ZSKZG determines that: "The Fund or municipality is the legal successor to the administrator of agricultural land, farms and forests in social ownership ... in the part which refers to transferred agricultural land, farms and forests".

17. The treaty between SFRY and the Federal Republic of Germany on the mutual protection nad encouragement of investment was ratified by law which was adopted by the Federal Assembly of the former SFRY and which was published in the Official Gazette SFRY no. 7/90 of 6/7.1990.

In the second paragraph of article 13, the treaty determines that it take effect one month after the exchange of ratification documents, and in article 11 determines that it also applies to investments made prior to its taking effect.

The Constitutional Law for Implementing the Basic Charter on the Sovereignty and Independence of the Republic of Slovenia (Official Gazette RS, no. 1/91 and 45/94) which took effect 25/6-1991, determines in article 3 that international treaties concluded by former Yugoslavia and relating to the Republic of Slovenia shall apply on the territory of the Republic of Slovenia. On this basis, the National Assembly adopted an Act on the succession to treaties of the former Yugoslavia with the FR Germany (Official Gazette RS, no. 67/93 - international contracts no. 20). The Act took effect 18/12-1993, and contains the Treaty under point 30.

II. Social-ownership entitlements (rights) of social-legal persons

18. The former constitutional system was based on the social ownership of the means of production, with some exceptions.

Social ownership enjoyed special constitutional protection.

Under its heading, workers had the right to work and to manage social resources. Any act which could violate these workers' rights was unconstitutional (article 16 of the 1974 Constitution). The right of workers to self-management, as a fundamental right or freedom was inviolable and inalienable.

19. Amendment XCIV to the previous Constitution (Official Gazette RS, no. 7/91) envisaged the transformation by law of social ownership into public and other forms of ownership. Under the current constitutional arrangement, in which amendments to the previous Constitution of course no longer apply, the legislator had a constitutional foundation for the adoption of ZLPP in article 1 of the Constitutional Law for Implementing the Constitution, according to which it was necessary to accord all legislation with the new Constitution, thus also to regulate legislatively the manner of terminating social ownership, or its transformation into real ownership.

The new Constitution does not recognise social ownership any longer, so it also does not enjoy constitutional protection. In the transitional period until its transformation, it is protected by previous legislation insofar as it still applies, and new legislation which regulates its transformation and protection. Irrespective of the manner of creation of social ownership, it was the task of the legislator to transform social ownership into real ownership and to determine criteria for deciding known owners. The legislator was bound to this by the Constitution. However, the Constitution does not protect social ownership as such.

20. Social ownership was not ownership, because under the previous constitutional arrangement, a fundamental attribute of legal ownership was lacking: a legal subject who could have the position of owner. Not just that no regulations expressly determined who is the owner both of resources and "capital", which were in social ownership. Numerous regulations and the entire theory of social ownership were based on social ownership meaning the negation of ownership, and its fundamental property being its "non-ownership" character. So rights which derived from the well-known "triad" of social ownership rights - use, management and disposal - according to its contents defined in regulations of implementation, could/can not be equated with rights which, from the point of view of their material things, real owners. This was mainly the right to gather the fruits, the results of managing property.

21. The fourth paragraph of section III of the Basic Principles of the 1974 Constitution SFRY determines: "Deriving from the fact that nobody has ownership rights to the means of social production, nobody - not a socio-political community, nor an organisation of associated labour nor a group of citizens nor an individual - can in any ownership-legal basis usurp the product of social work, nor may they manage social production and labour resources, nor dispose of them, nor arbitrarily determine conditions of share".

22. The Law on Associated Labour (Official Gazette SFRY, no. 11/88 - clarified text; hereinafter ZZD) determined in the fourth paragraph of article 41: "If an organisation of associated labour cannot meet its obligations, the competent body of the socio-political community, in accordance with its own constitutionally defined rights and duties must assist it economically and otherwise, and with measures for its rehabilitation and with other economic and administrative measures create the conditions for overcoming the difficulties because of which it cannot meet its obligations".

23. Such treatment of basic resources was understandable and conditioned by their social-ownership nature. Social ownership conditioned the basic difference between companies and organisations of associated labour. As the commentary on the Companies Act

(note)
The Law on companies and inscription in the court register with introductory clarifications, ČZ Official Gazette RS, Ljubljana, 1990, p. 10,11
(end of note)

established, a company is "socio-economically and functionally organised and institutionalised capital which is personified through obtained legal capacities and is the bearer of rights, duties and responsibilities in economic exchange", and an organisation of associated labour is "irrespective of the form, socio-economically and functionally and personified organised labour or associating the right to work with social resources". "The intention of organising resources in companies is profit, and in an organisation of associated labour the satisfaction of specific social needs". The commentary further establishes that a company is "a closed system, whose functions and aims are determined on the market", while an organisation of associated labour represents "an open system characterised by integral linking on the basis of agreement, all with the purpose of satisfying social needs". Precisely because of the satisfaction of general social needs, organisations of associated labour were distinguished from companies which "create profit in strict competitive struggle", "in the framework of the agreed economy try to reduce the influence of competition by mutual agreement". 24. Because of such a nature of social ownership and management of it, as established by Dr. Bogomir Sajovic,

(note)
Basics on defining the system of rights to social resources, Združeno delo, special volume: Law on associated labour in theory and practice, 1981, p. 309
(end of note)

"in a series of cases of mutual income links among individual organisations of associated labour ... (it was) difficult to imagine how to set up recognisd civil protections, especially the system of material law". In the author's view "the legal consequences under discussion are an expression of their "non-ownership" nature". So "the changed nature of the fundamental right-holder's position in contrast to owners' ... has a crucial consequence that it is not possible to base demands of protection in the same way as in cases of material property rights. The absence of an ownership base thus changes a series of well-known elements of material law, whether it is transferable business or transferable treatment, or the nature of requirements for protection or the nature of "introduced" rights (of a material nature). The actual departure from an ownership basis and the grounding of all legal relations as a conseuqence of managing social resources leads in a system of social ownership relations to the unified management of all types and forms of resources. ... Since rights are also a subject of management, we can no longer in such unified management talk about a classical material legal nature or a material law basis of all management relations which have material things as their subject. So a non-ownership system abolishes any kind of fictitiousness of actual managerial positions, which it cannot be claimed of mechanisms of material (civil) law".

(note)
ibid, p.309
(end of note)

25. Social ownership and the right to work with social resources deriving from it, gave workers in associated labour the right to use and the right to administer, and the organisation of associated labour the right to dispose. In this, workers only had those rights, obligations and responsibilities which were determined by law and by self-management general acts in accordance with the law. This is determined by article 187 ZZD, which derived in this from article 13 ZZD as one of its basic provisions. In a commentary to article 1870, it is written: "In view of the structural elements of the rights or authorisations themselves, which associated workers have in self-management forms of organisation, the provision does not signify anything new to article 13. In any case, the legislator wanted with this provision to stress in particular the importance of the changing nature of the right to manage resources in social ownership in contrast to the owner's position".

(note)
Commentary on the Associated Labour Act, ČGP Delo, TOZD Gospodarski vestnik, Ljubljana 1988, p. 376
(end of note)

26. In the same work, in a commentary to article 131,

(note)
1 ibid, p. 39
(end of note)

it writes: "In defining the position of those holding rights in self-management organisations, it is thus necessary as far as possible to avoid interpreting in the sense of a private property content. With a closer search for the meaning of defining aspects of generally distorted contents, it is necessary to stress above all that the system of managing social resources can in no way derive from ownership rights in the paramount definition. All ownership basis for managing social resources is lacking for such a definition".

27. It still does not follow from the fact that social ownership was not ownership that the legislator, on transforming social property into property with known owners, could not affect any constitutionally protected position of subjects which used resources in social ownership.

28. It is necessary to bear in mind in this that resources in social ownership "appertained" to specific social legal persons. These could freely appear on the market, enter into obligatory (contract) relations, whereby in principle the same rules applied for them as in obligatory relations between physical persons and civil legal persons who were bearers of real ownership. These subjects were also answerable for accepted obligations with the resources at their disposal and in legal traffic; singular and general execution (bankrupcy) could be executed against them (with the same kind of limititations as with the resources of small industrialists who operated with private resources, and the resources of farmers). From this it follows that the non-ownership concept of social ownership as a whole applied in relation to authorising workers to resources in social ownership, and to a lesser extent to authorising social legal persons who had integral legal and business capacity.

29. Resources in social ownership, which were organised as a material sub-strata of social legal persons, as practically the only form of ownership of resources which can be devoted to economic purposes, were the basis of the social security of employees in the social sector, which was the great majority of the population.

30. The Associated Labour Act, namely, in the second paragraph of article 22, determined that "workers in basic organisations suffer material and other effects, if the basic organisation finds itself in difficulties because of social and economic inexpedient management of resources, because of business which has not been adapted to market needs or the self-management agreed social division of work, because of bad work and business or unscrupulous behaviour which results in a low

productivity of labour, and because of this they do not obtain sufficient income for carrying out their social function in social reproduction" and in the first paragraph of article 41, that "organisations of associated labour and other social legal persons are answerable for their obligations with the social resources at their disposal. In this, the law is supposed to define the conditions of forced settlement and determine the resources which were exempted from forced settlement" (third paragraph of article 41 ZZD), analogously corresponding to provisions which protected and maintained obtained capacities of means of production in other forms of ownership.

31. In the previous points, the described position of social ownership and social legal persons which manage them, began greatly to change with the Companies Act and the Constitutional Amendments of 1989, towards the transformation of former organisations of associated labour into companies - although these companies were still managers of social property and were not yet owners of their resources. For companies from whom ZLPP nationalised agricultural land, the former constitutional and legal regime of social ownership no longer applied, but already a greatly altered regime approaching a company concept according to the already many times amended Companies Act.

III: Social ownership management of agricultural and forest lands

32. In the judgement of the content of the rights of legal persons who used land in social ownership, it is necessary to respect further specific particularities and limitatations which applied in relation to social ownership management of agricultural and forest land in comparison with management of other resources which legal persons had use of. These are particularities which even under the former system gave users of social resources of land an even lesser extent of management than they could have of other resources, and they derived from the fact that land is a national asset and limited natural resource on the one hand, and that this resource as a whole became a "general social asset" and later state and social property with legislative measures alongside the revolutionary changes of the social system after the second world war, and was not created as a result of "associated labour".

33. The transfer of agricultural land in social ownership into private property was in principle forbidden, and allowed only in exceptional cases determined by law (first paragraph, article 206 ZZD). The passing of agricultural land in social ownership into the ownership of citizens, societies and other civil legal persons was subject to the consent of the competent public "defender of law" (article 35 of the Agricultural Lands Act, Official Gazette SRS, no. 17/86 - clarified text, and Official gazette RS, no. 9/90 and 5/91). On the other hand, it was possible to transfer agricultural and building land, forest and forest land which was social property, to another social legal person without payment, or on payment only at the level of the investment in this land or this forest (second paragraph of article 206 ZZD). This provision of the Associated Labour Act, even in the system of social ownership, essentially reduced the economic importance of the right to dispose of land in social ownership. Only purpose and interest linkage of agricultural lands, in other words, could be the basis of the possibility of unpaid transfer or transfer on the basis of return of investment. This can be understood only in the context of the self-management association of labour and resources: the subject of the right does not change, but only the subject of management.

C. ASSESSMENT OF CONSTITUTIONALITY

I. Extent and method of assessing the constitutionality of the encroachment

34. The proposers and initiators impugn the provisions of article 5 ZLPP because they are claimed to be in conflict with the following constitutional norms:

- article 2 (legal and social state),

- article 14 (equality before the law),

- article 33 (right to private property),

- article 50 (social security)

- article 67 (property),

- article 69 (disappropriation),

- article 74 (entrepreneurship),

- article 155 (ban on retroactivity) and

- article 158 ((attribute of being) legally binding).

Bayer Pharma d.o.o. also proposes a judgement of the accordance of these legal provisions with the ratified treaty between SFRY and the Federal Republic of Germany on the mutual protection and encouragement of investment.

35. The above review of the legal reasons for the category of social ownership, social ownership rights and social legal persons, enables their comparison with categories of ownership with known title holders, corresponding holders of ownership rights and legal persons of civil law on the other hand. This review also facilitates understanding of the category of legal person in mixed ownership.

Such a comparison enables an assessment of the extent of constitutional protection of legal interests, position or rights on the basis of the constitutional standards to which the proposers and initiators of the constitutional dispute refer. It also enables an assessment of the constitutional protection of corresponding categories of legal subject, that is social legal persons with social ownership rights to agricultural lands and forests.

36. In the case that the rights of these legal persons are constitutionally protected, the question is raised of whether there was an encroachment on them, or whether measures determined in article 5 ZLPP represent an encroachment on these constitutionally protected rights.

37. In the case of an affirmative answer to the above question, that is to say if in the judgement of the Constitutional Court there was an encroachment on the constitutionally protected rights of subjects, the further question is raised as to whether the encroachment was constitutionally permissable or not. It is thus necessary to respect constitutionally envisaged legitimate restrictions on relevant constitutional rights, first the general limitation by the rights of others, the legality of prescribed ways of exercising these rights and, especially, with the limitation of concrete rights and corresponding entitlements of subjects because of the social or public good permitted by the Constitution.

38. On this point the constitutional judgement begins the test of proportionality or the ban on excessive encroachments and suitable weighing of whether the measures determined in the law are in accordance with its intention. A measure must be based on the aim that it infringes as little as possible on the rights and interests of affected subjects.

Measures must be suitable for achieving the legislator's aims, necessary for their implementation in relation to the objective interests of citizens and may not be outwith any understandable proportion to the social or political values of these aims.

39. That is to say, the legislator may also encroach on the constitutionally protected position of proposers and initiators if it thus realises some other constitutionally permissible aim. In this, it may encroach on this position only insofar as this is unavoidable for implementing the legislative aims. In regulating the relation between constitutionally protected benefits which are mutually incompatible, the legislator must respect the principle that the means chosen to achieve legitimate ends must be both legally permissible and suitable for achieving these ends. Further, the chosen means for achieving the aim must be necessary, that is that the aim cannot be achieved in a manner that would encroach less

into constitutionally protected positions, and finally, that the encroachment, that is the extent of the effect on protected benefits must be in (political values) proportion to the value of the established legislative aim.

40. The aims of the legislator must be defined, umderstandable and constitutionally legitimate. In the procedure of adopting the impugned legislative provisions, the following aims were stated as reasons for such an arrangement:

- carrying out the unified and longterm agricultural (land) and nature protection policies of the Republic of Slovenia;

- the need to separate land from the assets of companies which are being privatised because otherwise the danger exists that foreigners would thus obtain ownership rights to this land;

- easier implementation of denationalisation because of the guaranteeing of compensation for land.

41. Unified and longterm agricultural policies is a legitimate aim, for the achievement of which the establishment of state ownership of land is a suitable intervention. Such measures are recognised in comparable legislation, which also applies to legally prescribed limitations of ownership rights in individual subjects of ownership.

42. In relation to the achievement of other aims, the separation of land from the assets of companies which are being privatised enables state control over the land obtained, in accordance with national policies. Economic subjects on the market primarily follow company interests. The national strategy in relation to the ownership structure of agricultural land as an irreplaceable natural resource and a constituent element of Slovene statehood, can only be carried out if in the trade in this land and in the manner of management and administration of it, business interests will not primarily be decisive.

43. Even the facilitation of carrying out denationalisation (guaranteeing land compensation) is a legimate aim for the legislator. The impugned provision, namely, increases the possibility of returning in natural form such that the circle of land from which the Fund, as a body bound to denationalisation decisions, may draw, is increased.

44. In the continuation, this Reasoning is based on (the judgement) that the legislator also adopted possible and necessary legislative measures whereby it reduced the gravity of legitimate encroachments to the extent which guaranteed the achievement of the aims set, and it established an understandable balance between the values of these aims and the gravity of the encroachments.

II. Asserted violations of articles 67, 69 and 155 of the Constitution

45. The cited articles of the Constitution determine: article 67 (first paragraph)

"The manner in which property is acquired and enjoyed shall be regulated by statute so as to ensure the economic, social and environmental benefit of such property".

article 69

"Land and property affixed to land may be compulsorily acquired, or ownership thereof may be limited by the State in the public interest and subject to a right to such compensation in kind or monetary compensation from the State as shall be determined by statute".

article 155

"No statute, regulation or other legislative measures shall, in general, be interpreted as having retrospective affect".

A law itself may determine that individual of its provisions shall be retroactive if this is required for the public good and if this does not thus encroach on obtained rights".

46. The proposers or initiators base the violations of these provisions of the Constitution in the following manner:

Lek and Bayer Pharma believe that the legislator should, according to article 67 of the Constitution, have defined the manner of obtaining and enjoying right of property, but the impugned provision of article 5 ZLPP determines the State or municipality as the subject of rights of property. It is claimed thus to have created state ownership without a constitutional basis and in a manner which the law does not envisage. Material possessions or rights, obtained through lawful business or legally binding decisions, are taken away without compensation in kind or indemnification, in conflict with article 69 of the Constitution. This is claimed thus also to violate the principle of a legal state and the prohibition of the retroactivity of laws.

TP Alpinum and IRP Alpinum claim that the impugned provision encroaches on the constitutional right to private property, although it is claimed that restrictions on obtaining private property may only be determined by the Constitution. The Constitution determines restrictions in articles 67, 69, 70 and 71. Since the impugned provision is claimed to restrict one of the fundamental rights otherwise than determined by the Constitution, this is claimed also to be in conflict with the principle of a legal state.

The agricultural organisations believe that articles 67, 69 and 71 of the Constitution restrict ownership rights neither by extent nor by title holder and do not provide a legal basis for nationalisation. Expropriation, carried out for the public good, should only take place in individual cases for which, the premises are expressly envisaged by statute. The Constitution is said not to provide the basis for encroachment on the right of ownership itself.

The forest management organisations believe that there is no constitutional basis for the nationalisation of their assets.

Even under the former legal regime, they had been completely independent as legal persons. Not only does the Constitution not recognise such a manner of obtaining ownership as is determined by article 5 ZLPP, but such a transfer of agricultural lands and forests is claimed not to guarantee the economic and social functions of property. The initiators obtained the assets in a legal manner, so the assets and rights which they have are obtained rights for them. An encroachment on them would be an infringement of article 155 of the Constitution.

47. The National Assembly believes that the adoption of constitutional amendment XCIV to the 1974 Constitution gave a constitutional basis for the transformation of social property into public and other forms of property. Point 3 of this amendment, namely, determined that the law regulate the transformation of social property into public and other forms of property, and restrictions on ownership. Social ownership is said to have been based on the non-ownership concept and from it in relation to this should derive only individuals with legally defined rights, generally the right of use, administration and restricted disposal, in accordance with the purpose. So the exercising of these rights to specific material assets or rights is claimed not to signify automatic legal title to obtaining classical property, as a completely different legal institution. Citizens as holders of rights in the process of privatisation of companies are claimed to draw their rights under the heading of their contribution to increasing the value of the national wealth and not on the basis of social property as such.

The National Assembly believes that in view of this, it is not possible to accept the claim that in the described cases it is dispossession, nor (that it is) the compulsory transfer of the right of use (which applied in regulations until then in cases in social ownership), since the operation of privatisation of social property is supposed to avoid this and is supposed thus to be a completely independent and specific legal relation which the law defines. This provision is claimed not to encroach on obtained rights since the right to manage and dispose of assets in social ownership is not the same as the right to ownership, which was established only with the validation of ZLPP.

48. The Constitutional Court found that the various standpoints of the participants in relation to the constitutionality of the impugned provisions are based on the fact that they perceive social ownership fundamentally differently, and the rights deriving from it of the (former) social ownership holders of rights, or the boundary of legislative freedom to regulate the transformation of this ownership from ownership with unknown owners, or non-ownership, into ownership with known owners.

While the proposers and initiators equate their social ownership rights with ownership in terms of content, the opposing party starts from the premise that social ownership did not give any kind of ownership rights and that with the provisions of amendment XCIV, it obtained a free hand to adopt a legislative arrangement on the basis of which social ownership as a constitutional category under the 1974 Constitution will be transformed into public and other forms of ownership with known owners.

49. The above review of the law and theory of social ownership has demonstrated that social ownership was in its essence a negation of ownership, and that in no way did it represent ownership such as is protected by the provisions of the Constitution. The proposers and initiators may not therefore call on the provisions of article 67 and 69 of the Constitution in impugning the provisions of ZLPP .

50. In view of the fact that social ownership was not a real ownership category, and in view of the fact that article 5 ZLPP is a transitional regulation, the proposers and initiators may also not call fundamentally on the principle of the protection of confidence in the law - as an element of a legal state (article 2 Constitution) and the provisions of article 155 of the Constitution. Their legal position in relation to assets, namely, is not altered retrospectively by the law (agricultural land and forests became state property on the day of validation of the impugned regulations).

III. Claimed violations of articles 2, 33, 50, 70 and 74 of the Constitution

51. The cited articles of the Constitution determine: article 2

"Slovenia is a state governed by the rule of law and is a social state".

article 33

"The right to own ... property shall be guaranteed". article 50 (first paragraph)

"All citizens who fulfil such conditions as may be laid down by statute shall have the right to social security".

article 71 (first and second paragraphs)

"The State shall regulate by special statute on land use its suitable exploitation.

"Agricultural land shall be afforded special protection by statute".

article 74

"Free enterprise shall be guaranteed.

The establishment of businesses shall be regulated by statute.

Any business activity in conflict with the public interest may not be pursued.

Restrictive trading practices and other practices which restrict free competition, as specified by statute, shall be forbidden".

52. The proposers and initiators base the violation of these provisions of the Constitution in the following manner:

Lek and Bayer Pharma claim that the impugned provisions encroach on the validity of material law relations to material assets, which were made in accordance with valid regulations with the concluding of legal payments business and accomplished with the inscription in the land register. Thus, when land so obtained became without payment the property of the state, such an enjoyment of ownership was not guaranteed as could guarantee in entirety its economic function and free enterprise, which is a constitutionally protected category, is restricted. With the alienation of the land, there is claimed to be a longterm restriction on the proposers of performing a basic activity, or the implementation of the planned company business strategy. The confiscation of material assets obtained on payment on the basis of valid legal business and legally binding decision, without compensation or indemnification is claimed also to violate the principle of a legal state.

The agricultural organisations state that the validation of the impugned provisions would have irreparable social consequences, since a series of activities would have to be terminated (even with bankruptcy and liquidation), there would be a collapse of technological and organisational development and the destruction of agricultural expert staff, as well as the laying off of workers or their retraining and redisposal. The legal order is supposed to give social legal persons the property of legal persons. An encroachment on the material sub-strate of a legal person is an encroachment on their essence. Nationalisation under article 5 ZLPP, which is executed ex tunc, is claimed to be in conflict with the principle of legal security as an expression of a state of law, and the public interest in it is claimed not to have been demonstrated.

The forest management organisations claim that the social security of their workers would be threatened with the implementation of the impugned provisions, in conflict with article 50 of the Constitution. The encroachment on assets which they obtained in a legal manner, in the opinion of the initiators also destroys legal security in legal business, which would be in conflict with the principle of a state of law.

53. The National Assembly states that in the procedure of adopting ZLPP, the standpoint was clearly expressed that land and forests which were managed and disposed by individual companies in the framework of social ownership cannot become the subject of sales contracts, but that it is necessary to protect such companies and ensure future business, so instruments were included in the law which enable the continued use or the independent right to award a concession.

The new solutions are claimed not actually to change the quality of rights for a company, since even to date a regime of management and disposal of agricultural land had been prescribed, which was frequently not carried out. In the framework of the process of privatisation of companies, it was also necessary to respect the fact that the new Constitution determines in article 68 that foreigners may not obtain ownership rights to land, except by inheritance on condition of reciprocity. The starting ownership structure in companies could be essentially different from some optimal structure which will be created in the future with the involvement of foreign capital.

54. The Constitutional Court first draws attention to the important question of guaranteeing the obligations of organisations of associated labour. The Associated Labour Act determined in article 209 that a social legal person is responsible for assets of which it disposes (first paragraph).

At the same time, it determined that the law specify which assets of which an individual social legal person disposes, with reference to their importance for performing their activities or function, cannot be expropriated. The Law on executive procedures (Official Gazette SRS, no. 20/78 - hereinafter ZIP), until 1.7.1990 contained a provision (article 191), whereby agricultural land exploited by an organisation of associated labour for business purposes and which was necessary for performing their activities, could not be the subject of forced settlement of financial debts. This provision thus applied for a further two years after the validation of the Companies Act (Official Gazette SRS, no. 77/88, 40/89, 46/90 and 61/90 - hereinafter ZP). ZP also retained the validity of the second section of chapter VI ZZD, which contains article 209 ZZD. On the other hand, it also explicity follows from article 191 ZIP (thus even in 1978) that all agricultural land (and forests) which exceeded the extent of land urgently

required by a social legal person for carrying out their activities could be the subject of forced settlement.

55. Legislation, already from the validation on the Law on forced settlement, bankruptcy and liquidation (Official Gazette SRS, no. 84/89) no longer recognised obligatory rehabilitation, so that at the latest from the validation of the cited law, the provisions of ZZD on the socialisation of company risks had become of a predominantly declarative nature, without support in legislation executed.

56. In view of the circumstance that resources in social ownership represented an important element of the social security of a large majority of employed persons, in forming the provisions whereby social property was changed into public property and other forms of (legal) ownership on the basis of article 1 of the Constitutional Law for Implementing the Constitution (historically resting on amendment XCIV to the previous Constitution), the legislator should also have respected the provisions of article 50 of the Constitution.

57. Since privatisation is predominantly taking place in the framework of existing legal persons (article 1 ZLPP), the law should also in relation to the subject being privatised under this law, have respected the provisions of article 74 of the Constitution and sensibly also the provisions of article 33 and other constitutional provisions on ownership. Equally, in view of the provisons of article 8 of the Constitution, in regulating privatisation, the legislator is bound to international treaties which bind Slovenia.

58. In relation to legal persons undergoing ownership transformation under ZLPP, the principle applies that privatisation will not change their legal identity (it is thus not a question of possible legal succession, but establishing legal identity or continuity in law). All obligatory legal and civil law material and non-material (responsibility for offences and violations) obligations which they had as legal persons with social capital will be retained as legal persons with known owners. Precisely in view of the fact that social legal persons did not have known owners, the legislator could also have chosen other solutions: he could have encroached on the legal subjectivity and identity of these legal persons. However, he would would then have had to regulate all questions connected with legal succession and questions connected with the position of persons who exercised their right to social security on the basis of working relations (employment contract) with subjects that would in this way cease to exist. The legislator decided on this kind of intervention in transforming legal persons, e.g. in the provisions of article 72 of the Cooperatives Act (the Constitutional Court judged the constitutionality of these provisions by Decision U-I-83/92 - in the collection OdlUS: 57/II), additionally in the provisions of article 82 of the Forests Act (Official Gazette RS, no. 30/93) (on the significance of these provisions on the position of forest management organisations in relation to their assets see below in this Decision), but not also in the ownership transformation of persons transformed under ZLPP.

59. By deciding that also after carrying out privatisation, legal persons who prior to this had social capital would continue activities on the same market, with the same employees, with the same subject of business, so that they would continue to be entirely liable for all their obligations with all their assets, the legislator essentially restricted the field of freedom of regulating the privatisation which was determined by article 1 of the Constitutional Law. Because he determined in that way that a social legal person shall continue business as a legal person with known owners, in the context of the aims of ZLPP - that is the transformation of companies with social capital into companies with known owners - he had also to respect the material legal position of the cited legal subjects, the provisions of article 50 and the provisions of article 74 of the Constitution. The claim of the opposing party that the legislator's regulation of the privatisation of assets which were to be found among the assets of legal persons with social capital was constitutionally entirely unconnected, is thus not well founded.

60. The alienation of basic resources from the assets of legal persons who continue under the legislation to perform their work on the market, thus signifies an encroachment on existing material rights of these legal persons, could signify an encroachment on the right to social security of the employees therein, and signifies an encroachment into free enterprise, since it could reduce the competitiveness and achieved capacities of such persons.

61. On the other hand, it is necessary to bear in mind that workers and companies did not have real ownership, because their right to self-management was inextricably linked to the existence of social

ownership. So it is constitutionally permissible for ZLPP to determine the state as the owner of agricultural land and forests. This measure was even better founded because land as a natural resource is part part of the natural wealth of Slovenia (article 5 of the Constitution). Also for this reason, in transforming the right to land and forests, the legislator had to protect the public interest.

62. In addition to the particularities in relation to social ownership rights, which applied in particular to land and which reduce the firmness of the constitutionally protected position under the title use of land in social ownership, in establishing the proportionality of the encroachment, the court also bore in mind that the encroachment is alleviated by the provisions of the fifth paragraph of article 14 ZSKZG. This determines that the Fund for agricultural land and forests of the Republic of Slovenia or a municipality is the legal successor to the holder of rights to agricultural land, farms and forests in social ownership, in the component consisting of agricultural land, farms and forests transferred to it. It is necessary to interpret the cited provision such that the Fund is also responsible for all obligations created in connection with agricultural land, farms and forests which have been transferred to it under article 5 ZLPP. Such an arrangement, which the Law on obligatory relations (article 452) also recognises in confiscated material totalities, to a large extent reduces the gravity of the encroachment which the impugned legislative arrangement represents.

63. Above all, the encroachment is not in conflict with the principle of proportionality, if the second paragraph of article 5 ZLPP is understood and interpreted such as is defined in point 2 of the Disposition of this Decision. The Constitutional Court adopted the constitutionally conforming interpretation of this provision because it is consistently formulated such that it could in itself be understood also such that affected companies - on the condition of good management under their own management - were guaranteed continued use and management of nationalised agricultural land and forests (unless restored to rightful claimants to denationalisation) only "until the award of a concession or the conclusion of a purchase contract in accordance with statute", which could be concluded (concession or sale) under the same conditions with such a company, or with anybody else. Such an understanding of this provision (and analogously the provisios of article 17 ZSKZG) was also expressed in some of the provisions of the Regulations on the purchase of agricultural land and farms (Official Gazette RS, no. 7/94), which the Fund of farmland and forests adopted on 24/12-1993, and whose constitutionality and legality will be the subject of judgement in case U-I-176/94. Such a content of this provision would only be constitutionally acceptable in the case of the position of affected companies not enjoying any kind of constitutional protection. Since this is not so, the Constitutional Court recognised as according with the Constitution, only such an interpretation of this provision as guarantees to affected companies, under conditions cited within it, the establishment of concession or purchase relations and in this way allows them ongoing management of this land - of course in accordance with legal regulations which the legislator has adopted on the basis of article 71 of the Constitution.

64. Along with such an interpretation of this provision, ZLPP thus retained in the second and third paragraph of article 5, the right of companies to manage and the right to use and recognised to them the same value of agricultural land and forests as determined by article 206 ZZD, that is "the level of the value of investment in this land or forest", since it establishes a purchase contract or awards a concession to it at least for a period which "corresponds to the amortization period of the investment into land or permanent plantations".

In addition, on payment of a purchase price or compensation for the award of a concession, the purchase price for land obtained by payment is respected such that the purchase price or compensation is reconciled to this purchase price. This means that although the impugned provision increases the business costs, it does not place those users of social resources with business ability under conditions of a market economy in a position which could be the cause of cessation or liquidation of a legal person.

65. The arrangement of ZLPP and ZSKZG thus in this way guarantees and protects the existing basic social security of workers employed in the companies of the initiators and proposers, and also protects these companies in relation to the right to continued use of land. The cited laws retained the right to work with former social property, now state property, in a way which enables the position of those who wish to continue their activities as good managers, to be essentially unaffected.

66. The law did not prevent the use and exploitation of land necessary for companies which used it for agricultural production, since directly according to the law, companies continue with its use. So the encroachment of the legislator on otherwise legitimate rights and legal interests of legal subjects is in understandable proportionality to the aim which he pursued in this, and is also not in conflict with the principles of a state of law and a social state.

67. Although the state becomes the owner of the land, the latter still remains in the use of companies. The legislator prescribed the following restrictions on the State's ownership rights:

- that companies have the right to continued use of transferred land,

- that the Fund as manager and "master" of land, is bound to conclude a purchase contract with the current management if the latter so wishes,

- that the Fund must award a concession, and

- that the purchase price must respect the price for land obtained by payment, such that the price and the purchase price (or compensation for concession) shall be reconciled.

68. Along with this, the finding in point 3 of the Disposition of this Decision was necessary, that ZLPP is not in accordance with the Constitution insofar as it does not regulate the duration of the transitional period to the establishment of purchase or concessionary relations and the manner of resolving disputes in connection with this. Because the State can calculate the purchase price or compensation for a concession only from the establishment of such relations onwards, a company could of course be interested in the transitional period to the establishment of such relations lasting as long as possible. The law on denationalisation and the Housing Act regulated similar questions differently: with a provision that appropriate relations are established by the law itself and that their content, if there is no contract, shall be determined by the courts in a civil proceeding. Since ZLPP has no such provision, the legislator will additionally (within a set time limit) have to regulate the question of how to terminate the transitional period established by article 5 ZLPP, when there is not or there will not be the establishment of purchase or concessionary relations between affected companies and the Fund, and how to resolve possible disputes in this connection.

69. The Constitutional Court also bore in mind that land enjoyed a special legal position as a resource in general use, even in the legal system of the previous Constitution and it could be used bearing in mind the specific legal conditions. A special regime of disposal of land was determined, different from the system of disposal of other social resources, and budget and other public resources were invested in it.

70. And finally, in judging the extent of legally protected interests of companies which had the use of agricultural land, the Constitutional Court had to take into consideration that according to the previous legislation, a special statutory regime applied to agricultural land, from which it derived that on the validation of ZLPP, a specific part of these resources belonged to such legal persons without legal title, which was the basis for holding rights to the social ownership content.

Even under the Agricultural Lands Act (first and second paragraphs of article 30, second paragraph of article 33, first and third paragraph of article 39, article 59), agricultural organisations would have had to transfer agricultural land which they did not cultivate themselves to the agricultural lands fund, and non-agricultural organisations would have to do this under article 145.

From the claims of the opposing party, it derives that the cited provisions have not been implemented in relation to a substantial proportion of agricultural land. According to the undisputed statements of the opposing party, a number of legal persons were entirely without evidence on the basis of which it could be established what land was among their assets. This is said to have been one of the main obstacles to the carrying out of transfer of land to the Fund according to the provisions of the impugned article 5 ZLPP. The Constitutional Court finds that land which legal persons should have transferred to the agricultural lands fund under the then existing legislation, irrespective of the

provisions of article 5 ZLPP, does not form part of their assets, that it belongs to the Fund, and irrespective of the impugned provisions of ZLPP, this part of the value of companies cannot be privatised. This part of the impugned provisions, therefore, does not encroach on the legal position of companies who had the use of this agricultural land without legal title.

71. From the reasons cited, in weighing the constitutional values of public interest which the legislator wished to achieve, and the rights of legal subjects on the basis of the constitutionally assured freedom of enterprise, the Constitutional Court judged that the legislator's intervention was in understandable proportion to his aims and that the appropriate measures determined by article 5 ZLPP are not in conflict with article 74 of the Constitution.

72. Article 1 ZLPP determines that this law shall regulate the ownership transformation of companies with social capital into companies with known owners. The Constitutional Court therefore considered that entitlements which derive from the right to private property cannot be applied to social legal persons who had the use of land in social ownership. Consequently, it found that the impugned article 5 ZLPP or the regulations prescribed with it, are not in conflict with article 33 of the Constitution.

73. All the above mentioned applies also to forest land (forests) of which companies had the use and management, which are being privatised according to ZLPP. But the Forests Act (Official Gazette RS, no. 30/93) determines another legal arrangement than for agricultural land for multi-functional forest, in which the public interest is much more strongly expressed than for agricultural land (point 6 of article 3). The cited law also determined in the provisions of articles 82 to 89, such a transformation of forest management organisations as entirely changed their organisational legal structure. Along with this, it also regulated the question of legal succession and the question of the social position of workers whose work will become redundant because of the changes in the organisation and activities of these organisations. In relation to the changed status, to the changed activities of these organisations, whereby under the previous legislation they performed activities of special social significance (see, for example, paragraphs 2 and 3 of article 6 of the Law on forests, Official Gazette SRS, no. 18/85), according to article 82 of the Forests Act, they continue work as implementing forestry companies, but the content of the material legal position of these organisations in relation to forest land and the problem of the social security of their workers are different and their position in performing services on the market regulated differently. The Forests Act also regulates their ownership transformation, and only to a lesser extent ZLPP (indent 5 of article 2 ZLPP in connection with point c of article 83 of the Forests Act).

Forests which had been until then social forests which were managed and used by forest management organisations, were given owners by ZSKZG (article 14) and on its basis these forests became state property on 11/3-1993. The Constitutional Court will decide by a special decision on the accordance of these legal provisions with the Constitution and possible anti- constitutional encroachments on the constitutionally protected position of forest management organisations.

IV. Asserted violations of article 14 of the Constitution

74. The cited article of the Constitutional Court determines: article 14

"In Slovenia each individual shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political or other beliefs, financial status, birth, education, social status or whatever other personal circumstance.

All persons shall be equal before the law".

75. The proposers or initiators base the violation of this provision of the Constitution in the following manner:

TR Alpinum and IRP Alpinum believe that the impugned provision is in conflict with article 14 of the Constitution in connection with article 2 of the Constitution because there are said to be unclarities in

defining which real estate shall be excluded from the process of privatisation, and above all because without appropriate grounds it treats legal persons who have real estate in Triglav National Park differently from others with similar activities.

The agricultural organisations believe that the impugned provision does not ensure the equality of physical, civil legal and legal persons before the law because former social legal persons are dealt with differently in relation to resources or assets, differently than others. The impugned provision is claimed to mean the nationalisation of the assets of a company irrespective of whether they were obtained by payment or without payment or whether a company acquired them by their own husbandry.

76. It is not possible to confirm the standpoint that the different treatment of agricultural land and forests causes a violation of the principle of equality before the law. The legislator is justified in determining special measures in relation to the nature and purpose of material objects. So in the given case, because of general interests it would have been possible to decide on another principle for determining the proportion of social capital.

The basis for such a different arrangement cannot be article 71 of the Constitution, which only determines special conditions for the use and special protection of land, but not also the question of property rights. This constitutional provision is connected with some principles of protection of nature and the landscape: preserving the natural balance, the safe use of natural resources, preserving the fertility of the soil, mining mineral resources, the protection of waters, air and the climate, protection of vegetation, the free growth of plants and animals.

77. The provision of the first paragraph of article 5 ZLPP is not in conflict with article 14 of the Constitution, also in the part which determines that prior to determining the social capital of a company which performs tourist activities, the value of assets which relate to the area of Triglav National park shall be separated from their assets and shall be privatised in accordance with special law.

In this case, the legislator did not encroach on the assets of companies, in such a way as these would be reduced, but only temporarily, until the adoption of a special law, determined that the value of assets of tourist companies which lie in Triglav National park, shall not be included in the open balance sheet that serves in the privatisation of the company. This real estate remains a social ownership composite element of the assets of a company and awaits privatisation of this part of the company according to a special law. The legislator, in accordance with the special status which this region enjoys under the Triglav National Park Act (Official Gazette SRS, no. 17/81 and 42/86), decided on a special manner of privatisation in this region, so it did not thus violate any constitutional provisions.

The special legal regime of real estate which is situated in regions which are defined by law as a national park, are based on the ecological function of ownership. Until the adoption of the special law, it is not possible to ascertain that the exclusion of the value of such real estate from privatisation is a violation of any of the rights of the initiators TP and IRP Alpinum.

78. The legislation that regulates privatisation differentiated the circle of those holding rights to privatise social property in relation to the nature of the assets. A special system of privatisation had thus already been determined for social housing, for real estate being denationalised and for cooperative real estate.

79. The Constitutional Court finds that the nature and importance of agricultural land and forests and the prevailing manner of obtaining it justifies the special manner of privatising it and the individual, thus different, positions of its current users and holders of rights in comparison with other participants in the process of transforming social property.

V. Claimed violations of article 158 of the Constitution

80. The cited provision of the Constitution determines:

article 158

"The legal consequences flowing from the final decision of a government body may be set aside, cancelled or amended only in such cases, and pursuant to such procedures, as are prescribed by statute".

81. The proposers or initiators base the violation of this provision of the Constitution in the following manner:

Lek states that it obtained part of the land, on payment, by final decision of a state body and the company's right to use the land is inscribed in the land register. Decisions remained unchanged, and no procedure for their annulment has been initiated, so the encroachment on legally arranged relations is in conflict with article 158 of the Constitution.

The forest management organisations state that the lands were obtained in a legal manner and it is in conflict with article 158 of the Constitution that the obtained right is thus now being taken away.

82. The National Assembly believes that it was not a violation of article 158 of the Constitution. Even in cases when unpaid use of land was awarded to social legal persons by final decision of a state body, in accordance with the then valid regulations, it would be possible to remove, annul or alter this right by law, which was also done in this case.

83. The fact that legal persons obtained lands or forests by legally binding decisions does not itself mean that this land enjoys different ownership or "right-holding" or disposal status to other land in social ownership. Such land was equated with other land in social ownership.

It is stressed in administrative theory that the ban on a redecision on already decided matters does not protect the legally binding nature of administrative decisions, but obtained rights, on which it is not possible to encroach by a new administrative act. The law on ownership transformation is a transitional regulation which changes, on a constitutional basis, non-ownership into ownership with known owners. Social ownership rights, in relation to this, except to the extent which derives from the reasoning of this decision, cannot be considered constitutionally protected obtained ownership rights.
VI. Claimed violation of a ratified international treaty

84. The proposer Bayer Pharma states that the impugned legal provision would encroach on the nominal capital of a company in which the private capital of foreign investors also has a part.

The confiscated lands, or the rights to use them, were obtained in legal business by payment from these assets. These assets- lands may be extracted from the assets of the company only by reducing the nominal capital of the company and thus the role of foreign investors, and because this encroachment does not envisage any compensation, there is thus a direct encroachment on the property of a foreign legal person whose investments are protected by the treaty between the Socialist Federative Republic of Yugoslavia and the Federal Republic of Germany on the mutual protection and encouragement of investment.

85. The Constitution determines in article 8 that statutes and other legislative measures shall comply with generally accepted principles of international law and with international agreements which bind Slovenia, and that ratified and proclaimed international agreements shall be used directly; in the second paragraph of article 153a it determines that statutes must conform with generally accepted principles of international law and with international agreements currently in force and ratified by the National Assembly.

86. The Treaty with the Federal Republic of Germany on the mutual protection and encouragement of investment determines in article 4 that the investments of one of the treaty parties shall enjoy full protection on the territory of the other treaty party, and that the investments of investors of one of the treaty parties on the territory of the other treaty party may be alienated, nationalised, or other

measures applied to it which are in their effect the same as alienation or nationalisation, only in the general interest and against compensation. The compensation must be just and must correspond to the value of the alienated investment on the day of promulgation of the decision on alienation, nationalisation or any similar measure.

The compensation must be settled without undue delay, and it is necessary to guarantee its payment and free transfer. An investor whose real estate has been alienated has the right to normal bank interest until the day of payment of the compensation. The legality of the alienation or other similar measure and the level of compensation shall be verified on the demand of the investor in regular court proceedings.

87. Ownership transformation of companies is in the general public interest, which means that the condition of article 4 of the Constitution is met. Partners in capital companies have no material rights to the individual assets of a company, and this means that it is possible to speak neither of alienation nor nationalisation of the share of physical or legal persons in a capital society. It is necessary to respect the third point of the Protocol to the Treaty, which is a composite part of the Treaty. This point, which is bound to article 4 of the Treaty, determines thta an investor has the right to compensation also if state measures intervene in a company in which he has a share, and thus significantly reduce his role.

88. The case of the proposer Bayer Pharma d.o.o. is precisely such a case. It is true that the case under discussion is not that of individual and concrete measures of the state, but legislative regulation of the transition of agricultural land to state ownership and its mandatory transfer to the Fund, which consequentially affects the assets of business companies which have used this land to date. The extraction of individual material assets from the assets of a company without compensation or other indemnification means a reduction of their assets, and this affects the level of nominal capital and the value of the role of partners in such a company.

89. The fact that ZLPP does not define compensation for alienated agricultural lands and forests does not yet mean that the Treaty with FR Germany has ceased to apply or that foreign contract partners cannot bring into effect measures which such a contract provides for the protection of their investment, by calling on direct use under article 8 of the Constitution.

However, reasons of legal protection dictate that the law explicitly and clearly prescribe the manner and procedures for determining compensation, so that it will be possible to verify the legality of the measures used and the level of compensation in individual cases in regular legal (court) proceedings.

D. RESOLUTION

90. The provision of article 5 ZLPP, in the part in which it is determined that agricultural land of companies which are being privatised according to the cited law become the property of the Republic of Slovenia or municipality, signifies an encroachment on a specific constitutionally protected position of subjects who used the agricultural land as assets in social ownership.

However, this encroachment is appropriate and necessary to achieve the legitimate aims of the legislator and to protect the public interest and is thus in accordance with the Constitution.

91. The legislator's motivation was defined and legitimate. The aim of the appropriate measure was in particular the realisation of the unified and longterm agricultural policies of the state and basing the process of denationalisation in statute.

92. The constitutional basis and framework allowed the legislator a choice among various legislative motives, aims and strategies. Those which the measures determined in article 5 ZLPP concretise are not the only constitutionally permissible ones. The proposers did not mention other possible motives whereby it would have been possible, in a manner which would encroach to a lesser extent on their rights, to achieve the cited legislative aims. The Constitutional Court also itself ascertained whether in the expert discussions on these questions any possible alternative measures were mentioned

whereby the aims which the legislator had determined could have been achieved to the same extent less painfully.

93 The Constitutional Court thus found that the legislator could have prescribed (and will have to prescribe also for land which has been transferred to the Fund) a restriction of ownership rights to land on the basis of articles 67 and 71 of the Constitution. However, it would not have been possible thus to guarantee the cited individual aims which the legislator determined on the transformation of social property into property with known owners.

94. The Constitutional Court therefore studied in particular the possibility that the legislator could have determined a way of privatisation whereby legal persons which were being privatised would retain agricultural land in their assets, and would have to issue shares to the State or the Fund for an appropriate capital value. It found that such a solution would also have been in accordance with the Constitution, although it would have guaranteed to a much lesser extent the realisation of the aims set, and on the other hand, in specific aspects would represent an even greater encroachment on the rights of the proposers, and especially on the partners of such a legal person, since it would have essentailly altered relations in the ownership or management structure of companies which are being privatised, and especially those companies that have already been privatised.

95. The Constitutional Court had to judge in particular whether the impugned encroachment, that is the transfer of agricultural land and forests which are a composite part of the assets of companies to the ownership of the Republic of Slovenia or municipality, was outwith any understandable proportion to the social and political values of the legislative aims. The appropriate constitutional test of proportionality demonstrated that the appropriate measures were proportional to the gravity of the aims.

In this, introduced legislation which, in the interest of users of agricultural land, significantly restricted the ownership rights of the state as the new owner, had special weight.

96. In order for the appropriate encroachment on the constitutionally protected position of legal subjects to remain within the boundary of its constitutionally permissible extent, the Constitutional Court draws the attention of the National Assembly to some still unresolved or partially resolved questions which accompany the implementation of article 5 ZLPP:

a. It is necessary to study with special care and appropriately resolve the question of the social security of persons who exercised their right to social security on the basis of employment in the affected legal persons.

b. It is necessary to follow the way of implementing the provisions of the fifth paragraph of article 14 ZSKZG in relation to the legal succession of the Fund in connection with transferred land, and if it is shown to be necessary, to define more precisely the criteria for determining what obligations of companies have been created in connection with land and, in relation to legal succession, have been transferred to the Fund.

c. To a certain extent there remains an affected legal benefit of those legal persons which were already in mixed ownership on the validation of ZLPP, and because of the nationalisation of part of their assets (agricultural land) without compensation or indemnification on the basis of article 5 ZLPP, the value of capital is reduced, and thus also the value of the shares of the owners.

Because of the legal arrangement of questions under point c., it will be necessary to define criteria according to which it will be possible to establish which land companies were not cultivating on the validation of ZLPP, and also criteria for which companies are non-agricultural organisations which should have transferred land to the agricultural lands fund because they were not themselves cultivating it.

E.

The Constitutional Court adopted this decision on the basis of articles 21 and 48 of ZUstS, composed of: president Dr. Tone Jerovšek and judges Dr. Peter Jambrek, Mag. Matevž Krivic, Mag. Janez Snoj, Dr. Janez Šinkovec, Dr. Lovro Šturm, Franc Testen, Dr. Lojze Ude and Dr. Boštjan M. Zupančič. The resolution was adopted with eight votes against one. Judge Ude voted against, and provided a negative separate opinion. Judges Jerovšek and Krivic gave an affirmative separate opinion.

President
Dr. Tone Jerovšek