



REPUBLIKA SLOVENIJA  
USTAVNO SODIŠČE

U-I-137/10  
26 November 2010

DECISION

At a session held on 26 November 2010, in proceedings for the review of constitutionality initiated upon the petition of the Ankaran Local Community, the Mirna Local Community, and others, represented by Mag. Miha Šipec, attorney in Ljubljana, the Constitutional Court

decided as follows:

- 1. The Establishment of Municipalities and Municipal Boundaries Act (Official Gazette RS, No. 108/06 – official consolidated text) is inconsistent with the Constitution.**
- 2. The National Assembly of the Republic of Slovenia must remedy the inconsistency referred to in the preceding point of these operative provisions within a time limit of two months following the publication of this Decision in the Official Gazette of the Republic of Slovenia.**
- 3. The Decree of the President of the National Assembly of the Republic of Slovenia Calling the Regular Elections to Municipal Councils and the Regular Elections of Mayors (Official Gazette RS, No. 60/10) is annulled insofar as it refers to the elections in the Urban Municipality of Koper and the Municipality of Trebnje.**
- 4. Within a time limit of 20 days following the entry into force of the law by which the National Assembly will fulfil the requirement referred to in the second point of these operative provisions, the President of the National Assembly shall call the elections of municipal councils and the elections of mayors of the new Municipalities of Ankaran and Mirna, and the Urban Municipality of Koper and the Municipality of Trebnje in accordance with the rules that apply for early elections of a municipal council if such is dissolved before the termination of its four-year term of office.**
- 5. The term of office of the members of the municipal councils and the mayors of the Urban Municipality of Koper and the Municipality of Trebnje is to be extended until the first session of the newly elected municipal councils.**

Reasoning

A

1. The petitioners challenge the Establishment of Municipalities and Municipal Boundaries Act (hereinafter referred to as the EMMBA), as it does not contain any provisions regarding the Municipality of Ankarán and the Municipality of Mirna. The National Assembly of the Republic of Slovenia adopted the assessment that the territories in question fulfil the statutory conditions for the establishment of a municipality, and, on the basis of this assessment, it called referenda for the determination of the will of the residents of these territories. In both referenda the residents supported the establishment of a new municipality. On this basis, the Government of the Republic of Slovenia submitted a draft of the Establishment of the Municipality of Ankarán and the Municipality of Mirna and the Determination of their Territories Act (EPA 943-V, hereinafter referred to as the EMMBA-G), which was not adopted; furthermore, a subsequently submitted draft law on the establishment of the Municipality of Ankarán was not adopted, while a subsequently submitted draft law on the establishment of the Municipality of Mirna is still in the legislative procedure. The rejection of these draft laws or failure to adopt them without a substantiated reason would allegedly entail arbitrary decision-making by the National Assembly as well as a violation of the principles of a state governed by the rule of law and the principle of the equality of the residents of the territories in question (Article 2 and the second paragraph of Article 14 of the Constitution), a violation of the fairness of the proceedings in which their proposals would be considered (Article 22 of the Constitution), and would prevent the exercise of the right to judicial protection and to a legal remedy (Articles 23 and 25 of the Constitution), as the law does not prescribe a legal remedy for such a situation. Since the legal situation is not consistent with the will of the people expressed in a referendum, the challenged Act allegedly also violates the principle determined by the second paragraph of Article 3 of the Constitution, according to which power is vested in the people. Such a situation allegedly unconstitutionally interferes with Articles 9 and 38 of the Constitution, according to which local self-government is guaranteed in Slovenia and the residents exercise it in local communities, and it allegedly also violates the third paragraph of Article 139 of the Constitution, according to which a municipality is established by law, following a referendum in which the will of the residents of a particular territory is determined. At the same time, it allegedly violates Article 44 of the Constitution, as the will of the residents of the territories in question determined in a referendum was nullified and as they cannot participate in the governance of public affairs in a manner that they themselves chose in accordance with the law and the Constitution. The petitioners emphasise that the creation of such an unconstitutional situation just before the local elections entails its perpetuation for another four years, as the possible subsequent amendment of the EMMBA as such could only have effect at the first regular local elections [following its entry into force]. They draw attention to the still on-going unconstitutionality of the Urban Municipality of Koper and the Constitutional Court decisions regarding the protection of specific parts of the territory of Ankarán. They enclose an expert opinion regarding the constitutional aspects of the establishment of the Municipality of Ankarán with the petition.[1] They suggest absolute priority consideration. They propose that the Constitutional Court [issue a Decision] establishing the existence of an unconstitutional legal gap in the challenged Act, that, by determining the manner of the implementation of the Decision until the inconsistency of the Act with the Constitution is remedied, it ensures the establishment of municipalities on the two territories in question (they refer to Decision of the Constitutional Court No. U-I-294/98, dated 12 October 1998, Official Gazette RS, No. 72/98, and OdlUS VII, 185), and that it suspend the regular local

elections in the Urban Municipality of Koper and the Municipality of Trebnje, which will allegedly enable their transformation into municipalities that are in conformity with the Constitution.

2. In its reply, the National Assembly summarises the course of the procedure for the establishment of municipalities in the years 2009 and 2010, namely from the viewpoint of the law in force as well as from the viewpoint of the actual course of the procedure. It states that in such procedure the National Assembly decides on the basis of expert assessments and the proposals of the Government, which, within the framework of its responsibility with regard to the National Assembly (the first paragraph of Article 4 of the Act on the Government of the Republic of Slovenia, Official Gazette RS, No. 24/05 – official consolidated text, and 109/08 – AGRS), also implements the entire concept of local self-governance. Regarding the proposal to establish the Municipality of Ankaran, the Government thus established that the proposed territory fulfils the conditions for the establishment of a municipality and that the proposal goes in the direction of implementing the Constitutional Court decisions in relation with the unconstitutionality of the Urban Municipality of Koper, and it suggested that the National Assembly postpone a decision on the proposals for the establishment of municipalities and urban municipalities until the competences of regions and municipalities are defined on the basis of an expert analysis, and within this framework, especially the competences of urban municipalities. The Government made a statement regarding the proposal on the establishment of the Municipality of Mirna in the framework of a common opinion on several proposals; therein it found that the proposal satisfies the conditions, but an end must be put to the process of breaking municipalities into smaller parts, as this leads to an increase in the number of municipalities that are unable to fulfil their tasks in accordance with the principles of functional and financial autonomy, and therefore it does not support the further process of establishing municipalities. After carrying out the preliminary procedure, the Government submitted a draft of the EMMBA-G to the National Assembly with a delay with regard to its agenda, which allegedly prevented the National Assembly, as the legislature, from concluding the procedure for establishing new municipalities within the statutory time limit. When this draft law was not adopted at a second vote, two separate draft laws on the establishment of each of the municipalities and the determination of their borders were introduced into the legislative procedure; the National Assembly rejected the draft law on the establishment of the Municipality of Ankaran already upon its first reading, while the consideration of the draft law on the establishment of the Municipality of Mirna came to a standstill in the second reading within the framework of the legislative procedure. The National Assembly is of the opinion that the petitioners' statements regarding the "finality" and thereby the binding effect of a referendum on the establishment of a municipality are not substantiated. It stresses that the legal nature of such a referendum as consultative and non-binding on the National Assembly must be taken into account, and it also quotes constitutional case law on this issue. From such it allegedly follows that it falls within the constitutional competence of the National Assembly to establish a municipality by law and determine its territory, thereby taking into account the constitutional concept, statutory criteria, and within this framework, the will of the residents (Decision of the Constitutional Court No. U-I-144/94, dated 15 July 1994, Official Gazette RS, No. 45/94, and OdlUS III, 95),[2] as well as the fact that the National Assembly is not unconditionally bound by such a referendum (Decision of the Constitutional Court No. U-I-183/94, dated 9 November 1994, Official Gazette

RS, No. 73/94, and OdlUS III, 122).[3] It emphasises that the National Assembly conducted the procedures in accordance with the Local Self-government Act (Official Gazette RS, No. 94/97 – official consolidated text, 76/08, and 79/09 – hereinafter referred to as the LSA) (with the exception of observing the time limit for their conclusion), and that it cannot be bound by its previous decisions on the establishment of municipalities, as each such procedure is allegedly independent (it refers to Decision of the Constitutional Court No. U-I-104/02).[4] With regard to such, the petitioners' allegations that the EMMBA violates Article 2 and the second paragraph of Article 14 of the Constitution because it did not establish the two municipalities in question are allegedly not substantiated. The National Assembly is also of the opinion that there is no violation of Articles 23 and 25 of the Constitution, as, in light of the opinion of the Government as the executive authority responsible for the implementation of the concept of local self-government, the National Assembly allegedly had the possibility to exercise political discretion and take into account the broader public interest in adopting this law, even though such entails a decision of a concrete nature. Also with regard to this law, legal protection is therefore allegedly ensured in the proceedings for the review of its consistency with the Constitution before the Constitutional Court, which would decide whether there exist substantiated and convincing reasons for "the decision adopted by the National Assembly".

3. In its opinion, the Government emphasises that the process of establishing municipalities in Slovenia resulted in a large number of municipalities, therefore it does not support their further establishment. Continuing to break up municipalities into smaller parts would further diminish their ability to fulfil their tasks in accordance with the principle of functional and financial autonomy, which in particular is not observed by very small municipalities. As a result, the regulation regarding the establishment of new municipalities was already amended by law (the Act Amending the Local Self-Government Act, Official Gazette RS, No. 51/10 – hereinafter referred to as the LSA-R). In relation with the proposals on the establishment of the Municipalities of Ankaran and Mirna, the Government prepared a draft amendment of the EMMBA in which, taking into account Order of the Constitutional Court No. U-I-239/98, dated 15 March 2001 (Official Gazette RS, No. 28/01, and OdlUS X, 51), it found that all constitutional and statutory conditions for the establishment of the municipalities in question are fulfilled. It also forwarded such an opinion regarding the subsequently submitted proposals for the establishment of these municipalities.

## B – I

4. By Order No. U-I-137/10, dated 3 September 2010 (Official Gazette RS, No. 72/10), the Constitutional Court accepted the petition for consideration and decided to consider it with absolute priority. At the same time, it suspended the Decree of the President of the National Assembly of the Republic of Slovenia Calling the Regular Elections to Municipal Councils and the Regular Elections of Mayors (Official Gazette RS, No. 60/10 – hereinafter referred to as the Decree calling regular local elections) insofar as it refers to the elections in the Urban Municipality of Koper and the Municipality of Trebnje.

5. On 4 November 2010, the Constitutional Court held a public hearing. The petitioners supported the allegation regarding the National Assembly's arbitrary

decision-making in relation to the establishment of the Municipalities of Ankaran and Mirna with documents that allegedly indicate the presence of political bargaining and not only the application of the National Assembly's political discretion, the territorial completeness and independence of the Ankaran settlement, the fact that the authorities of the Urban Municipality of Koper neglect the Ankaran settlement, the support of the Italian national community, and the initial support of the Municipality of Trebnje, which was allegedly withdrawn as a result of the subsequent political influence of the authorities of the Urban Municipality of Koper. The representative of the National Assembly stated that in the preliminary proceedings the National Assembly adopted the assessment that several territories fulfilled the conditions for the establishment of a municipality, however due to political influence it allegedly called referenda only on the two territories in question and not on the other territories. Upon reconsideration [of this matter] on the basis of a request submitted by the National Council that it again decide on the EMMBA-G in new proceedings, the majority of the National Assembly, in accordance with the positions and the warnings of the Government, allegedly realised that decisions in the direction of breaking municipalities into smaller parts are no longer feasible. The Government reiterated its assessment that Slovenia has a large number of municipalities, some of which are not able to perform their tasks due to their small size, and assessed that the two territories at issue fulfil the statutory and constitutional conditions for the establishment of a municipality. The representatives of the Urban Municipality of Koper stressed that there is neither a constitutional right to establish a municipality nor a constitutional concept of a municipality, and that the establishment of the Ankaran Municipality would be unconstitutional; such is allegedly also substantiated by the expert opinions submitted at the public hearing.[5] The establishment of a municipality is allegedly a matter of the National Assembly's political discretion and if its decisions were bound in any manner it would also entail an impediment to the functioning of the National Council of the Republic of Slovenia. The representatives of the Municipality of Trebnje objected to the allegations regarding the withdrawn support and stated they had problems due to the suspended elections. The replies to the questions of the Constitutional Court judges showed that when the National Assembly decided again [on the draft Act], the Government's new political concept of local self-government prevailed as a broader interest, the Government was caught between political and expert assessments of the proposals on the establishment of new municipalities, and that it determined that the proposals then in procedure which had successfully completed the preliminary stage were to be concluded according to the rules of the same procedure that was in force at the time of their submission, as well as that in the event of the establishment of the Municipality of Ankaran the special rights of the members of the Italian national community in accordance with the Constitution and the law would be guaranteed.

## B – II

6. The fundamental question that the Constitutional Court must answer in the case at issue is whether the National Assembly may decide not to adopt a law after calling a referendum in which the residents [of part of the municipality] decided in favour of establishing a municipality. Before this question can be answered, the substance of the concept of local self-government, as guaranteed by the Constitution (Article 9),

and of a municipality, in the framework of which the residents of Slovenia exercise the former (Article 138 of the Constitution), must be defined.

7. Already in Decision No. U-I-13/94, dated 21 January 1994 (Official Gazette RS, No. 6/94, and OdlUS III, 8), the Constitutional Court stated the following: "Although the Slovene Constitution does not explicitly refer to the right to local self-government in the chapter on fundamental rights and freedoms, the principle of local self-government was incorporated into the fundamental provisions of the Constitution and defined in more detail in a separate chapter on local and other forms of self-government. The 'right to local self-government', however, is inherent in the fundamental constitutional guarantee of local self-government ('Local self-government shall be guaranteed in Slovenia', Article 9 of the Constitution) as the institutional framework for deciding on local public affairs, on the one hand, and in the fundamental constitutional right of every citizen to participate in the management of public affairs (Article 44 of the Constitution), on the other." It especially emphasised that the process of the deconstruction of the old communes or the establishment of new municipalities entails a process "in the sense of an 'upward reform' based on the democratically expressed will of citizens regarding the territory in which they wish to establish 'their' municipality as a natural and functional local community." It may be established that from the launch of the reform of local self-government the Constitutional Court understood such as a process in which the main role is played by the persons residing in a particular territory.

8. In Decision No. U-I-90/94, dated 20 May 1994 (Official Gazette RS, No. 29/94, and OdlUS III, 58), the Constitutional Court rejected the claim that "the people may freely decide on the size of a municipality in a referendum." It further stated the following: "The establishment of municipalities is the basic condition for the actual exercise of local self-government. In Chapter V a), the Constitution namely defines the status of a municipality, an urban municipality, and a region as local communities (Articles 138 through 144). The fundamental local community is a municipality, whose constitutional concept is conditioned by (1) the common needs and interests of the (2) residents of (3) one or a number of settlements (4) who participate in the management of public affairs of a local nature (5) independently, i.e. self-governing in relation to the state. A municipality is therefore a residential community of persons living in the territory of one settlement or a number of interconnected settlements. It is particularly characterised by territorial links that are the basis for the formation of a network of interpersonal and neighbourly relations and the awareness of belonging to a municipality as the fundamental territorial community." It again emphasised that "[s]uch entails the process of the establishment of new municipalities on the basis of the democratically expressed will of the people as to the local territory where they would like to establish a municipality as a natural and functional local community." In Decision No. U-I-85/94, dated 20 May 1994 (Official Gazette RS, No. 29/94, and OdlUS III, 57), the Constitutional Court referred to Decision No. U-I-90/94 regarding the definition of the concept of a municipality and explicitly pointed out "territorial links" as an essential element of the constitutional concept of a municipality that the National Assembly must consider when establishing municipalities.

9. The Constitutional Court defined the substance of the right to local self-government most clearly in Decision No. U-I-322/98, dated 15 March 2001 (Official Gazette RS, No. 28/01, and OdlUS X, 44). After quoting Article 9 and the third

paragraph of Article 139 of the Constitution, it stated that “[t]he Constitution guarantees the right to local self-government that belongs to the residents of a particular territory. It authorises the National Assembly to establish municipalities, but only after the will of the residents has been established,” and it proceeds by stating that “[t]he authorised petitioners are determined very broadly, so as to allow the residents to exercise their right to local self-government (their right to establish municipalities) to the greatest possible extent.” It follows from this Decision that the Constitutional Court also understood the constitutional right to local self-government as the right of the residents living in a particular territory to exercise such right in a municipality of their “own”. Such is also indicated by the requirement determined by the same Decision that the procedure for the establishment of a municipality must be regulated in such a manner so as to prevent the potential arbitrariness of the National Assembly in determining the constitutional and statutory conditions for the establishment of a municipality and that judicial protection against the decisions of the National Assembly must be provided. Arbitrary conduct of the National Assembly preventing the residents of a particular territory from exercising their constitutional right to express their will to establish a municipality in a referendum would consequently also entail an interference with their constitutional right to local self-government.

10. Order of the Constitutional Court No. U-I-254/06, dated 10 April 2008, entails a certain divergence from the position expressed in Decision No. U-I-322/98 and a clearer answer to the question of whether the constitutional right to local self-government also entails the right to one’s own municipality. The Order states the following: “It follows from the constitutional concept of a municipality (the second paragraph of Article 139, the first paragraph of Article 140, and Article 142 of the Constitution) that local self-government is the right of local authorities to manage common local affairs. Although the establishment of a municipality is an essential condition for the exercise of local self-government, such does not entail that the legislature is not entitled to determine the criteria (conditions) and the procedure for the establishment (and changes in the boundaries) of municipalities [...]. Therefore the provisions of Articles 138 and 139 cannot be interpreted in the sense that they guarantee the residents of Slovenia the right to their own municipality, but only the right to exercise local self-government in a municipality that is established in accordance with the conditions and according to the procedure determined by law.”

11. On the basis of the constitutional provisions regarding local self-government and considering the Constitutional Court decisions that also defined the substance of these provisions, the legislature determined the conditions and procedure for the establishment of municipalities. The procedure can be divided into two parts (two stages). The first part is initiated by a petition or proposal for the establishment of a new municipality and is concluded by a decision of the National Assembly on whether or not an individual proposal fulfils the constitutional and statutory conditions for the establishment of a municipality, and, if these conditions are fulfilled, a referendum is carried out in which the residents express their will to establish a municipality. If the proposal does not fulfil the conditions, the procedure is concluded by an order against which judicial protection is guaranteed in instances of potential arbitrary conduct of the National Assembly (the second and third paragraphs of Article 14a of the LSA). “The requirement that arbitrariness must be prevented at all levels of the legal decision-making process, especially when it could threaten rights safeguarded

by the Constitution, is consistent with the principles of a state governed by the rule of law.” (Decision of the Constitutional Court No. U-I-322/98.) If the National Assembly acted arbitrarily in making this decision, it would prevent the residents from expressing their will to establish a municipality in a referendum and such would also entail an interference with the right to local self-government (Decision No. U-I-322/98.) The holding of a referendum determining the will of the residents is a constitutional condition for the second part of the procedure for the establishment of a municipality, i.e. the initiation of the procedure for the adoption of the law by which the municipality will be established. It is not possible to establish a municipality or achieve a change in the territories of municipalities without carrying out a referendum (held by the Constitutional Court in Decision No. U-I-285/98, dated 17 September 1998, Official Gazette RS, No. 67/98, and OdlUS VII, 160). Before the referendum is carried out, all questions in relation to the fulfilment or non-fulfilment of the constitutional and statutory conditions for the establishment of a municipality have to be resolved and also, in a potential judicial dispute, all potentially disputable questions have to be resolved and potential unconstitutionality and illegalities have to be remedied. Legal protection must therefore be regulated in such a manner that it will effectively protect the constitutional rights and legal position of the participants in the procedure (See Decision of the Constitutional Court No. U-I-322/98). In the second part of the procedure, i.e. the procedure for the adoption of the law by which a municipality is established, the National Assembly does not decide on whether the conditions for the establishment of a municipality or for a change in its territory are fulfilled. In proceedings to review the potential unconstitutionality of the law by which municipalities are established or their territories are changed and to review the constitutionality of the procedure in which the law was adopted, only violations that were committed in the legislative procedure may be assessed, and not violations committed in the preliminary procedure, against which special legal protection is provided (See Order of the Constitutional Court No. U-I-239/98).

12. A municipality is established by law following a referendum by which the will of the residents in a given territory is established (the third paragraph of Article 139 of the Constitution). The Constitutional Court has been considering the question of the legal nature of the mentioned referendum since the launch of the implementation of local self-government. Thus already in Decision No. U-I-85/94 it stated the following: “The third paragraph of Article 139 of the Constitution requires the legislature only to carry out a referendum to ‘establish the will of the people in a certain territory’ before establishing new municipalities, without thereby defining the term ‘territory’ and without explicitly binding the legislature to observe such will. In accordance with the spirit of this constitutional provision, by the first paragraph of Article 14 of the LSA the legislature bound itself to establish (by law) the territories of municipalities ‘in accordance with the will expressed [...] in a referendum’ – of course, provided such will is not contrary to the letter and spirit of the constitutional provisions regarding local self-government, since the legislature must above all else abide by the Constitution.” In Decision No. U-I-144/94, by which it abrogated the “self-imposed restriction” under Article 14 of the LSA in force at that time, the Constitutional Court repeated the position from the abovementioned Decision. “The third paragraph of Article 139 of the Constitution, however, does not prescribe such referendum [with binding effect], but it requires that prior to determining the territory of a municipality by law the will of the residents be determined in a referendum. It is, however, within the constitutionally defined sphere of competence of the National Assembly to establish a

municipality by law and determine its territory, thereby taking into account the constitutional concept, statutory criteria, and within such framework the will of the residents.” And it offered the National Assembly the following practical instruction: “The will expressed in a referendum by the population of the entire referendum area as well as by the residents of its individual parts will have to be taken into account insofar as the municipality established on its basis will conform to the constitutional concept of local self-government and statutory provisions.” A similar position, which the Constitutional Court developed further, is found in Decision No. U-I-183/94: “Referenda in the sense of Article 139 of the Constitution express the will of the residents of a particular territory which is not necessarily consistent with the interests of adjacent territories and wider public interests, which the legislature must take into consideration in defining such territorial division of the state as will enable not only the implementation of local self-government but also the fulfilment of those administrative tasks of the state which the latter will exercise through municipalities and the powers of the state vested in them. Therefore, the Constitution provides for a consultative referendum, which leaves the final determination of the territory of a municipality to the legislature. In determining the territory of a municipality the legislature is thus not bound by the will of the residents expressed in a referendum in an absolute or unconditional manner.” Thereby the Constitutional Court explicitly underlined that “constitutional authorisations could be exceeded if the National Assembly failed to establish a municipality in a territory which fulfils the constitutional and statutory conditions and whose residents voted in favour of establishing their own municipality.”

13. In Decision No. U-I-294/98, the Constitutional Court adopted a very clear position on whether the National Assembly is bound [by the result of a referendum], namely: “When establishing municipalities and changing their territories, the National Assembly is bound by the will of the voters expressed in a referendum regarding the establishment of a municipality or a change in its territory – except in two instances: – when respecting the will of the voters expressed in a referendum would lead to the establishment of a municipality that would not be in accordance with the constitutional and statutory provisions on municipalities, and – when it is objectively not possible to respect the will of the voters expressed in a referendum due to the conflicting results of referenda.

Conduct contrary to the will of the voters expressed in a referendum also in other instances would entail a violation of the principle that Slovenia is a democratic republic (Article 1 of the Constitution), the principle that in Slovenia power is vested in the people (the second paragraph of Article 3 of the Constitution), the right to participate in the management of public affairs (Article 44 of the Constitution), and the constitutional provisions regarding local self-government (Article 9, Article 138 of the Constitution).” It repeated the cited position in Decision No. U-I-288/98, dated 14 October 1998 (OdlUS VII, 189), and most recently in Order No. U-I-246/06, dated 10 May 2007.

14. In the course of their implementation, the constitutional provisions that refer to local self-government (in particular, Articles 9, 138, and 139 of the Constitution) must be applied in a manner that derives from Constitutional Court decisions. That also the legislature is bound by the interpretation of the Constitutional Court follows already from the foundations of the principle of the separation of powers. The authorisation of the Constitutional Court to provide interpretations of constitutional provisions that

have legally binding effects derives from its constitutionally defined position. It follows from the hitherto interpretations of the Constitutional Court that Articles 138 and 139 must be interpreted as ensuring the residents of Slovenia the right to exercise local self-government in a municipality established in accordance with the conditions and according to the procedure determined by law, and that the National Assembly is – regarding the establishment of municipalities and any change in their territory – bound by the will of the voters expressed in a referendum on the establishment of a municipality or a change in its territory, except in two instances: when respecting the will of the voters expressed in a referendum would lead to the establishment of a municipality that would not be in accordance with the constitutional and statutory provisions on municipalities and when it is objectively not possible to respect the will of the voters expressed in a referendum due to the conflicting results of referenda. In its decisions, the Constitutional Court emphasised that the National Assembly was entitled to determine the conditions under which it assessed specific proposals for the establishment of municipalities, but the principle of a state governed by the rule of law requires that the legislature follow the rules it has itself created and that it does not act arbitrarily in its decisions regarding the establishment of municipalities (See Decision No. U-I-103/02). Conduct contrary to these principles entails a violation of the principle of a state governed by the rule of law (Article 2 of the Constitution) and the general principle of equality before the law (the second paragraph of Article 14 of the Constitution).

15. The following may be derived from the presented positions of the Constitutional Court:

- when deciding on proposals for the establishment of municipalities, the National Assembly has to respect the constitutional concept of local self-government and the statutory conditions and procedure it itself determined. Such entails that if the National Assembly establishes that the conditions are not fulfilled, it is neither obliged to establish a municipality nor to call a referendum. If the National Assembly, however, establishes that the conditions are fulfilled, and the residents express their will to establish a municipality in a particular territory in a referendum and there exist no reasons to disregard the will expressed in such manner, the National Assembly is required to establish the municipality;
- the National Assembly is required to respect the will of the residents to establish a municipality in a particular territory expressed in a referendum unless it has substantiated (constitutional law) reasons to act in a different manner;
- it may not act arbitrarily in deciding on the establishment of municipalities.

### B – III

16. The procedure for the establishment of the Municipality of Ankaran through its secession from the Urban Municipality of Koper and of the Municipality of Mirna through its secession from the Municipality of Trebnje was conducted in accordance with the LSA in force before its amendment (LSA-R) and as it continues to govern the two proposed municipalities according to the transitional provisions (Article 8 of the LSA-R). Such entails that the provision of the LSA that enabled the establishment of a new municipality through the secession of a part of a municipality from an existing municipality (the third paragraph of Article 15) is still applicable to the two proposed new municipalities. The National Assembly found that both proposed territories

fulfilled the constitutional and statutory conditions for the establishment of a municipality and following such conclusion it called a referendum in which the residents of the two territories expressed their majority will that they wish to establish a new municipality. No judicial dispute was initiated against the Decree calling the referendum. Following the referendum, the National Assembly also established the two municipalities by law. The National Council requested that the National Assembly vote again [on this matter]. In the new vote, however, the law was not adopted. The draft law for the establishment of the Municipality of Ankarán was also rejected in a newly initiated procedure, while the draft law for the establishment of the Municipality of Mirna came to a standstill in the legislative procedure.

17. As has already been mentioned, the petitioners' main allegation is that the National Assembly acted arbitrarily when it did not establish the two municipalities, even though in the relevant procedure it itself found that both territories fulfilled all constitutional and statutory conditions for the establishment of a municipality, which in the case at issue entails a violation of the second paragraph of Article 14 and Article 2 of the Constitution, and as a consequence it also violated Articles 9, 138, and 139 of the Constitution. The National Assembly's objection is that it is completely free when deciding on the establishment of a municipality, as such concerns full political discretion. However, at the public hearing it added that it also had the right to change its mind. The representative of the Municipality of Koper argued above all that there is no constitutional right to one's own municipality, that the referendum on the establishment of a municipality is of a consultative nature, and that the proposed new Municipality of Ankarán also otherwise does not fulfil the conditions for a municipality.

18. As regards the objections that the proposed Ankarán municipality does not fulfil the constitutional and statutory conditions, attention should be drawn to the position of the Constitutional Court that holds that all questions in relation to the fulfilment of such conditions have to be resolved in the procedure leading to the calling of a referendum, also through the use of judicial protection. The Urban Municipality of Koper could have challenged the Decree calling the referendum.<sup>[6]</sup> Therefore, the allegation of the non-fulfilment of the conditions cannot be taken into account. By Order No. U-I-239/98, the Constitutional Court adopted the clear position that "in the procedure for the adoption of a law the National Assembly does not establish the fulfilment of the conditions for the establishment of a municipality or a change in its territory, but proceeds from the results of the referendum in accordance with Articles 25 and 26 of the [Act regulating the procedure for establishing municipalities and municipal boundaries]. In proceedings to review a potential unconstitutionality of the law by which municipalities are established or their territories are changed and to review the constitutionality of the procedure in which the law was adopted it is only possible to assess violations committed in the legislative procedure, and not violations committed in the preliminary procedure, for which special legal protection is prescribed."

19. The objection that the right to one's own municipality does not exist and that the National Assembly is completely free in deciding upon the establishment of a new municipality, even though it itself established that the constitutional and statutory conditions for the establishment of the two new municipalities were fulfilled, and in spite of the affirmative will expressed by the residents, is also not substantiated. Such

position is not consistent with Articles 138 and 139 of the Constitution. The National Assembly is not obligated to establish a new municipality if it finds that the constitutional and statutory conditions for its establishment are not fulfilled. However, as the National Assembly established that the constitutional and statutory conditions were fulfilled, and following the fulfilment of the last condition – the affirmative will of the residents expressed in the referendum – and the finding that no reasons exist due to which it would not be required to take into account the result of the referendum, it should have established the two municipalities, in accordance with the procedure it itself had prescribed. The National Assembly's position that in adopting a law by which it establishes a municipality it is bound by neither the result of a referendum nor the finding from the preliminary procedure that the conditions are fulfilled, in connection with the concurrent position that legal protection against such law is guaranteed before the Constitutional Court, which will assess primarily if substantiated and convincing reasons for the decision adopted by the National Assembly derive from the entire procedural documentation, is unclear and even contradictory. What these reasons may be and why the Constitutional Court would establish them at all, since, given the National Assembly's position that it is bound by neither the result of the referendum nor by the findings from the preliminary procedure, the National Assembly would not even be required to state them, is not evident from the National Assembly's reply.

20. Already in Decision No. U-I-13/94 the Constitutional Court stated that it is a task of a state governed by the rule of law to enable residents of municipalities to express their interests and exercise their appropriately determined will in a legally regulated manner. By a special law the National Assembly prescribed the conditions and procedure for the establishment of a municipality. Following the prescribed procedure conducted by the National Assembly, a municipality is established by a law. It is true that the legislature is completely autonomous when adopting laws by which it regulates social relations in a general and abstract manner, and bound only by the Constitution. It undoubtedly had such broad autonomy regarding the establishment of municipalities when adopting the laws by which it defined, in conformity with the Constitution, the conditions and procedure for the establishment of municipalities. However, it does not have such broad autonomy when adopting a law by which it decides on the establishment of a municipality.

21. "The establishment of a municipality by the constitutionally and statutorily defined procedure is an essential condition for the exercise of the constitutional right to local self-government.[7] It is the constitutional right of the residents living in a particular territory who are connected by common needs and interests to govern local affairs by themselves." [8] An integral part of the right to local self-government is also the possibility of the residents of a particular territory to exercise this right in a municipality that they establish independently in accordance with the statutory conditions. That is the intention of the constitutional provision providing that the National Assembly establish a municipality following the prior determination of the will of the residents. By a decision adopted at the end of such procedure, the National Assembly decides precisely on this constitutional right, namely on the basis of the finding that according to the procedure that was carried out, the obtained documents, and the established facts, as well as according to the result of the referendum, the constitutional and statutory conditions for the establishment of a municipality as the fundamental self-governing local community are fulfilled. Therefore, such does not

entail an “abstract right to a municipality” in whatever territory, but only in the territory that fulfils the constitutional and statutory conditions for the establishment of a municipality.

22. According to an explicit provision of the Constitution, the National Assembly adopts the decision on the establishment of a municipality in the form of a law. However, such constitutional competence of the National Assembly does not change the fact that, despite the prescribed formal form, such in substance entails a decision on a constitutional right in a concrete, individual case following the prior execution of the procedure prescribed by the Constitution and the LSA. Therefore, in such an instance the legislature, despite using the form of a law, nevertheless does not have a wide margin of appreciation in the sense of political discretionary decision-making, so as to be able to – having drawn its democratic legitimacy from general elections – decide on whether to establish a municipality or not only on the basis of a value-oriented and interest-oriented assessment. The margin of the legislature’s appreciation is present in the general and abstract legal regulation of rights and obligations, as only there – taking into account the constitutional framework – may the democratically elected legislature freely decide on the most appropriate legal regulation. In deciding on whether in a concrete case the residents of a particular territory may exercise their constitutional right to local self-government in the framework of a new municipality, however, the legislature enjoys less freedom, as it has to respect the rules that it itself defined. As soon as the legislature defined the conditions for the exercise of its constitutional competence to establish municipalities, which have to be fulfilled and the existence of which it establishes itself, and the special procedure, in accordance with the principle of legality and trust in the law as well as the general principle of equality, it also had to observe these rules.[9] The statutory regulation of the conditions and the procedure for the establishment of municipalities as well as the guarantee of legal protection in such procedure require not only that the regulation be observed, including by the legislature (Article 2 of the Constitution), but also that all residents (petitioners) who want to establish a municipality in a particular territory be treated equally (the second paragraph of Article 14 of the Constitution). The principle of equality of course does not require that the National Assembly break the law (i.e. that it establish a municipality even though the conditions for such are not fulfilled), it does however require that it apply the prescribed conditions in all cases equally. If a territory fulfils the conditions, it must act in the same manner as it acted in other cases where the conditions had been fulfilled. Citizens, in the case at issue, the residents of the two territories in which the new municipalities are to be established, legitimately expected that the legislature would adhere to the defined rules and would, provided that all prescribed conditions are fulfilled, establish a municipality, as it had done in similar cases. Conduct contrary to the described principles entails a violation of the principle of legality and trust in the law (Article 2 of the Constitution), as well as the general principle of equality under the second paragraph of Article 14 of the Constitution.

23. As the National Assembly did not establish the Municipalities of Ankarana and Mirna, it acted arbitrarily and thereby violated the general principle of equality (the second paragraph of Article 14 of the Constitution) and the principle of legality and trust in the law (Article 2 of the Constitution). The refusal to establish the two municipalities consequently also entails a violation of Articles 138 and 139 of the

Constitution. The Constitutional Court therefore decided that the EMMBA is inconsistent with the Constitution (point 1 of the operative provisions).

#### B – IV

24. The National Assembly is required to remedy the established inconsistency with the Constitution within a period of two months (point 2 of the operative provisions). In determining the time limit for remedying the inconsistency, the Constitutional Court considered that the content required to remedy the law is already known and it is not necessary to carry out a new preliminary procedure for the establishment of the fulfilment of the constitutional and statutory conditions or to carry out a referendum, but only the legislative procedure for adopting an amendment to the EMMBA. The transitional provision of the LSA-R (Article 8) can also be understood in such a manner, as it determines that procedures regarding proposals for the establishment of new municipalities regarding which a referendum had been called before this Act (the LSA-R) was adopted are to be continued and concluded under the provisions that governed these procedures before the entry into force of this Act. The Act defines the “calling of a referendum” as a condition for the application of the previously valid law, not that “a referendum had already been carried out”. In the case at issue, the results of the referendum had even already been proclaimed. The Act, however, does not define the term “conclusion of the procedures”. However, as it links the application of the LSA-R or the law in force before the amendment to the “calling of a referendum”, which entails the conclusion of the preliminary procedure, it is absolutely clear that the term “conclusion of the procedure” refers to the legislative procedure. Therefore, all actions carried out in the preliminary procedure, including the referendum, remain legally valid. Thereby it also has to be emphasised that the established inconsistencies refer only to the legislative procedure, not the preliminary procedure.

#### B – V

25. The Constitutional Court found that the EMMBA is inconsistent with the Constitution and ordered that it be harmonised with the Constitution, but such does not suffice for remedying the established unconstitutionality. The goal of procedures for the establishment of a municipality is the exercise of local self-government in a particular territory, which, however, may only be ensured through elections of mayors and municipal councillors, which in essence entail the final stage before the constitution of a municipality. Therefore, the EMMBA is directly linked to the Local Elections Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the LEA). The regulation by which the execution of these elections is ensured is the decree calling the regular local elections that is issued by the President of the National Assembly within the time limits defined by statute.[10] Therefore, with regard to the established unconstitutionality of the EMMBA, on the basis of the mandate under Article 30 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA), the Constitutional Court also reviewed the constitutionality of the Decree calling the regular local elections insofar as it refers to elections in the Urban Municipality of Koper and the Municipality of Trebnje. By Order No. U-I-137/10, dated 3 September

2010, the Constitutional Court suspended the execution of the mentioned Decree insofar as it refers to the Urban Municipality of Koper and the Municipality of Trebnje. As the Constitutional Court decided that the EMMBA is unconstitutional, because it did not establish the new municipalities, the Decree calling the regular local elections is also unconstitutional in the part in which its execution was suspended, and thus the elections in the Urban Municipality of Koper and the Municipality of Trebnje were not carried out. By carrying out the elections in the Urban Municipality of Koper and the Municipality of Trebnje without previously establishing the new municipalities, the unconstitutional state of affairs established by this Decision would be perpetuated and the residents of the new municipalities would be prevented from exercising local self-government therein, which would entail a violation of the principle of legality and trust in the law under Article 2 of the Constitution. Therefore, as in the Urban Municipality of Koper and the Municipality of Trebnje certain acts in relation to elections have already been carried out, the Constitutional Court annulled the Decree calling the regular local elections insofar as it refers to the elections to the authorities of the Urban Municipality of Koper and the Municipality of Trebnje (point 3 of the operative provisions). Such entails that also all actions carried out in relation to the elections on the basis of this part of the Decree calling the regular local elections and all acts adopted on its basis also lost their legal validity.

#### **B – VI**

26. After the EMMBA is harmonised with the Constitution, local elections have to be carried out as soon as possible in the new municipalities that will be established by their secession from the Urban Municipality of Koper and the Municipality of Trebnje, as well as in the latter two municipalities. On the basis of Article 40 of the CCA, the Constitutional Court thus determined that within a time period of 20 days following the entry into force of the law the President of the National Assembly is to call local elections in both newly established municipalities as well as the Urban Municipality of Koper and the Municipality of Trebnje in accordance with the rules for early elections (point 4 of the operative provisions). The Constitutional Court chose such a manner of implementation [of its Decision] because the time limit the LSA defines for the conclusion of the procedures had already expired. Delaying the implementation of this Decision would, however, entail disregard for a Constitutional Court decision and therefore a violation of Articles 2 and 3 of the Constitution as well as a perpetuation of the established unconstitutionality.

#### **B – VII**

27. In order to ensure legal certainty regarding the functioning of the Urban Municipality of Koper and the Municipality of Trebnje in the period until the local elections are carried out on the basis of the EMMBA, which will be harmonised with the Constitution, in spite of Articles 41 and 42 of the LSA,[11] an extension of the terms of office [of the members of the municipal councils and the mayors of these municipalities] was determined, namely until the first session of the newly elected municipal councils of these municipalities. In this period the members of the municipal councils and the mayors of these municipalities are to retain their regular

mandates to decide on all affairs within the competence of the municipalities (point 5 of the operative provisions).

28. The Constitutional Court is aware that the periodic nature of elections is one of the more important elements of the right to vote and the principle of democracy. However, the extension of the [mentioned] terms of office in the Urban Municipality of Koper and the Municipality of Trebnje is necessary in order to ensure that the residents who proposed the establishment of the new municipalities (regarding which the National Assembly in the prescribed procedure determined that all the conditions for their establishment are fulfilled and their residents expressed the will to establish a municipality) can enforce and exercise the right to local self-government, including elections, in a municipality “established in accordance with the conditions and the procedure determined by law”, even though as a result elections will be held after the term of office expires.[12] Making the territory of a municipality consistent with the Constitution without also carrying out elections in the (new) municipality does not entail of itself that the exercise of local self-government is ensured in such a municipality. The residents predominantly exercise the rights (competences) of local self-government through elected authorities (the municipal council and the mayor). Therefore, the Constitutional Court deems that a shorter delay in the holding of elections does not entail an inadmissible interference with the right to vote, and in no instance does it cause its hollowing out.

### C

29. The Constitutional Court adopted this Decision on the basis of Article 40, the second paragraph of Article 45, and Article 48 of the CCA, as well as the third indent of the third paragraph of Article 46 of the Rules of Procedure of the Constitutional Court (Official Gazette RS, Nos. 86/07, and 54/10), composed of: Dr Ernest Petrič, President, and Judges Dr Mitja Deisinger, Dr Etelka Korpič – Horvat, Mag. Miroslav Mozetič, Jasna Pogačar, Mag. Jadranka Sovdat, Jože Tratnik, and Jan Zobec. It adopted the Decision by seven votes against one. Judge Sovdat, who submitted a dissenting opinion, voted against. Judge Petrič submitted a concurring opinion.

Dr Ernest Petrič  
President

#### Endnotes:

[1] Prepared by C. Ribičič with the cooperation of I. Kaučič and L. Ude and through consultations with F. Grad, Institute for Comparative Law at the Faculty of Law in Ljubljana, 17 May 2010.

[2] In this Decision the Constitutional Court abrogated the first and third paragraphs of Article 14 of the Local Self-government Act (Official Gazette RS, No. 72/93), according to which the National Assembly was required to establish a municipality in accordance with the will expressed by the adult residents who voted in a referendum, because it deemed that it is possible to derive a process from such by which local

communities could be created in Slovenia that do not fulfil the constitutional and statutory conditions for their establishment.

[3] The Constitutional Court established that Articles 2 and 3 of the EMMBA are inconsistent with the Constitution as they establish municipalities that do not fulfil the constitutional and statutory requirements.

[4] Correctly: Decision of the Constitutional Court No. U-I-103/02, dated 18 April 2002, Official Gazette RS, No. 39/02, and OdlUS XI, 64, which drew attention to the fact that the conduct of the National Assembly must always be consistent with the Constitution and the laws, regardless of its prior illegal conduct (since it led to the establishment of municipalities that were not consistent with the constitutional concept of a municipality).

[5] The expert opinion was prepared by M. Cerar, J. Čebulj, I. Kristan, M. Senčur, J. Šmidovnik, and S. Vlaj.

[6] See Decision of the Constitutional Court No. U-I-322/98.

[7] Held by the Constitutional Court in Order No. U-I-254/06, dated 10 April 2008, para. 5 of the reasoning.

[8] See Decision of the Constitutional Court No. U-I-163/99, dated 23 September 1999, Official Gazette RS, No. 80/99, and OdlUS VIII, 209, para. 13 of the reasoning.

[9] See also Decision of the Constitutional Court No. U-I-103/02.

[10] See Order of the Constitutional Court No. U-I-403/98, dated 19 November 1998, OdlUS VII, 206, regarding the suspended regular elections in the Urban Municipality of Koper.

[11] Article 41 of the LSA determines that the four-year term of office of members of a municipal council lasts until the first session of the newly elected council, which applies to both regular and early elections, as well as elections that, for whatever reason, are carried out later than the regular elections to municipal councils. Article 42 of the LSA determines that the four-year term of office of mayor lasts until the first session of the newly elected council, which applies to both regular and early elections, as well as elections that, for whatever reason, are carried out later than the regular elections to municipal councils.

[12] See Decision of the Constitutional Court No. U-I-254/06.