Case No.: U-II-1/09-11

Date: 5 May 2009

THE DISSENTING OPINION OF JUDGE MAG. MARTA KLAMPFER, AND JUDGES DR. MITJA DEISINGER, MAG. MIROSLAV MOZETIČ, AND JAN ZOBEC IN CASE No. U-II-1/09

1. We voted against the majority decision that unconstitutional consequences could occur due to the suspension of the implementation or due to the rejection of the Act Amending the Lawyers Act (Gazette of the National Assembly, No. 30/09, EPA 248-V - hereinafter referred to as the LA-C), because we cannot agree with the central arguments of the decision. The consequence of such decision is the prevention of a referendum on the above-mentioned law, which was required by a group of National Assembly deputies, and consequently also an interference with the constitutional right of citizens to decide at a referendum on any issue which is the subject of a regulation by law (the first paragraph of Article 90 of the Constitution).

2. It is not disputable that on the request of the National Assembly, the Constitutional Court may prevent a referendum if unconstitutional decisions would potentially be adopted at such or if unconstitutional consequences could occur due to the suspension of the implementation or rejection of a law. However, an interference with the right of the people to decide at a referendum is so important that it needs to be applied extremely cautiously and with reservation. It is a sphere wherein the Constitutional Court must act with reservation. Prohibitions on the people deciding in a referendum must only be instituted in exception, well thought-out, and comprehensively substantiated. Such prohibitions can only be substantiated by constitutional and not political reasons. [1] The Constitutional Court should be particularly circumspect also because the Slovene system only provides for a subsequent legislative referendum and voting on a law as a whole. This entails that only a minor unconstitutionality in a law can prevent a referendum from being held although the contents of other provisions thereof are constitutionally disputable. A clever legislature can always intentionally prevent a legislative referendum. This is also the reason that, when deciding on the possible prohibition of a referendum, the Constitutional Court must be guided by the principle *in favorem* regarding the right to a referendum. Therefore, the question whether the present regulation of legislative referendums is consistent with the Constitution justifiably arises.

3. In our opinion, the central arguments in the reasoning of the Constitutional Court decision regarding the alleged unconstitutionality of the second and fifth paragraphs of Article 5 of the Lawyers Act (Official Gazette RS, No. 18/93 et sub. – hereinafter referred to as the LA) and Article 42 of the Lawyers' Fees Act (Official Gazette RS, No. 67/08 – hereinafter referred to as the LFA) are not supported.

4. We do not agree with the position laid down in paragraphs 14 to 17 of the decision, namely with the statement that the LA-C remedies the unconstitutionality which is allegedly contained in Article 5 of the Act Amending the Lawyers Act (Official Gazette RS, No. 54/08 – hereinafter referred to as the LA-B). The statutory regulation in force

implemented a mechanism which enables lawyers to perform their services when such is necessary in order to provide legal aid or the mandatory defence of defendants in criminal proceedings. The National Assembly did not demonstrate that the regulation in force provided for in Article 5 of the LA is in and of itself inconsistent with the Constitution. In accordance with the third paragraph of Article 5, the list of lawyers is maintained by the Bar Association of the Republic of Slovenia (hereinafter referred to as the BAS), thus the courts may appoint any lawyer from the list, as lawyers perform their services in the territory of the entire country regardless of the fact whether they act on the basis of a letter of authorisation or if they are appointed by a court. Territorial and subject-matter jurisdictions apply only to courts, not to lawyers. In the tenth indent of item two of Article 60 of the LA the legislature even envisaged that if a lawyer unjustifiably declines to defend or represent a party to proceedings, such entails a serious violation of the professional duties of a lawyer, for which the disciplinary measure of the revocation of the right to carry out the profession of lawyer may be imposed. It is true, however, that this institution is intended for individual disciplinary accountability of lawyers in the event of violations committed by individual lawyers. It is not and it cannot be used such that lawyers en masse boycott being put on the list. It does not follow from the enclosed minutes of the lawyers' regional assemblies that the lawyers in fact requested that they be struck from the list of lawyers. [2] It is only clear that the lawyers announced a boycott as regards the provision of legal services, by which they primarily wanted to achieve that the manner of determining lawyers' fees be amended.

5. Such a boycott, which is thus merely hypothetical, cannot be acceptable from the viewpoint of the role which lawyers play in ensuring a state governed by the rule of law (Article 2 of the Constitution) and from the viewpoint of the fact that in Article 137 of the Constitution the Bar is defined as a part of the system of justice. If the legislature had proceeded from such an assumption, this would have entailed that it did not trust the Bar as an institution that must be trustworthy in the performance of its constitutional mission. The latter primarily entails that the Bar must contribute to the protection of human rights and fundamental freedoms and not to possibly jeopardise such. Upon the implementation of Article 5 of the LA the legislature could therefore justifiably expect that because of lawyers’ commitment to the law and their due respect for lawyers' professional ethics, lawyers will exercise this article in a manner such that a sufficient number of lawyers will always be available on the list of lawyers in order to effectively ensure human rights and the performance of judicial power. [3] Therefore, the regulation in force is not inconsistent with the Constitution. This approach of lawyers – which is merely possible, and not only unethical, but from the viewpoint of the above-mentioned even unlawful – to the announced boycott of the implementation of the statutory provisions that are a basis for ensuring legal aid and the mandatory defence of defendants in criminal proceedings cannot alone entail that these statutory provisions are in and of themselves unconstitutional. With reference to such, attention must also be drawn to the relevant provisions of the LA-C, although they are not important for the decision as it has been established that the statutory regulation in force is not unconstitutional. Pursuant to the fourth paragraph of Article 5 of the LA-C, in the event there are not enough lawyers on the list, a court namely appoints a lawyer according to the alphabetical order of all lawyers listed in the register of lawyers who are part of the regional assembly of lawyers organised in the territory of an individual district court. A disciplinary violation is not envisaged in cases in which a lawyer who is not on the list unjustifiably declines to represent a

client; such could be added only with the amendment of the Statute of the BAS. The question arises whether the statutory regulation of the LA-C itself might even be restrictive. The fourth paragraph of Article 5 can be interpreted in a manner such that the appointment of a lawyer from the list is connected to the registered office of a law firm in the territory of a district court, which would in fact entail that the unified list of lawyers be narrowed and as a consequence there would be a substantially smaller number of lawyers that a court can appoint from the list. Due to the fact that appointed lawyers can justifiably and possibly unjustifiably decline to represent a client, certain smaller district courts could face problems in judicial proceedings. Hence, the LA-C would not remedy the alleged unconstitutional consequences, even if the regulation in force were unconstitutional.

6. Merely theoretically, the question can be raised of what to do in the event were no lawyers are left on the list of lawyers or if their number on the list no longer sufficed for all cases of *ex officio* defence (i.e. criminal defence lawyers *ex officio*) and for providing legal aid. In cases involving a mandatory defence the appointment of a criminal defence lawyer *ex officio* is regulated in Articles 70 through 72 of the CPA. These provisions do not contain any limitations regarding the appointment of a criminal defence lawyer *ex officio*. If there are no lawyers left on the list, this cannot be an obstacle that would prevent the president of the court from appointing a lawyer from the list of lawyers. Even if no one is on the list, such appointment does not entail a violation of any provision of the CPA. In cases in which a criminal defence lawyer *ex officio* is appointed, the first indent of Article 29 of the Constitution, which is raised to the level of a fundamental human right as a legal guarantee in criminal proceedings, is transposed in the CPA. This cannot be prevented by any list determined in the LA as such is directly ensured under CPA provisions. Moreover, this right of defendants is ensured even more broadly on the basis of item c) of the third paragraph of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the ECHR) and item d) of the third paragraph of Article 14 of the International Covenant on Civil and Political Rights. In the competition between ratified international documents, the Constitution, and the CPA, on one hand, and the provisions of the LA, on the other hand, it is absolutely clear that the provisions of the LA cannot be taken into consideration in cases in which such would entail a violation or limitation of fundamental human rights. Similar also applies regarding legal aid. If there were no lawyers on the list and such assistance could not be provided by other qualified persons or notaries, which the law allows, a court should appoint lawyers from the list of lawyers. Entitled persons are ensured the right to legal aid as an aspect of the fundamental human right of access to court determined in the first paragraph of Article 23 of the Constitution, which is also ensured by the first paragraph of Article 6 of the ECHR. This is also emphasized in the text of Article 1 of the amended Legal Aid Act (Official Gazette RS, No. 23/08).

7. In its decision, when weighing the legal circumstances and the state of the facts regarding the appointment of criminal defence lawyers *ex officio* and the provision of legal aid, the Constitutional Court adopted the standpoint that by allowing the right to a referendum, the LA-B would cause predictable and actual violations of human rights if the LA-C were not upheld at a referendum. As an essential circumstance in such evaluation, the presumption of how the unconstitutional circumstances would allegedly occur must be taken into consideration. In its decision the Constitutional

Court substantiates such by the conduct of the lawyers who allegedly rendered the implementation of the LA-B impossible. Such position is not acceptable. Lawyers may indeed legitimately request certain solutions in a law, however, regardless of their observations, they cannot be allowed to achieve such in a manner by which they would violate human rights. Performing the profession of a lawyer is an honour, the ethics of this profession is directed towards the protection of human rights; in accordance with the Constitution and the law, lawyers are part of the system of justice, therefore, it is not admissible to connect their position with the assumption that lawyers will intentionally cause unconstitutional consequences and violations of human rights as well as render the normal functioning of the judicial system impossible. It is unimaginable that a lawyer who by an order of the president of the court is appointed to be a criminal defence lawyer *ex officio* or to provide legal aid would unjustifiably decline such appointment in order to boycott [this system]. It is precisely the trust that lawyers will not abuse their profession and their mission that is the fundamental starting point due to which we cannot and may not assume the occurrence of unconstitutional consequences with regard to the outcome of a referendum. If we follow from this starting point of the decision, we deny that Slovenia is a state governed by the rule of law, we ascribe to lawyers and the Bar as a whole a negative role and image, which is not allowed and is unfair because in such a manner we deprive them of the good reputation and significance that they have in judicial proceedings and in the protection of human rights and freedoms. Trust in lawyers can also not be built only on sanctioning individual excess instances, as the foundation of this trust is precisely the position and functioning of the Bar in our judicial system. There was thus no legal and factual basis for the Constitutional Court decision by which it prohibited the referendum because of the above-mentioned reason.

8. We agree with the position that the autonomy of the legal profession refers to the regulation of issues which concern the position of lawyers, and that also the manner of evaluation, calculation, and payment of lawyers' fees and expenses which a client must pay to a lawyer fall within this sphere. The legislature has taken two things into consideration – not only the autonomy of the Bar but also that the Bar is a part of the system of justice. The first when the first and third paragraphs of Article 4 of the LFA enabled that a lawyer may always agree with a client for a payment of (higher or lower) fees than determined by the LFA, and the second when it determined that such fees are binding in cases in which a court decides on the obligation to reimburse the expenses of a lawyer to a party who has succeeded in a dispute. The free negotiation of fees is thus an expression of the autonomy of the Bar, whereas the fee prescribed by the law is an instrument which brings a predictability of expenses in judicial proceedings (which is one of the aspects of the principle of legal certainty – clients can thus estimate in advance what kind of a financial burden will they have if they do not succeed in proceedings). However, the principle of the autonomy of the Bar must to a reasonable extent also be respected in cases in which a payment for lawyers' services (i.e. a fee) is determined by law. Therefore, we agree with the position that from Article 137 of the Constitution there follows the obligation of the legislature that in cases in which the legislature itself determines fees by a law, it envisages the obligatory participation of the BAS in the legislative procedure. The legislature fulfilled this constitutional obligation in Article 42 of the LFA, which authorised the minister competent for justice to determine, by rules and within three

months after the coming into force of this law, the manner of the participation of the BAS in the procedure for amending the law which regulates lawyers' fees.

9. Regarding the consistency of this provision with the Constitution, our position is different than the majority position, namely that this provision entails a so called *bare execution clause.* In our opinion, in this case the legislature did not act contrary to the legality principle determined in the second paragraph of Article 120 of the Constitution, which requires that a statutory authorisation for issuing a regulation is determined in light of the contents, purpose, and scope thereof, [4] and that it is supplemented by substantive criteria. [5] The authorisation may not be such as to allow the entity authorised to issue a regulation such a degree of "creativity" which would entail an interference with the very existence of rights and obligations: either that the exercise of rights would be rendered impossible or made difficult, that it would extend obligations, or even that in the name of "exercising [the rights]" it would introduce new obligations and suspend the exercise of rights developed by the Constitution and laws. [6] How precise the statutory authorisation must be thus depends on the subject of the regulation and most of all on its significance.

10. With reference to such, the German Federal Constitutional Court has developed a so-called theory on the importance or essential nature of the case, according to which there must exist a mutual dependency between the importance of the statutory regulation and the form of the legal norm. The greater the interference or effect of a law on the individual's fundamental rights, the more restrictive and precise the statutory authority must be. [7] In view of such starting points, it must be taken into consideration that the case at issue does not concern human rights, but only concerns ensuring a certain aspect of lawyers' autonomy in regulating fees for lawyers' services (an important aspect of such autonomy is in this case entirely protected by the first and third paragraphs of Article 4 of the LFA, which enables the contractual determination of the payment for lawyers' services) – which as a constitutionally protected value does not reach the level of human rights. [8] In addition, the execution clause, just as is the case for any other legal norm, is subject to interpretation, first of all a linguistic interpretation and one that is consistent with the Constitution. This entails that Article 42 of the LFA must be interpreted in a manner friendly to the participation of lawyers – which entails that the BAS has the right to participate in adopting and supplementing the LFA in all stages of the legislative procedure (not only in the stage of the preparation of a draft law, but also after the draft law has been submitted to the legislative body). The law namely does not limit this right only to a certain stage of procedure. Also the scope and manner of the influence of the BAS on amending or supplementing the act which regulates lawyers' fees are clear enough. They are limited to participation – and not to more than this (e.g. to the right to give consent, the right to veto, or even the right to autonomously regulate certain issues regarding lawyers' payment by means of a prescribed fee) – and also not to less (e.g. to simple, passive attendance). The term participation itself is namely not so open in terms of meaning (and even less ambiguous) that it would enable a minister to determine "transferred" tasks on his own initiative. We are convinced that such cannot be interpreted differently than the right to be informed of the intended change or supplementation of fees, the right to be heard thereon (and to have influence on such) and the duty of the proposer of the law or the legislature to study the comments, opinions, positions, and viewpoints of the BAS, to take a position thereon, and dismiss those that will not be applied, and

with reference to such, to provide a statement of reasons. There is nothing wrong if in an execution clause the legislature did not particularly (in fact, “once again”) write down what can be revealed by the interpretation of the disputable statutory norm.

11. In paragraph 26 of its decision, in the argumentation of the so-called bare execution clause, which is allegedly contained in Article 42 of the LFA, the Constitutional Court refers to the established case-law regarding deciding on the inconsistency with the second paragraph of Article 120 of the Constitution. When analysing the Constitutional Court decisions cited in footnote 22, we established that they are not applicable to the case at issue, as with regard to Article 42 of the LFA the interference or effect of the law on the individual's fundamental rights are not such that the statutory authorisation should be more precise and restrictive. In Decision No. U-I-200/00, dated 28 September 2000 (Official Gazette RS, No. 42/2000 and OdlUS IX, 225), the Constitutional Court annulled Article 30 of the Temporary Asylum Act (Official Gazette RS, No. 20/97 – hereinafter referred to as the TAA) and abolished the Decree on Acquiring Temporary Asylum for the Citizens of Bosnia and Herzegovina (Official Gazette RS, Nos. 41/97 and 31/98), as it established that a statutory authorisation for the Government to establish by decree which citizens of Bosnia and Herzegovina can acquire the right to temporary asylum, was a bare or blank authorisation, as on the basis of Article 30 of the TAA the decree could, completely independently from the act for whose implementation it was issued, determine the rights and obligations of citizens of Bosnia and Herzegovina as well as the procedure in accordance with which these citizens could have acquired temporary asylum in accordance with the TTA. Due to the fact that Article 30 of the TTA concerned such an execution clause which did not exclude the possibility that administrative authorities change or independently regulate a matter of statutory regulation, but rather contained authorisations on the basis of which a regulation could contain provisions for which there is no basis in the law and could independently determine rights and obligations, the Constitutional Court annulled the above-mentioned statutory authorisation, as it was not consistent with the second paragraph of Article 120 of the Constitution. This case thus concerned the transfer of the statutory authorisation to the executive branch of power regarding deciding on the right to acquire temporary asylum and regarding the regulation of the procedure by which citizens of Bosnia and Herzegovina can acquire asylum. Due to the fact that the case at issue concerned a greater interference or effect of a law on the individual's fundamental rights, the statutory authorisation had to be restrictive and precise to the greatest extent possible.

12. A similar case was also the review of the constitutionality of the Road Transport Act (Official Gazette RS, Nos. 72/94, 18/95, 54/96, and 48/98), which in the first paragraph of Article 33 determined that the Ministry distributes permits in accordance with measures, procedure, and in the manner determined by the rules of the minister competent for transportation. In Decision No. U-I-58/98, dated 14 January 1999 (Official Gazette RS, No. 7/99 and OdlUS VIII, 2), the Constitutional Court held that a law should provide for all essential elements of the functioning of administrative bodies in the organisational, procedural, and substantive sense in order to meet the requirements set forth in the second paragraph of Article 120 of the Constitution. Only in such manner can the administrative functioning of the executive branch of power be known, transparent, as well as predictable for citizens, which also improves their legal certainty. Also in this case, the statutory authorisation was bare, as it left

substantive and procedural provisions regarding the distribution of permits for international road transport of objects to be determined by a regulation, regardless of the fact that the law did not determine a substantive framework for determining the criteria, procedure, manner for issuing and use of permits. It follows from the above-mentioned that in cases, such as the above-mentioned Constitutional Court decisions, stricter requirements for a more definite establishment of the state of the facts must apply than regarding other administrative authorisations regarding interferences.

13. In Order No. U-I-239/06, dated 22 March 2007, the Constitutional Court reviewed the constitutionality of the Salary System in the Public Sector Act (Official Gazette RS, No. 110/06 - official consolidated text – hereinafter referred to as the SSPSA) and the Rules Amending the Rules on the Classification of Posts of Directors in the Field of Health to Salary Brackets within the Range of Salary Brackets (Official Gazette RS, Nos. 106/05 and 20/06), with reference to which it held that the law provided satisfactory substantive frameworks for a more detailed classification of individual rights or obligations. In accordance with the third paragraph of Article 11 of the SSPSA, salary brackets for determining basic salaries of principals, directors, and secretaries of budget users established by the state and referred to in item two of Article 2 of the SSPSA, were prescribed by the minister competent for each individual field. On the basis of this provision, the Minister of Health adopted these Rules, with regard to which the Constitutional Court established that regulating directors' salaries by rules was not outside the statutory frameworks.

In accordance with the third paragraph of Article 11 of the SSPSA, salary brackets for determining basic salaries of principals, directors, and secretaries of budget users established by the state and referred to in item two of Article 2 of the SSPSA, were prescribed by the minister competent for each individual field.

14. It clearly follows from the above-mentioned that these cases cannot be compared. In Article 42 the LFA authorises the Minister of Justice to determine by rules the manner of participation of the exhaustively determined circle of entitled subjects in amending the law which regulates lawyers' fees, namely the BAS, the courts, the State Attorney's Office, the State Prosecutor's Office, the Chamber of Notaries of Slovenia, and non-governmental organisations. The above-mentioned provision of the law cannot be understood so that the participation of the Bar is merely a formality [9] and also not that it would overstep the boundaries to which the term participation itself reaches. Therefore (at least through the interpretation which also includes the principle of lawyers' autonomy deriving from the Constitution), all substantive requirements for there being a determined nature of the criteria for executing authorisation are evident: not only the contents but also the purpose and scope of the participation of the BAS in the procedure for adopting and supplementing the prescribed lawyers' fees. We can speak of a bare authorisation – such that would contain unclear descriptions of the powers in question, too broadly determined and not sufficiently defined authorisations, exemplifying clauses, etc., which would entail a legally unfounded transfer of the legal regulation of the participation of lawyers in the procedure for adopting or supplementing the prescribed lawyers' fees [10] – only in cases if the law transferred to a minister the authorisation to determine the manner of drafting amendments or supplements to the act regulating fees, without at the same time determining that the participation of the

BAS must be ensured thereby and what form (participation or merely passive attendance at the procedure) such participation should have (by which this issue would be left entirely to the minister's decision). Therefore, we do not agree that Article 42 of the LFA is inconsistent with the Constitution.

15. Due to the fact that in our opinion the allegations of the National Assembly that unconstitutional consequences could occur due to the suspension of the implementation or due to the rejection of the LA-C, we were in favour of a decision which would enable (i.e. allow) the referendum.

Mag. Marta Klampfer
Judge

Dr. Mitja Deisinger
Judge

Mag. Miroslav Mozetič
Judge

Jan Zobec
Judge

[1] See the dissenting opinion of Judge Dr. Ribičič in Case No. U-II-1/06, dated 28 February 2006 (Official Gazette RS, No. 28/06 and OdlUS XV, 17).
[2] It cannot be concluded from all the collected information that unconstitutional consequences are occurring. No court reports are cited that state that proceedings have been stayed because the representation of criminal defence lawyers *ex officio* or the provision of legal aid has not been ensured. The analysis of the documents enclosed in the court file does not show that any consequences, let alone unconstitutional, would occur. Only the minutes of the meetings of certain regional associations and the BAS taken before the adoption of the amended LA-C are enclosed in the court file. The Koper regional assembly of lawyers decided that lawyers should be struck from all lists of lawyers maintained at courts (i.e. which entails also from the lists which are not that kind of list), whereas lawyers who were not present can request that they be struck from the lists themselves. The same decision was reached by the Celje regional assembly of lawyers. The Nova Gorica regional assembly of lawyers reached the decision that no one would apply to be registered in “the lists of lawyers that provide legal aid or represent clients *ex officio*”. The lawyers from Posavje (i.e. the Krško regional assembly of lawyers) decided that all of them would request that they be struck from the list. The Maribor regional assembly of lawyers decided to withdraw the lists from their region if the amended LA is not adopted. From the minutes of the meeting of the BAS, it follows that in the case of the Ljubljana regional assembly of lawyers numerous members are “applying to be registered in the lists, whereas numerous others are requesting to be struck from the lists”. It follows from the Statute of the BAS that, in addition to the mentioned regional assemblies of lawyers, also the following regional assemblies of lawyers exist: those of Gorenjska, Dolenjska, and Ptuj. Regarding these regional assemblies of lawyers, there is no information on any requests to be struck from the lists. It is not clear from

the collected data in the court file that any lawyer in fact individually requested to be struck from the lists, whereby only such a request to be struck from the list would be admissible and consistent with the fifth paragraph of Article 5 of the LA and with the same provision of the LA-C. A collective request to be struck from the list is not admissible (this also follows from the minutes of the meetings of the BAS). With reference to such, it must be added that a criminal defence lawyer *ex officio* may request to be dismissed only if there exist grounds for such, which is decided by a court order, against which there is no appeal (Article 72 of the Criminal Procedure Act – hereinafter referred to as the CPA).

[3] It follows from the transcription of the 5th session of the National Assembly held on 20 April 2009 that in the answer to a parliamentary question, the Minister of Justice, Aleš Zalar, submitted the data of the district courts as of 27 March 2009 from the lists of criminal defence lawyers *ex officio* and lawyers performing services within the scope of legal aid: the number of criminal defence lawyers *ex officio*: Celje 64, Koper 6, Kranj 43, Krško 20, Maribor 77, Novo mesto 29, while 5 district courts did not provide data, amounting to a total of 239; the number of lawyers performing services within the scope of legal aid: Celje 43, Koper 3, Nova Gorica 29, Kranj 43, Krško 21, Ljubljana 193, Maribor 67, Ptuj 32, while 3 district courts did not provide data; amounting to a total of 431; thus a total of 670 (out of approximately 1200) lawyers, taking into consideration the fact that there is no data available for five district courts regarding representation *ex officio* and for three district courts regarding legal aid.

[4] Cf., J. Schwarze, European Administrative Law, Sweet and Maxwell, London, 1995, p. 219.

[5] See also, Šturm in Šturm (Editor), Komentar Ustave Republike Slovenije, Fakulteta za podiplomske državne in evropske študije 2002, p. 871.

[6] See, Šturm, Rezmerje med zakonodajno in izvršilno oblastjo in pravna pravilnost podzakonskih predpisov po novi ustavni ureditvi, Upravni zbornik, Inštitut za javno upravo pri Pravni fakulteti v Ljubljani, Ljubljana, 1993, p. 265.

[7] Šturm, *ibidem*, p. 872.

[8] It is important that the Austrian Constitutional Court explicitly underlined that a requirement for a rigid, substantive determination of a statutory provision which is intended for the executive branch of power regarding economic states of the facts should not be too strained (L. K. Adamovich, B. C. Funk, Allgemeines Verwaltungsrecht, 2nd Edition, Springer Verlag, Vienna, 1984, p. 105, cited from Šturm, *ibidem*, p. 272).

[9] It is in the nature of the matter that participation cannot be merely formal. Participation (differently than attendance, which can [also] be merely formal and passive presence, quiet observation of events, without the possibility to influence such) can only be active. Participation is namely the verbal noun of “to participate”, which means to be actively connected due to of a common activity (Slovar slovenskega knjižnega jezika, Državna založba Slovenije, 1985, IV, p. 788).

[10] Šturm, *ibidem*, p. 269.