

RS
USREPUBLIKA SLOVENIJA
USTAVNO SODIŠČEU-I-17/11
18 October 2012

DECISION

At a session held on 18 October 2012, in proceedings to review constitutionality initiated upon the request of the National Council of the Republic of Slovenia, the Constitutional Court

decided as follows:

The Act on Cooperation Between the National Assembly and the Government in EU Affairs (Official Gazette RS, Nos. 34/04, 43/10, and 107/10) is not inconsistent with the Constitution.

REASONING

A

1. The National Council (hereinafter referred to as the applicant) filed a request to initiate proceedings to review the constitutionality of the Act on Cooperation Between the National Assembly and the Government in EU Affairs (hereinafter referred to as the ACBNAGEUA). It alleges that the ACBNAGEUA is inconsistent with the Treaty of Lisbon, which amends the Treaty on European Union and the Treaty Establishing the European Community (UL C 306, 17 December 2007 – hereinafter referred to as the Treaty of Lisbon), because regarding EU affairs it does not regulate the role of the National Council.

2. The applicant alleges that the Parliament of the Republic of Slovenia is composed of two chambers, namely the National Assembly of the Republic of Slovenia and the National Council, and is of the opinion that in EU affairs the role of both chambers should have been regulated by law. The ACBNAGEUA is allegedly unconstitutional precisely because it fails to regulate the role of the National Council in the field of EU affairs and it only regulates the relationships between the National Assembly and the Government. The applicant alleges that its role in the consideration of EU affairs is very weak, if compared with the role of parliaments' second chambers in other EU Member States. This weakness is allegedly expressed both in the relation to the National Assembly and in the relation to the Government. It is of the opinion that in EU affairs the National Assembly and the National Council should be more equal. In the opinion of the applicant, the role of the National Council in the procedure for the adoption of legal acts and decisions in the European Union should not only entail the hindering and correction of hasty decisions of the National Assembly, as is characteristic of internal legislative procedures; instead, the National

Assembly and the National Council should complement each other and together cooperate with the Government, which directly cooperates, as the executive branch of power, in decision-making within the institutions of the European Union. The applicant substantiates such standpoint by stating that the role of national parliaments in the European Union increased after the implementation of the Treaty of Lisbon. It refers to Article 12 of the Treaty on European Union (UL C 83, 30 March 2010, consolidated version – hereinafter referred to as the TEU), which determines how national parliaments contribute actively to the good functioning of the European Union and in such framework emphasises, above all, Protocol (No. 1) on the Role of National Parliaments in the European Union, which in Article 8 determines that in the systems that are not unicameral, its provisions shall apply to all the chambers of which such parliaments are composed. The applicant is therefore of the opinion that also [Slovene] national law should in an appropriate manner take into consideration the fact that at the level of EU law, a formal role is envisaged in procedures before the institutions of the European Union for both chambers – i.e. both the National Assembly and the National Council. However, due to the fact that in the field of EU matters the challenged ACBNAGEUA only regulated the position of the National Assembly and entirely overlooked the National Council, in the national legal order there allegedly exists a legal gap with regard to the National Council that is inconsistent with the Treaty of Lisbon.

3. Within the framework of the general allegation that the ACBNAGEUA does not regulate the position of the National Council in EU affairs, the applicant alleges in particular that Article 11a of the ACBNAGEUA is inconsistent with the Treaty of Lisbon – or, more precisely, with the first paragraph of Article 8 of Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality (UL C 83, 30 March 2010 – hereinafter referred to as Protocol No. 2) – because it does not determine that in addition to the National Assembly also the National Council can require that an action be filed before the Court of Justice of the European Union on grounds of a violation of the principle of subsidiarity by a legislative act of the European Union.

4. Due to the mentioned inconsistencies with the Treaty of Lisbon, the ACBNAGEUA is consequently allegedly inconsistent also with Articles 8 and 153 of the Constitution.

5. The National Assembly did not reply to the request.

B – I

6. With regard to the fact that the applicant proposes that the Treaty of Lisbon be the criterion for the review of the constitutionality of the ACBNAGEUA, and in particular that the first paragraph of Article 8 of Protocol No. 2 [be the criterion] for the assessment of Article 11a of the ACBNAGEUA, the Constitutional Court first had to assess whether it has jurisdiction to carry out such assessment. In the hitherto constitutional case law, the

Constitutional Court adopted the position that it is not competent to assess the conformity of national regulations with EU directives (Decision No. U-I-32/04, dated 9 February 2006, Official Gazette RS, No. 21/06, and OdlUS XV, 10). Similar holds true for the review of the constitutionality of national regulations with EU regulations; by Order No. Up-328/04 and U-I-186/04, dated 8 July 2004 (OdlUS XIII, 82), the Constitutional Court *inter alia* adopted the position that in light of the fact that EU regulations are not treaties, Article 8 of the Constitution does not apply thereto, and the Constitutional Court is also not competent on the basis of the second indent of the first paragraph of Article 160 of the Constitution.

7. In the case at issue, the legal situation is different. The Treaty of Lisbon, to which the applicant refers, represents so-called primary EU law. Its fundamental characteristic is that it is adopted and amended in such form and by such procedure as is ordinary for treaties, because ratification in all the Member States is necessary, in conformity with their constitutional rules, in order for the amendments to enter into force.[1] The Treaty of Lisbon also entered into force in such manner; it was signed on 13 December 2007 and on 1 December 2009 it entered into force, after it was ratified by all EU Member States. In the Republic of Slovenia, the National Assembly ratified by law, on the basis of Article 86 of the Constitution, the Treaty of Lisbon.[2] Therefore, in the Slovene national constitutional legal order, the Treaty of Lisbon has the status of a [regular] treaty. Such entails that for the review of the constitutionality of the ACBNAGEUA in the case at issue, Article 8 and the second paragraph of Article 153 of the Constitution, in conformity with which laws must be in conformity with treaties that are binding on Slovenia, are relevant. Such also entails that the conditions for the Constitutional Court's jurisdiction determined by the second indent of the first paragraph of Article 160 of the Constitution, that is jurisdiction to decide on the conformity of laws with ratified treaties, are met.

8. With regard to the fact that the Treaty of Lisbon amended the previous TEU and the Treaty Establishing the European Community – the latter was renamed the Treaty on the Functioning of the European Union (hereinafter referred to as the TFEU), the Constitutional Court deemed that in the part in which the applicant alleges an inconsistency of the ACBNAGEUA with the Treaty of Lisbon it alleges an inconsistency with the TEU and the TFEU. The European Union is based on these two treaties, which have equal legal validity, as is explicitly determined by the third paragraph of Article 1 of the TEU and the second paragraph of Article 1 of the TFEU.

9. The Constitutional Court also has jurisdiction to assess the consistency of Article 11a of the ACBNAGEUA with the first paragraph of Article 8 of Protocol No. 2, because on the basis of Article 51 of the TEU, Protocols form an integral part of treaties and have thus the same legal status as the TEU and the TFEU.

B – II

10. With the transfer of the exercise of part of [Slovene] sovereignty to the European Union, which occurred on the basis of the first paragraph of Article 3a of the Constitution, important substantive changes arose in the constitutional relationship between the National Assembly as the legislative branch of power and the Government as the executive branch of power. The legislative competence of the National Assembly substantially diminished, precisely to the benefit of the Government, because the representatives of the latter in the EU adopt legislative and other decisions that with regard to their content would otherwise fall within the competence of the National Assembly. Precisely due to these changes in the constitutional balance between the National Assembly and the Government, which is based on the constitutional principle of the separation of powers, the Constitution envisaged the cooperation of the National Assembly and the Government in EU affairs. It ensured the National Assembly the possibility to directly monitor and assess the activities of the Government in the European Union and, in doing so, direct and even bind it with its positions.[3] In accordance with the fourth paragraph of Article 3a of the Constitution, in the procedures for the adoption of legal acts and decisions in the European Union the Government informs the National Assembly thereof; with regard to the proposals of acts and decisions, as well as the activities of the Government, the National Assembly may adopt positions that the Government must take into consideration in its activities. The Constitution left the regulation of the relations between the National Assembly and the Government in the procedures for the adoption of EU acts and decisions to be regulated in more detail by a law adopted by a two-thirds majority vote of National Assembly deputies present. The ACBNAGEUA is this law.

11. The fourth paragraph of Article 3a of the Constitution thus does not envisage the direct cooperation of the National Council in EU affairs, and this also does not follow from other provisions of the Constitution. In fact, such does not entail that the National Council cannot cooperate in the formation of the opinions of the Republic of Slovenia with regard to the legal acts and decisions of the European Union; such cooperation in the legal procedures that are carried out in conformity with the national law takes place within the framework of its other constitutional competences determined by Article 97 of the Constitution.[4] From this constitutional provision it follows that the Constitution does not ensure a direct relationship between the National Council and the Government. The influence of the National Council on the functioning of the Government – also in EU affairs – is only indirect, i.e. through the influence that it may have on the functioning of the National Assembly when carrying out its constitutional and statutory competences. In such context, of particular importance is the constitutional competence of the National Council entailing that it may convey to the National Assembly its opinion on all matters within the competence of the National Assembly (the second indent of the first paragraph of Article 97 of the Constitution), therefore also on all the matters that refer to the European Union. In order for this constitutional competence of the National Council to be effectively carried out, legislative solutions were adopted that impose certain obligations on the National Assembly (and also the Government) in relation to the

National Council. For instance, the first paragraph of Article 54 of the National Council Act (Official Gazette RS, No. 100/05 – official consolidated text – hereinafter referred to as the NCA) determines that the president of the National Assembly is to inform the president of the National Council of the sessions of the National Assembly and send him or her all the materials on matters that are on the agenda of the sessions of the National Assembly, and the second paragraph of Article 56 determines that the National Council and its working bodies are to cooperate with the working bodies of the National Assembly and present them opinions on the matters falling within their competence. In relation to the Government, it is in particular the first paragraph of Article 56 of the NCA that is relevant, which determines that the National Council and its working bodies have the right to request from state authorities explanations and information with regard to matters that they are dealing with.

12. When alleging an unconstitutionality of the national legislation that regulates the procedures under national law in which those positions are formed that the Government supports in the institutions of the European Union – in the case at issue, the ACBNAGEUA – it is not possible to refer to the Treaty of Lisbon or the TEU and the TFEU. In fact, it is true that the TEU, the TFEU, and the Protocols that form an integral part of the treaties regulate in multiple places the significance and the role of national parliaments and also give them certain concrete authorisations;^[5] however, these instances concern the regulation of direct relationships between the national parliaments (and their individual chambers) and the European Union and its institutions, and not the regulation of how Member States are to form and adopt, in their national legal orders, the positions that the representatives of their governments support in the institutions of the European Union or that are, within the framework of the European Union, the subject of intergovernmental cooperation.

13. The treaties on which the European Union is based do not determine how Member States are to form and adopt, in conformity with their national law, [their] positions in EU affairs and what the role of national parliaments and their individual chambers is to be in these procedures. Also the provisions of the treaties on which the European Union is based that otherwise refer to the position of national parliaments in the European Union do not deal with national constitutional questions. Therefore, the TEU, the TFEU, and Protocol No. 2 are not relevant in any manner to the question of what the constitutional relationship between the National Assembly, the National Council, and the Government should be in the national procedures that refer to EU affairs. The allegation of the applicant that the ACBNAGEUA (or the legal order as such) is inconsistent with the TEU and the TFEU, and consequently with the Constitution, because it does not regulate the role of the National Council in EU affairs, is thus unsubstantiated.

14. In the assessment of the Constitutional Court, also the special allegation that Article 11a of the ACBNAGEUA is inconsistent with the first paragraph of Article 8 of Protocol No. 2 is unsubstantiated. The applicant alleges that Article 11a of the ACBNAGEUA, which regulates the procedure by which the National Assembly imposes on the State Attorney's Office [the

obligation] to file an action before the Court of Justice of the European Union on grounds of a violation of the principle of subsidiarity by a legislative act of the European Union, should also give the same competence to the National Council. Such a requirement entailing the equal treatment of the National Assembly and the National Council allegedly follows from the first paragraph of Article 8 of Protocol No. 2 and also from the general equal treatment of the second chambers of national parliaments under EU law.

15. The competence of national parliaments to ensure, in the fields that do not fall within the exclusive competence of the European Union, compliance with the principle of subsidiarity, is a special competence of theirs that is originally determined by EU law and does not follow from Member States' national law. The third paragraph of Article 5 of the TEU and point (b) of Article 12 of the TEU thus determine that national parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in Protocol No. 2. This protocol envisaged, as a primary mechanism, the cooperation of national parliaments in the legislative procedure: in conformity with Article 4 of Protocol No. 2, draft legislative acts are sent to national parliaments, and then, on the basis of Article 6 of Protocol No. 2, any national parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, submit a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. Further reasoned opinion procedures depend on how many national parliaments (or individual chambers) were opposed to the draft legislative act at issue due to the alleged violation of the principle of subsidiarity. When taking into account the "weight" of the collective veto of national parliaments against a certain draft legislative act, each national parliament has two votes, and in bicameral parliamentary systems each of the two chambers has one vote (Article 7 of Protocol No. 2).

16. In addition to the *ex ante* cooperation of national parliaments, Protocol No. 2 also envisaged an *ex post* mechanism to ensure [the implementation of] the principle of subsidiarity. On the basis of Article 8 of Protocol No. 2, the Court of Justice of the European Union has jurisdiction in actions on grounds of infringement of the principle of subsidiarity. With regard to the subjects entitled to file an action, the mentioned provision of the Protocol determines that a Member State may file an action before or notify the Court of Justice thereof in accordance with its legal order on behalf of its national parliament or a chamber thereof.[6]

17. From the above it is evident that there is a significant difference between the cooperation of national parliaments in the initial phase of the legislative procedure and their role before the Court of Justice of the European Union after the legislative act has already been adopted. While Protocol No. 2 directly and comprehensively regulates their role in the legislative procedure of the European Union, with regard to their position before the Court of Justice of the European Union it refers to the regulation under national law. From the wording of the first paragraph of Article 8 of Protocol No. 2, which states that [the Court of

Justice of the European Union] is "notified [by Member States of actions] in accordance with their legal order on behalf of their national Parliament or a chamber thereof," it clearly follows that EU law does not give national parliaments or their individual chambers active standing to directly file actions on grounds of a violation of the principle of subsidiarity; their legal position, as well as the position of individual chambers of parliaments, with regard to the initiation of a procedure before the Court of Justice of the European Union is a question of national law.

18. On the basis of the above, the Constitutional Court assessed that the fact that the challenged Article 11a of the ACBNAGEUA gave only the National Assembly the competence to require the State Attorney's Office to file, on its behalf (and in conformity with its instructions), an action before the Court of Justice of the European Union on grounds of a violation of the principle of subsidiarity by a legislative act of the European Union, is not inconsistent with the first paragraph of Article 8 of Protocol No. 2.

19. Since the Constitutional Court assessed that the ACBNAGEUA is not inconsistent with the TEU and the TFEU, and that Article 11a of the ACBNAGEUA is not inconsistent with the first paragraph of Article 8 of Protocol No. 2, there is consequently also no inconsistency with Articles 8 and 153 of the Constitution.

C

20. The Constitutional Court adopted this Decision on the basis of the first paragraph of Article 21 of the Constitutional Court Act, composed of: Dr Ernest Petrič, President, and Judges Dr Mitja Deisinger, Dr Dunja Jadek Pensa, Mag. Marta Klampfer, Dr Etelka Korpič – Horvat, Mag. Miroslav Mozetič, Jasna Pogačar, Dr Jadranka Sovdat, and Jan Zobec. The decision was reached by eight votes against one. Judge Sovdat voted against and submitted a dissenting opinion.

Dr Ernest Petrič
President

Endnotes:

[1] The procedure for the revision of the treaties on which the European Union is based is regulated by Article 48 of the TEU.

[2] The Act Ratifying the Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community (Official Gazette RS, No. 20/08, and MP, No. 4/08).

[3] Cf. I. Kaučič, *Uvodno pojasnilo* [Introductory Explanation], in: *Ustava Republike Slovenije* [Constitution of the Republic of Slovenia], 4th revised edition, GV Založba, Ljubljana 2003, pp. 25–26. See also F. Grad, in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije, Dopolnitev – A* [Commentary on the Constitution of the Republic of Slovenia, Supplement – A], Fakulteta za državne in evropske študije, Ljubljana 2011, pp. 95–100.

[4] The National Council also carries out certain competences on the basis of laws. For instance, Article 23a of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA) determines that the National Council can require that the Constitutional Court review the constitutionality of regulations or general acts issued for the exercise of public authority.

[5] The fundamental provision that defines the role of national parliaments in the European Union is Article 12 of the TEU, which determines:

"National Parliaments contribute actively to the good functioning of the Union: (a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union; (b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality; (c) by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 61c of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 69g and 69d of that Treaty; (d) by taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty; (e) by being notified of applications for accession to the Union, in accordance with Article 49 of this Treaty; (f) by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union."

[6] The first paragraph of Article 8 of Protocol No. 2 determines the following: "The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof."