

U-I-76/91
10.3.1994

DECISION AND RESOLUTION

At a session held on 10.3.1994, the Constitutional Court dealt with the proposal of Dimnikaska podjetja p.o.(Chimney sweeping company), Ljubljana, represented by Drago Mlinarič, attorney in Ljubljana, in a proceeding for assessing the constitutionality and legality and

I. found that:

The provisions of the second paragraph of article 2 of the law on the chimney sweeping service (Official Gazette SRS, no. 16/74, 14/90) and the Decree on the chimney sweeping service (Official Gazette of the municipality of Domžale, no. 23/90) are not in conflict with the Constitution.

II. passed the following resolution:

The proceeding for assessing the constitutionality and legality of the invitation to public tender for the selection of executors of chimney sweeping services on the territory of the municipality of Domžale (Municipal reporter of 20.12.1990) is terminated.

Reasoning

The proposer believes that an arrangement whereby the municipality determined which chimney sweeping organisations or self-employed tradesmen would provide chimney sweeping services on the territory of the municipality or in defined parts of this territory, is not in accordance with the principle of a free market offer, because it does not enable free market competition between competitors and envisages restricted districts for performing the activity. The decree of the municipal assembly on chimney sweeping services and the invitation to public tender for the selection of executors issued in the implementation of the impugned law are also said to be in conflict with this principle.

The Constitutional Court found that the impugned provisions of the law and the impugned decree are not in conflict with the Constitution.

According to article 74 of the Constitution, economic offer shall be free, although economic activities may not be performed against the public interest. The content and boundaries of public interest are clear from the legislative arrangements in specific fields. In the field of performing public utility activities, the most important is that material public benefits such as the provision of goods and services in the public interest shall be guaranteed on a longterm and undisturbed basis. It is not always and in whole possible to guarantee these public needs on the free market, since the income available is inadequate to satisfy public needs. Chimney sweeping services belong in that category and so their provision cannot be left to the free market. In view of the importance of chimney sweeping activities which derives from the legal arrangement, a municipality is obliged to ensure its provision. In this sense, the provisions of the impugned provision of the second article of the law on chimney sweeping services is not in conflict with the Constitution, although the law was adopted under a different system of socio-economic arrangement. In view of the above, the Decree of the municipal assembly on chimney sweeping services adopted in implementing the law on chimney sweeping services is not in conflict with the principle of a free market offer. The task of such a regulation is to arrange in general the manner of selecting suitable executors, since the law on chimney sweeping services does not arrange this.

The impugned decree arranged afresh the manner of selection in 1990 and for the transitional period until the selection of executors according to the provisions of this Decree determined in article 3 that the activity would be performed by the proposer. The cited provision is not by its content a general legal provision since it relates only to the relation between the municipality and the proposer. The provision of article 3 does not prevent the proposer from entering a tender for the selection of executors, nor does it exclude the possibility of being selected. The Constitutional Court terminated

the proceeding for assessing the constitutionality and legality of the public call for tenders, because this act does not contain provisions with the nature of general legal norms.

The Constitutional Court adopted this resolution on the basis of the first paragraph of article 161 of the Constitution, article 7 of the Constitutional Law for Implementing the Constitution and line 2 of the third paragraph of article 25 of the law on proceedings before the Constitutional Court SR Slovenia (Official Gazette SRS, no. 39/74 and 28/76), at a session composed of: president Dr Peter Jambrek and judges Dr. Tone Jerovšek, 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 by eight vote against one. Judge Krivic provided a separate opinion to the resolution.

President
Dr. Peter Jambrek