



REPUBLIKA SLOVENIJA  
USTAVNO SODIŠČE

U-I-67/09  
Up-316/09  
24 March 2011

DECISION

At a session held on 24 March 2011 in proceedings to decide upon the constitutional complaint and in proceedings to review constitutionality, initiated upon the petition of Dnevnik, časopisna družba, d.d., Ljubljana, and others, all represented by Mag. Emil Zakonjšek and Jasna Zakonjšek, attorneys in Ljubljana, the Constitutional Court

decided as follows:

- 1. The second paragraph of Article 5 of the Elections and Referendum Campaign Act (Official Gazette RS, No. 41/07 and 11/11) is inconsistent with the Constitution.**
- 2. The National Assembly of the Republic of Slovenia must remedy the established unconstitutionality within six months after the publication of this Decision in the Official Gazette of the Republic of Slovenia.**
- 3. Until the unconstitutionality has been remedied, the publication of opinion polls on the candidates, the lists of candidates, political parties, and referendum questions is prohibited during the twenty-four hours before voting day.**
- 4. Ljubljana Local Court Judgment No. ZSV-304/2008-2455, dated 13 January 2009, is abrogated and the case is remanded to that court for new adjudication.**

Reasoning

A

1. The petitioners challenge the second paragraph of Article 5 of the Elections and Referendum Campaign Act (hereinafter referred to as the ERCA), which prohibits the publication[\*] of public opinion polls on candidates, the lists of candidates, political parties, and referendum questions in the period of seven days before voting day. They claim that such is inconsistent with the second paragraph of Article 14, Article 39, and the first paragraph of Article 74 of the Constitution. They state that the prohibition of public opinion polls does not serve any of the legitimate aims specified in the second paragraph of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94 – hereinafter referred to as the ECHR). In addition, they believe that the restriction is

not sufficiently precise and that it is not necessary in a democratic society; these are the two conditions under which a restriction of freedom of expression is permitted in accordance with Article 10 of the ECHR. The regulation is allegedly also inappropriate because it does not prevent the polls from being made public. Furthermore, the challenged provision allegedly entails an excessive interference with the right to free economic initiative, particularly in relation to the general principle of equality before the law. It allegedly only restricts the publication of opinion polls by the mass media, but not by other legal and natural persons not categorised as such. The regulation allegedly also gives foreign mass media an unfair advantage over domestic mass media. It is claimed that foreign mass media can publish opinion polls even though they can be accessed via the Internet in the same way as domestic mass media.

2. The petitioners lodged a constitutional complaint along with the petition. In the constitutional complaint they challenge the judgment by which the Ljubljana Local Court rejected their application for judicial protection against the minor offence decision finding them guilty of minor offences, which constitute a violation of the prohibition determined in the second paragraph of Article 5 of the ERCA. In the judgment, the court found that the petitioners or complainants in principle admitted that they had committed the minor offences; however, they justified their actions on grounds that are legally not acceptable and did not absolve them of their responsibility for committing the minor offences with regard to the legislation currently in force. The petitioners believe that the challenged judgment violated their rights determined in the second paragraph of Article 14, Article 39, and the first paragraph of Article 74 of the Constitution, as well as the right determined in Article 22 of the Constitution. In order to substantiate the constitutional complaint, the petitioners invoke the arguments put forward in the petition. They only additionally substantiated the violation of the right determined in Article 22 of the Constitution, to be precise they claim that the court did not consider their allegations regarding the unconstitutionality of the second paragraph of Article 5 of the ERCA.

3. The National Assembly of the Republic of Slovenia did not reply to the petition; an opinion was, however, submitted by the Government of the Republic of Slovenia. It states that it does not wish to express an opinion on the constitutionality of the challenged provision; however, it believes that the challenged provision is inappropriate and unnecessary. It further states that the challenged provision was intended to prevent the misuse and manipulation of the results of public opinion, but that this purpose had lost its meaning due to the ubiquity of the Internet. The petitioners did not comment on the Government's opinion, as they believe that it clearly demonstrates that the Government agrees with their arguments in the petition and constitutional complaint.

#### B – I

4. The second paragraph of Article 5 of the ERCA provides: "It is prohibited to publish public opinion polls on candidates, lists of candidates, political parties, and referendum questions in the period of seven days before voting day." A grammatical interpretation of this provision leads to the conclusion that it prohibits everyone, not just the mass media, from publishing opinion polls during the seven days before

voting day; however, the fact that the provision is included in the chapter entitled “Election and referendum campaigns in the mass media” indicates that this legal prohibition is directed only at the mass media. Other provisions in this chapter also make reference only to the duties of the mass media – Article 6 determines how the mass media's airtime is allocated, and Article 7 regulates the publication of political campaign broadcasts in the mass media. The legislature's intention for the second paragraph of Article 5 of the ERCA to apply only to publications in the mass media is also evident from the second indent of Article 34, the first indent of the first paragraph of Article 35, and the second paragraph of Article 35 of the ERCA as, in accordance with these provisions, the editor-in-chief, the publisher, and the person in charge of the legal entity are punished for a minor offence if the mass media outlet in question publishes an opinion poll contrary to the second paragraph of Article 5 of the ERCA. As the minor offence can only be committed by way of a publication in the mass media and as it is not evident from the legislative materials that the second paragraph of Article 5 of the ERCA should be a *lex imperfecta* in relation to other entities, it was clearly the intention of the legislature for the second paragraph of Article 5 of the ERCA to only prohibit the publication of opinion polls in the mass media.<sup>[1]</sup> The publication of opinion polls is prohibited, regardless of the form in which the mass media are published, meaning that this also applies to Internet mass media. At the same time, it follows from the challenged provision that it is only the publication of opinion polls that is prohibited, not the conducting of such polls. Moreover, during the period of prohibition, anyone (the mass media, candidates, political parties, etc.) may conduct public opinion polls, but they may not publish the results in the mass media.

5. The second question that arises with regard to the second paragraph of Article 5 of the ERCA concerns the actual content of the prohibition. It is manifestly clear that the provision prohibits the mass media from publishing opinion polls ordered by the organisers of the election or referendum campaign during the seven days before voting day. It is clear from the title of Chapter II of the ERCA “Election and Referendum Campaign in the Mass Media” that it determines the rules that the mass media have to respect during the election or referendum campaign while carrying out their activities in relation thereto. Strictly speaking, the mass media do not lead the campaigns by themselves, but merely provide a space for the campaigns to be conducted by the campaign organisers. Election and referendum campaigns comprise the entire advertising content and other forms of political campaign material the purpose of which is to influence the choice of the voters in elections and referenda (the second and third paragraphs of Article 1 of the ERCA); however, it is primarily carried out through political campaign material disseminated in the mass media (first indent of the fifth paragraph of Article 1 of the ERCA). The election campaign may be organised by the candidates themselves, the candidates' backers, lists of candidates, political parties, or other organisers, and, in the event of a referendum, it may be organised by the proposer of the referendum or others that have an interest in its result (the first paragraph of Article 3 of the ERCA). The mass media thus do not normally conduct their own campaign but instead provide airtime or space in their newspapers to conduct the campaign. The mass media are also not obliged to facilitate the election or referendum campaign (the exception is Radiotelevizija Slovenija [i.e. the national radio and television broadcasting network], which, in accordance with the second paragraph of Article 6 of the ERCA, is required to provide airtime during the campaign for the presentation of the candidates or

opinions on the referendum question); however, if they decide to do so, they are required to respect the rules determined in Chapter II of the ERCA.

6. During the seven days before voting day, the mass media is therefore prohibited from publishing opinion polls conducted in the context of an election or referendum campaign *sensu stricto*, i.e. opinion polls that are ordered by the campaign organisers. The question as to whether the second paragraph of Article 5 of the ERCA also prohibits the mass media from publishing polls that were conducted upon the initiative of the mass media with the intention of informing the public, or polls that were not ordered by campaign organisers, however, is a special question. A grammatical interpretation of the second paragraph of Article 5 of the ERCA reinforces the interpretation that the mass media must not publish their own polls or polls that were not commissioned during a formal election or referendum campaign. The wording of the statutory provision is clear: it does not draw a distinction between public opinion polls in terms of who commissioned them, who conducted them, or their purpose. It follows therefore from the usual meaning of the words used that the challenged provision prohibits the mass media from publishing any opinion polls, including those that have been conducted in the context of typical mass media activity, which is to inform the public, and not in the context of campaigns that are run by campaign organisers.<sup>[2]</sup> This interpretation is also corroborated by the intention of the legislature and the aim that the legislature wished to achieve through this prohibition. With regard to the Government's statements, the purpose of the challenged provision is to prevent the misuse or manipulation of public opinion polls. It is clear that it would not be possible to achieve this aim if the mass media were prohibited only from publishing opinion polls commissioned and conducted in the context of a formal campaign during the seven days before voting day, but were freely permitted to publish their own opinion polls and other opinion polls, unrelated to the campaign organisers, until the last day before the elections or referendum (i.e. until the election silence). Unless this prohibition covers all public opinion polls, the second paragraph of Article 5 of the ERCA loses its meaning. An interpretation that would completely hollow out the purpose of the statutory provision is unacceptable. Therefore, the second paragraph of Article 5 of the ERCA is to be understood in such a way that the mass media are prohibited from publishing any public opinion polls on candidates, political parties, or a referendum question during the seven days before voting day.

7. In the case at issue, the petitioners (the newspaper and its persons in charge) are publishers of mass media. The performance of this activity is protected in the context of the freedom of the press and other forms of informing the public, which is guaranteed by the first paragraph of Article 39 of the Constitution, as well as in the context of free economic initiative, which is guaranteed by the first paragraph of Article 74 of the Constitution. The challenged second paragraph of Article 5 of the ERCA prohibits the mass media from publishing any public opinion polls during the seven days before voting day. Insofar as this prohibition refers to the mass media publishing their own opinion polls, which they publish on their own initiative in order to inform the public, this entails an interference with the first paragraph of Article 39 of the Constitution. Insofar as this prohibition also refers to the publication of polls that are ordered and paid for by others, this could also entail an interference with the first paragraph of Article 74 of the Constitution. In the case at issue, the publisher of the mass media, the editor in chief, and the person in charge of the legal entity were

punished for the minor offence of publishing their own public opinion poll. As a result, the Constitutional Court reviewed the constitutionality of the second paragraph of Article 5 of the ERCA from the viewpoint of the first paragraph of Article 39 of the Constitution.

8. In the first paragraph of Article 39, the Constitution guarantees the freedom of expression of thought, speech, and public appearance, protecting in particular the freedom of the press and other forms of informing the public or the freedom of expression in this framework. The significance of the right to freedom of expression is multi-faceted: its purpose is to protect the freedom to impart information and opinions (i.e. the active aspect) and the freedom to receive such, meaning the right to be informed (i.e. the passive aspect).<sup>[3]</sup> Freedom of the press and other forms of informing the public has a particularly important role in the framework of freedom of expression. In its Decision No. U-I-172/94, dated 9 November 1994 (Official Gazette RS, No. 73/94, and OdlUS III, 123), the Constitutional Court has already emphasised that the freedom of the press is one of the key institutional conditions for the effectiveness of the democratic process.<sup>[4]</sup> The positions taken by the Constitutional Court in that Decision are relevant not only for the press but also for other forms of informing the public. Free, i.e. independent from the government, mass media are the *conditio sine qua non* for creating pluralism and ensuring that the public is provided information that is free from bias.<sup>[5]</sup> The freedom to inform the public is required in order for the public to be able to supervise the authorities, and provides for the effective functioning of the political opposition to the government. Only free mass media can ensure the balanced exercise of political power within the state and continuous supervision of the state (governmental) authorities. The vital role played by the mass media in supervising the authorities entails that it is crucial that they are permitted to function freely, including when monitoring the processes through which people establish state power (i.e. through elections) or directly exercise such power (i.e. by referendum). Elections or referenda can only be deemed fair when the true will of the people has been expressed and when the public has been extensively and comprehensively informed throughout the process.

9. In light of the above, it is necessary to establish that the freedom of the press and other forms of informing the public and freedom of expression enjoy special constitutional protection. Statutory limitations of this human right are admissible only in accordance with the third paragraph of Article 15 of the Constitution, i.e. only in instances determined by the Constitution or to protect the rights of others. A statutory interference with the freedom of expression may only be based on an objectively justified and constitutionally admissible aim. If such aim is demonstrated, it is further necessary to review whether the challenged regulation is consistent with the general principle of proportionality (Article 2 of the Constitution). The Constitutional Court assesses whether an interference is excessive on the basis of the so-called strict test of proportionality in accordance with the settled case law of the Constitutional Court.<sup>[6]</sup>

10. The aim pursued by the second paragraph of Article 5 of the ERCA is not evident from the legislative materials. The National Assembly did not respond to the petition and the Government stated in its opinion that the aim of this provision was to prevent misuse and manipulation of the results of opinion polls. The Government did not explain in more detail how such misuse or manipulation could occur, but it considers

that, due to the ubiquity of the Internet, this purpose can no longer be achieved by the challenged provision. Therefore, the statutory prohibition determined in the second paragraph of Article 5 of the ERCA is inappropriate and unnecessary. In addition, the Government explained that a draft law amending the ERCA is in the process of being adopted and that according to this draft the period during which the publishing of public opinion polls is prohibited is reduced from seven days to twenty-four hours before voting day. In this respect, the Constitutional Court notes that the Act amending the Election and Referendum Campaign Act (Official Gazette RS, No. 11/11) was adopted on 9 February 2011, but did not amend the second paragraph of Article 5 of the ERCA.

11. Insofar as the aim of preventing misuse and manipulation of the results of opinion polls allegedly entails that the purpose of the challenged provision is to ensure conditions in which the voters can freely and without interference form and express their true will at the elections, then the Constitutional Court deems that this entails a constitutionally admissible aim for limiting the free functioning of the mass media before and during the elections. The requirement of fair and free elections where the voters have the opportunity to form their true will before voting, without any inappropriate (manipulative, misleading, etc.) external influences, interferences, or pressure, originates from the principle of democracy in the Constitution (Article 1 of the Constitution), which was emphasised by the Constitutional Court in Decision No. U-I-172/94.

12. Moreover, the European Court of Human Rights (hereinafter referred to as the ECtHR) ruled on the right to freedom of expression and whether it was admissible to limit that right during or before elections. The position of this court, in principle, is that during elections the right to freedom of expression enshrined in Article 10 of the ECHR has to be considered in light of the right to free elections protected by Article 3 of Protocol No. 1 to the ECHR.<sup>[7]</sup> Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system. The two rights are inter-related and operate to reinforce each other. In the ECtHR's opinion, freedom of expression is one of the conditions necessary to ensure the free expression of the opinion of the people in the choice of the legislature. For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely. Nonetheless, the ECtHR deems that, in certain circumstances, the right to freedom of expression and the right to free elections may come into conflict. The ECtHR therefore allows for the possibility that it may be considered necessary, in the period preceding or during an election, to place certain restrictions, of a type which would not usually be acceptable, on freedom of expression, in order to secure the free expression of the opinion of the people in the choice of the legislature. The ECtHR recognises that, in striking a balance between these two rights, the Contracting States have a wider margin of appreciation, as they do generally with regard to the restriction of freedom of expression pursuant to the second paragraph of Article 10 of the ECHR.<sup>[8]</sup> Therefore, also with regard to the ECtHR case law, ensuring the conditions required for voters to freely form and express their true political will in the elections may constitute a reason for restricting the time period during which the mass media may report on opinion polls.

13. Without considering the question of whether the statutory prohibition determined in the second paragraph of Article 5 of the ERCA is an appropriate and necessary measure to achieve the pursued aim, the Constitutional Court found that the severity of the consequences of an interference with freedom of expression cannot be justified by the pursued aim or the advantages that would result from the interference. When considering whether the challenged provision entails an excessive interference with the right to freedom of expression, the Constitutional Court took into account several constitutionally relevant circumstances (Paragraphs 14 through 19 of the reasoning).

14. The prohibition to publish specific information with the intention of preventing the mass media from influencing how public opinion is formed or changed entails an interference with the very essence of the role and significance of the mass media in a democratic society. It is in the nature of the mass media to influence public opinion; the principle function of the mass media (leaving economic interests aside) is to inform the public and thereby inevitably influence public opinion. Especially before the elections, when the direct expression of the voters' political will is concerned, the free functioning of the mass media is even more important.

15. In accordance with the first paragraph of Article 2 of the ERCA, an election campaign may not commence sooner than thirty days before voting day. The seven-day prohibition therefore entails that the mass media cannot perform their function of informing the public through the publication of opinion polls for almost one quarter of the duration of the election campaign. It is, however, just before the elections that the electoral activities of the candidates and political parties are performed in a most concentrated and intensive way and therefore undoubtedly significantly influence the voters' decisions.

16. The free functioning of the mass media also goes hand in hand with the right of voters to be informed. Therefore, the prohibition to publish opinion polls may also be considered from the perspective of a voter who may therefore be deprived of essential information. Free and democratic elections presuppose that the voter has the opportunity to be informed of all the relevant issues based on a wide range of true and complete information, as only comprehensively informed voters can in fact express their own true political will on voting day. In addition, information on the state or dynamics of public opinion may also be important, or even crucial, for the voters. Therefore, it is important that the flow of information regarding this question, which may have a decisive influence on the voter's final choice, is interrupted as late as possible.

17. It is not possible to ignore the fact that the prohibition to publish opinion polls is not binding on natural persons and legal entities that are not mass media publishers (or on the foreign mass media), which entails that, given the present-day ubiquity of the Internet, it is almost impossible to prevent such polls from being made available to the wider public.

18. On the other hand, the alleged benefits of the prohibition to publish opinion polls (i.e. guaranteeing to voters the right to freely form their own true will without interference) are relative because they depend on each individual voter and because other methods through which mass media can influence voters (critical or favourable

articles, comments, interviews, etc.) are allowed for the entire duration of that prohibition, up until the election silence. Unlike published opinion polls, the electoral campaign and all public campaigning must end one day before the day of the vote, which is when the so-called election silence begins.<sup>[9]</sup>

19. Even if, by seeking to prevent an unacceptable influence of the mass media on voters before the elections, the legislature pursued a constitutionally admissible aim, it was first required to consider adopting a regulation to limit such conduct by the mass media in a manner that takes into account the interest of the mass media to publish opinion polls as well as the interest of the voters to have access to such information before prohibiting their publication. A more precise regulation of the manner in which opinion polls are conducted during the pre-election period (e.g. by requiring the poll to contain information regarding the date on which it was conducted, who ordered and paid for the poll, who conducted the poll, the methodology used, the sample, and the margin of error, etc.) could reduce the possibility of an unacceptable influence on voters and thereby contribute to the purpose for which such polls are intended – the professional and objective presentation of information regarding changes in public opinion. It must namely be taken into account that opinion polls conducted by the mass media on their own initiative appear objective, impartial, and neutral. The fact (or at least the appearance) that a scientific methodological approach was applied in such polls clearly entails that some voters rely on the published opinion polls to a lesser or greater extent when forming their opinions. Naturally, expertise and objectivity do not imply that there are no differences between the polls or that the mass media are completely unbiased when conducting and publishing such polls (especially if the poll is accompanied by a commentary). However, in a democratic society, it is crucial that there is plurality in the mass media and that voters have the opportunity to form their own opinions on the basis of different public opinion polls.

20. On the basis of the above, the Constitutional Court held that the seven-day prohibition was a limitation that excessively interferes with the free functioning of the mass media. Therefore, the challenged second paragraph of Article 5 of the ERCA is inconsistent with the first paragraph of Article 39 of the Constitution. The Constitutional Court did not abrogate the provision but merely established its inconsistency with the Constitution (Point 1 of the operative provisions) and required the legislature to remedy the established unconstitutionality within six months (Point 2 of the operative provisions). The Constitutional Court adopted a declaratory decision as the abrogation of the provision would have jeopardised the effectiveness of the institution of election silence. Although the election silence is a special statutory institution that pursues other aims and, as such, it is not directly related to the prohibition of publishing opinion polls, it would lose its meaning to a great extent if the mass media were allowed to publish opinion polls without any restrictions during this time (and even on the day of voting). The publication of public opinion polls conducted by the mass media on their own initiative does not entail the conduct of a campaign and, therefore, the first paragraph of Article 2 of the ERCA, which determines that campaigning must cease no later than twenty-four hours before voting day, does not apply to such conduct of the mass media. Similarly, it is not possible to qualify the publication of opinion polls as an example of public propaganda, which is prohibited by Article 5 of the NAEA during the twenty-four hours before voting day. The Constitutional Court thus adopted a declaratory

decision as it would have interfered with the effectiveness of another statutory institution if it had abrogated the challenged provision.

21. In order to protect the effectiveness of the institution of election silence, the Constitutional Court, on the basis of the second paragraph of Article 40 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text - hereinafter referred to as the CCA), also determined the manner in which its decision was to be implemented. It determined that, until the established unconstitutionality has been remedied, the publication of public opinion polls is not permitted during the twenty-four hours before voting day (Point 3 of the operative provisions).

22. Since the Constitutional Court established that the second paragraph of Article 5 of the ERCA is inconsistent with the first paragraph of Article 39 of the Constitution, it did not consider the other allegations made by the petitioners. By determining the manner of implementation, the provisions of Articles 34 and 35 of the ERCA, which define that the conduct in violation of the second paragraph of Article 5 of the ERCA constitutes a minor offence, became irrelevant.

## B – II

23. The complainants were found guilty of minor offences under the first indent of the first paragraph of Article 35 of the ERCA, the second paragraph of Article 35 of the ERCA in conjunction with the first indent of the first paragraph of Article 35 of the ERCA, and the second indent of Article 34 of the ERCA. These minor offences entail a violation of the prohibition determined in the second paragraph of Article 5 of the ERCA, which the Constitutional Court found to be unconstitutional. Therefore, as the challenged judgment was based on an unconstitutional statutory provision, the Constitutional Court abrogated it and remanded the case to the court of first instance for new adjudication (Point 4 of the operative provisions). In such context, the Constitutional Court was not required to review the allegations regarding violations of other human rights and fundamental freedoms.

24. In addition, the Constitutional Court specifically draws attention to the unconstitutionality of the position taken by the court in the challenged judgment that a court is not required to take a position on alleged violations of the Constitution for lack of jurisdiction. It is true that the regular courts do not have jurisdiction to decide on the constitutionality of laws; however, this does not entail that they are not obliged to take a position on alleged violations of the Constitution. The position that, when deciding, a court is only bound by the law, but not by the Constitution, is inconsistent with the Constitution. Article 125 of the Constitution clearly determines that judges are bound by the Constitution and laws. When human rights – in the case at issue, freedom of expression – are subject to judicial protection, such obligation of the judges (i.e. that they are bound by the Constitution and laws) also arises from the fourth paragraph of Article 15 of the Constitution. In accordance with this provision, the judicial protection of human rights and fundamental freedoms and the right to obtain redress for the violation of such rights and freedoms are guaranteed. Such judicial protection is not judicial protection in constitutional complaint proceedings, but judicial protection in judicial proceedings at all levels of decision-making before the regular courts, as it is generally guaranteed by the first paragraph of Article 23 of the

Constitution. The courts are therefore required to take a position on relevant constitutional objections of the parties (such as the objection regarding the unconstitutionality of the second paragraph of Article 5 of the ERCA); otherwise, they are in violation of the constitutional procedural guarantee determined in Article 22 of the Constitution from which there proceeds, *inter alia*, the duty of the courts to take a position on the allegations of parties to proceedings that are essential for a decision from a human rights perspective. If as a result they are faced with a statutory provision that they deem unconstitutional, they must, on the basis of Article 156 of the Constitution, initiate proceedings before the Constitutional Court. If, however, they deem that the objections regarding unconstitutionality are unsubstantiated, they must present arguments to reject them. In light of the above, the position of the court, according to which it was not obliged to take a position on the alleged unconstitutionality of the statutory regulation which constituted the legal basis of the challenged decision, violated the right to the equal protection of rights determined in Article 22 of the Constitution. In the case at issue, the court also violated the right determined in the fourth paragraph of Article 15 of the Constitution.

### C

25. The Constitutional Court adopted this Decision in accordance with Article 48, the second paragraph of Article 40, and the first paragraph of Article 59 of the CCA, composed of: Dr Ernest Petrič, President, and Judges Dr Etelka Korpič-Horvat, Mag. Miroslav Mozetič, Jasna Pogačar, Mag. Jadranka Sovdat, Jože Tratnik, and Jan Zobec. The Decision was reached by six votes against one. Judge Pogačar voted against.

Dr Ernest Petrič  
President

#### Notes:

[\*] Translator's note: the Slovene noun *objava* used in the original text can mean both publication as well as broadcast. Similarly the verb *objaviti* can mean to publish or to broadcast. For reasons of brevity the translation therefore uses the terms publication and to publish to refer also to broadcast.

[1] The ERCA does not define the term "mass media". According to the first paragraph of Article 1 of the Mass Media Act (Official Gazette RS, No. 110/06 – official consolidated text), the term "mass media" includes newspapers and magazines, radio and television programme services, electronic publications, teletext, and other forms of editorially formulated programmes published daily or periodically through the transmission of written material, vocal material, audio, or images in a manner that is accessible to the public.

[2] The title of Chapter II of the ERCA ("Election and Referendum Campaign in the Mass Media") could be construed differently, i.e. it could be understood to mean that

the second paragraph of Article 5 of the ERCA prohibits only the publication of those polls that represent a formal campaign in the mass media.

[3] In Decision No. Up-20/93, dated 19 June 1997 (OdlUS VI, 181), the Constitutional Court explicitly linked the right of the mass media to function freely with the constitutional right of citizens to be informed: “The right to freedom of expression guarantees to natural persons and legal entities that are involved in informing the public the right to freely collect, receive, and disseminate information, thoughts, ideas, and opinions. Public mass media perform an activity through which all citizens are able to exercise their right to be informed; its activities are focused on the people and the community.”

[4] In that Decision, the Constitutional Court referred to Article 1 of the Constitution, which determines that Slovenia is a democratic state. It emphasised that the effectiveness of the democratic process depends, in particular, on: (a) fair election(s) at all levels that enable the formation of representative bodies of the state and local self-government in accordance with the will of the people; (b) public supervision of the legislative, judicial, and executive branches of power; and (c) recognition of the right to political opposition to the government.

[5] In Decision No. U-I-106/01, dated 5 February 2004 (Official Gazette RS, No. 16/04, and OdlUS XIII, 7), the Constitutional Court emphasised that the state is not the only one who can jeopardise freedom of expression, but individual social groups may influence it to an even greater extent. Therefore, it is not sufficient to understand freedom of expression merely in terms of being a negative or defensive right that only limits the state. The first paragraph of Article 39 of the Constitution requires the state to adopt legislation to ensure the independence of public mass media with regard to their programme, organisation, and financing.

[6] See Constitutional Court Decision No. U-I-18/02, dated 24 October 2003 (Official Gazette RS, No. 108/03, and OdlUS XII, 86).

[7] Article 3 of Protocol No. 1 to the ECHR reads as follows: “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot and under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

[8] See the Judgment in *Bowman v. UK*, dated 19 February 1998, in which the ECtHR invoked, in particular, the judgment in *Mathieu-Mohin and Clerfayt v. Belgium*, dated 2 March 1987. In referring to the mentioned judgments, the ECtHR also took the same positions in *TV Vest As & Rogaland Pensjonistparti v. Norway*, dated 11 March 2009.

[9] The first paragraph of Article 2 of the ERCA determines that the election campaign must end no later than twenty-four hours before voting day. Article 5 of the National Assembly Elections Act (Official Gazette RS, No. 109/06 – official consolidated text – hereinafter referred to as the NAEA) provides that public election campaigning must end no later than twenty-four hours before voting day. The NAEA applies *mutatis mutandis* also to other elections and to referenda (Article 9 of the Election of the President of the Republic Act, Official Gazette RS, No. 39/92; Article 4 of the Local Elections Act, Official Gazette RS, No. 94/07 – official consolidated text, and 45/08; and Article 55 and the fifth paragraph of Article 56 of the Referendum and Popular Initiative Act, Official Gazette RS, No. 26/07 – official consolidated text).