



U-I-191/17
25 January 2018

DECISION

At a session held on 25 January 2018 in proceedings to review constitutionality initiated upon the request of the Supreme Court, the Constitutional Court

decided as follows:

- 1. The Referendum and Popular Initiative Act (Official Gazette RS, No. 26/07 – official consolidated text) is inconsistent with the Constitution.**
- 2. The first paragraph of Article 3 insofar as it refers to the Government and the sixth paragraph of Article 4 of the Elections and Referendum Campaign Act (Official Gazette RS, Nos. 41/07, 11/11, and 98/13) are inconsistent with the Constitution.**
- 3. The National Assembly must remedy the unconstitutionality referred to in the preceding Points of the operative provisions within one year of the publication of this Decision in the Official Gazette of the Republic of Slovenia.**
- 4. Until the regulation in the Referendum and Popular Initiative Act has changed, in appeal proceedings the Supreme Court shall:**
 - dismiss the appeal if it does not establish irregularities in a referendum procedure or if it establishes irregularities that did not or could not have affected the referendum results;**
 - grant the appeal, annul the voting, and order new voting if it establishes irregularities in the referendum procedure that did or could have affected the referendum results;**
 - grant the appeal, annul the voting, and establish by itself the referendum results if it establishes irregularities in the referendum procedure that did or could have affected the referendum results and the consequences of which can be remedied by establishing different referendum results.**

5. Following the serving of the decision of the Supreme Court referred to in the second indent of the preceding Point of the operative provisions, the State Election Commission shall determine within two days, by an order, a new date of voting, with regard to which it must take into consideration the time for a referendum campaign, considering the established nature of the violation. A judgment of the Supreme Court that annuls the voting in the referendum or establishes different referendum results and the order of the State Election Commission on the determination of a new date of voting shall be published in the Official Gazette of the Republic of Slovenia.

REASONING

A

1. The applicant challenges the Referendum and Popular Initiative Act (hereinafter referred to as the RPIA) and the sixth paragraph of Article 4 of the Elections and Referendum Campaign Act (hereinafter referred to as the ERCA). It states that a referendum dispute is pending before the Supreme Court regarding protection of the right to vote in a referendum on the Act Regulating the Construction, Operation, and Management of the Second Track of the Divača–Koper Railway Line (hereinafter referred to as the ARCOMST), in which the applicant challenges not only the act by which the referendum results were established itself, but also the holding of the referendum and the results thereof in their entirety. It alleges that Article 53a of the RPIA (in conjunction with Article 53 of the RPIA) only regulates the dispute regarding the correctness and legality of the act establishing the final results of the voting. Taking into account the finding that broader judicial protection of all objections as regards other violations that arise during a referendum must be ensured within the framework of a referendum dispute, in the opinion of the applicant, the RPIA – in the part regulating the referendum dispute before the Supreme Court – is inconsistent with the Constitution. The applicant alleges that in order to ensure effective judicial protection (Article 23 of the Constitution) and the protection of the rights of both campaign organisers and those who voted in a referendum (Articles 44 and 90 of the Constitution), the legislature should have regulated both the substantive and procedural legal issues by law. Allegedly, it failed to do so. By means of the established available methods of legal interpretation and legal institutes of case law (e.g. analogy), the Supreme Court is allegedly unable to resolve the deficiencies of entire substantive institutes and the related procedural institutes, and to fill in the legal gaps that have arisen. Therefore, there is allegedly an unconstitutional legal gap in the RPIA.

2. The applicant alleges that the RPIA does not determine any substantive assessment criteria in referendum disputes before the Supreme Court. Allegedly, the legislature determined neither the substance of the objections in an appeal nor the basis for assessing whether such objections in an appeal are justified or not, nor under which conditions and in what instances they are justified. Similarly, when it is necessary to interfere with referendum results or, broadly speaking, with the will of the voters in a referendum, once a violation is established has allegedly also remained legally unregulated. The question of the consequences of the finding that a certain violation in a referendum procedure affected the referendum results allegedly requires a more precise substantive determination. It is allegedly necessary to determine whether in order to justify an interference with the results of a referendum it has to be established that – provided a causal link exists – the violation affected the final results in such a manner that the final results were different than they would have been had there been no violation, or whether the mere establishment that the violation significantly affected the results of the referendum suffices, even if it is not demonstrated that the final results of the referendum would have been different [had there been no violation]. In view of the absence of a statutory basis, the issue of an unconstitutional legal gap is all the more prominent as regards the question of whether the mere potential influence of a violation that has arisen in a referendum procedure on the results of the referendum suffices [to justify] an interference with the results of the referendum (“could have affected”).

3. Allegedly, the RPIA is inconsistent with the Constitution also because it fails to determine statutory rules that provide parties and courts clear and predictable rules for courts’ decision-making in a referendum dispute that are adapted to the special legal nature of the dispute in question. The applicant alleges that the Act should have precisely regulated a series of procedural questions that should ensure the right to fair judicial proceedings (Article 22 of the Constitution), and in such a framework should also ensure the establishment of the relevant state of the facts on which the legal assessment could be substantively based in view of its legal basis. Allegedly, the RPIA also does not confer on the Supreme Court the power to decide on a referendum dispute. In the opinion of the applicant, it does not suffice that a court’s decision is limited to adopting a decision regarding an interference (e.g. an annulment) with the report of the State Election Commission (hereinafter referred to as the SEC), as courts should also have the power to decide how to eliminate the consequences of violations that inadmissibly affected referendum results, e.g. by annulling the vote in its entirety and by requiring that it be repeated, and also, if necessary, by imposing on the Government or other competent authorities or participants in the referendum procedure (e.g. in the referendum campaign) certain limitations or obligations to

act. Without such, in the opinion of the applicant, it is possible that judicial protection is ineffective also in the referendum dispute at issue. As a result of such regulation that is so deficient and that cannot be substituted for by mere *mutatis mutandis* application the Act on the Judicial Review of Administrative Acts (Official Gazette RS, No. 105/06, 62/10, and 109/12 – hereinafter referred to as the AJRAA-1), the RPIA is inconsistent with both Article 2 and Articles 22 and 23 of the Constitution.

4. As regards the ERCA, the applicant concludes that the amount of funds the Government can use for the purpose of a referendum campaign is in fact limited by law, which contributes to limiting inadmissible influence on the equality of the organisers of referendum campaigns. However, it is allegedly impossible to deem the regulation in the ERCA that allows the Government to freely decide, without being regulated by law, to participate in a referendum campaign and to use public funds therein (Article 3 and the fifth paragraph of Article 4 of the ERCA) to be consistent with the Constitution, as such can entail an inadmissible interference with the right to a fair referendum procedure. The fundamental requirement of a fair referendum procedure is precisely to establish the conditions for ensuring that voters are informed to the necessary degree with regard to all aspects that are significant for deciding and free decision-making. Allegedly, in view of the constitutional requirements of a fair referendum procedure, the Government should not – at least not without strict and express limitations – allocate to itself or use special (additional) public funds. Although everyone contributes [to the pool of] public funds, in the opinion of the applicant they must not be used merely to benefit those who concur with the position of the Government, as this may cause unequal treatment in the management of public affairs within the framework of decision-making in a referendum (Articles 44 and 90 of the Constitution). As long as the Government ensures the neutrality of information from the viewpoint of those who support and those who oppose a draft law of the Government and the campaign is not biased, also the use of public funds cannot be disputable, according to the applicant. On the other hand, the applicant also sees no reason for the use of public funds by the Government to be prohibited in each and every case, as it is possible for the Government to use public funds in order to achieve goals that are consistent with ensuring a free referendum procedure, in particular when an imbalance of power, arguments, and information arises in a referendum campaign due to powerful financial interests or other individual interests, which, by financing the campaign against the entry into force of the law in question, jeopardise the public interest as viewed by the Government. Allegedly, it is not possible by means of any of the established methods of legal interpretation to decipher from the ERCA even the objective (i.e. the principle in favour) of the Government's use of public funds in order to organise a referendum campaign, nor limitations or orientations regarding the

use of these funds that would ensure that they are used in conformity with the Constitution and that there exists *ex post* effective judicial control over the correct use thereof. Such regulation of the sixth paragraph of Article 4 of the ERCA thus allegedly inadmissibly interferes with the requirement of the clarity and precision of regulations and could thus inadmissibly interfere with the right to a free referendum procedure (Article 2 in conjunction with Articles 44 and 90 of the Constitution). Allegedly, the ERCA (like the RPIA) also does not regulate the consequences of rules on the financing of a referendum campaign from the viewpoint of the consequences for the results of the referendum.

5. The request was sent to the National Assembly, which states in its reply thereto that Article 53a of the RPIA entered into force on the basis of Decision of the Constitutional Court No. U-I-63/99, dated 8 May 2003 (Official Gazette RS No. 48/03, and OdlUS XII, 41), in which the Constitutional Court held that the RPIA in force at the time was inconsistent with Article 23 of the Constitution, as it failed to ensure effective judicial protection of the right to vote in a referendum. The National Assembly draws attention to the fact that the Constitutional Court determined the manner of execution of its decision, which was essentially similar to the provisions of Articles 53a and 53b of the RPIA. The National Assembly opines that in Order No. U-I-130/17, Up-732/17, dated 28 September 2017 (Official Gazette RS, No. 63/17), the Constitutional Court already adopted a constitutionally consistent interpretation of Article 53a of the RPIA as regards all three questions raised by the applicant, as allegedly they entail a substantively inseparable and co-dependent whole. Allegedly, the Order expressly determined the substance of referendum disputes (all irregularities that could have affected or did affect the fairness of this procedure, and the results thereof, can be claimed therein) and thus also explained the substantive assessment criteria in a referendum dispute (the Supreme Court can only interfere with referendum results if it establishes irregularities that could have affected or did affect the results) and the powers of the Supreme Court in such a dispute. As regards the powers [of the Supreme Court], the National Assembly opines that they are determined by the first paragraph of Article 52 of the RPIA, which determines the powers of the SEC, which on the basis of legal analogy must also be applied in a referendum dispute before the Supreme Court. Furthermore, the power to decide allegedly also follows from Article 66 of the AJRAA-1, which in a procedure initiated by an action for the protection of human rights and fundamental freedoms (Article 4 of the AJRAA-1) confers very extensive powers on the court in such dispute, by which effective judicial protection of human rights and fundamental freedoms is ensured. As regards the ERCA, the National Assembly states that the right to organise and actively carry out a referendum campaign follows from the constitutional powers of the Government, in particular from its power to propose and implement laws, and is an integral part thereof. For such

reason, the Government allegedly urgently needs appropriate budgetary funds, as – being a public law entity – it cannot obtain other funds for a referendum campaign. The fact that the Government needs appropriate budgetary funds for financing a referendum campaign that it organises is allegedly implied in the reasoning of Decision of the Constitutional Court No. U-I-295/07, dated 22 October 2008 (Official Gazette RS, No. 105/08, and OdlUS XVII, 56), which refers to the National Council as the proposer of a referendum at the time and as the organiser of a referendum campaign. The National Assembly opines that also the Government is a public law entity, as is the National Council, and that in the legislative procedure it enjoys certain constitutional powers; as the organiser of a referendum campaign it thus needs appropriate budgetary funds to effectively exercise such powers. The National Assembly stresses that the expenditure of budgetary funds is strictly limited, as the Government may only allocate to the competent service up to 25% of the funds that organisers of referendum campaigns may receive in accordance with the general limitation. It thus opines that the allegation of the unequal position of organisers of referendum campaigns in terms of funds available is unfounded. The National Assembly alleges that as a result of these limitations the challenged provision ensures proportionate spending of budgetary funds and thereby prevents the referendum campaign of one side resulting in an imbalanced, non-objective, or impartial referendum campaign as a whole, and also ensures transparent financing of the Government's referendum campaign.

6. Also the Government submitted an opinion as to the request. It states that the regulation of referendum disputes in Article 53a of the RPIA was adopted on the basis of Decision of the Constitutional Court No. U-I-63/99 and that, furthermore, the Supreme Court has the power, if the first paragraph of Article 66 of the AJRAA-1 (proceedings for the judicial review of administrative acts in order to protect human rights) is applied *mutatis mutandis*, “to determine whatever necessary to eliminate an interference with human rights and fundamental freedoms and to re-establish a lawful situation,” which allegedly also includes an authorisation to annul [the results of] the voting in a referendum and to order voting anew. The Government states that from Order of the Constitutional Court No. U-I-130/17, Up-732/17, as well as from legal theory, it follows that due to the objective character of referendum disputes, an interference with referendum results is only admissible when the irregularities are such that the referendum results would have been different had these irregularities not existed. Different results allegedly entail the rejection of the law [at issue] in the referendum if, according to the established results, the law was not rejected, or vice versa. The Government opines that there is no unconstitutional legal gap in the RPIA and that the regulation of judicial protection in a referendum dispute is in conformity with the Constitution, and that it ensures effective judicial protection (Article 23 of

the Constitution). It states that, therefore, in the case at issue legal interest for a decision on the constitutionality of the RPIA by the Constitutional Court does not exist. As regards the ERCA, the Government alleges that it is responsible for the situation in all areas in the state; therefore, also in a legislative referendum procedure, which entails a part of the legislative procedure, it must have the possibility to be involved in the referendum campaign as the organiser of a campaign, which is not possible to achieve without appropriate funds. The Government also refers to Decision of the Constitutional Court No. U-I-295/07, in which the Constitutional Court held that the National Council, acting in accordance with its constitutional powers, was able to participate in a referendum campaign as an – at the time – entitled applicant of a request to call a legislative referendum, due to which it had to be ensured appropriate funds to this end. The Government opines that the same applies to the Government itself, in view of its constitutional position and its tasks. Allegedly, the referendum regarding the ARCOMST is an example of a decision that is of key importance for the future development of the state and is related to complex consequences in the international arena. For such reason, the Government, in view of its constitutional position and competences as an authority responsible for implementing the state's policies, should allegedly present the positions in favour of the ARCOMST within the framework of the referendum campaign. Allegedly, without being presented the facts as regards the content and the significance of the Act, and the consequences of the possible rejection thereof in a referendum, voters clearly cannot obtain all the information necessary to decide on the matter. As regards the amount of funds allocated for a referendum campaign, the Government considers it appropriately limited. The Government states that with funds limited to such a level it only can provide basic information to voters and, considering such a limitation, it states that it is absolutely impossible for a situation to occur wherein the Government would act in the campaign in an excessive or biased manner, thereby affecting the results of a referendum. It also alleges that there exists a public interest in the ARCOMST entering into force as soon as possible.

7. Vili Kovačič, the appellant in the stayed referendum procedure (hereinafter referred to as the appellant), declared his participation in proceedings to review the constitutionality of the challenged laws. He concurs with the position of the Supreme Court, i.e. that effective judicial protection of the rights guaranteed on the basis of the constitutional and statutory regulation of referendums is necessary and that the procedure for the protection of rights requires better legislative regulation. However, he is opposed to the finding of the Supreme Court that as a result of certain unconstitutional legal gaps the statutory regulation of referendum disputes currently in force prevents the Supreme Court from deciding in the referendum dispute at hand and from abrogating the referendum [results]. He opines that in cases where it is manifest that a

referendum is unfair and that violations of international standards and of a fair campaign have occurred, the state (i.e. either the Supreme Court or the Constitutional Court) should be able, merely on the basis of the Constitution, to establish a violation, to annul the decision of the voting authorities, and to call a new referendum, even if no detailed regulation regarding the appeal procedure exists. He alleges that Order of the Constitutional Court No. U-I-130/17, Up-732/17, and international constitutional case law provide the Supreme Court with a sufficiently clear framework for adopting a decision. Proceedings for the judicial review of administrative acts and civil proceedings also provide a sufficient framework for the Supreme Court to be able to consider the case and to decide on the dispute. He opines that the Constitutional Court has already explained in Order No. U-I-130/17, Up-732/17 that voters can allege any and all irregularities. The regulation is allegedly also sufficiently clear as regards the criteria for abrogating a referendum, as international constitutional case law, from which it is allegedly clear what is deemed to be a “fair and free” election and voting, provides sufficient orientation as to when referendum results must be annulled. The appellant draws attention to the recent decision by which the Constitutional Court of Austria annulled a presidential election and ordered that it be repeated, although no violation was established that could have affected the results. It allegedly clearly follows also from the case law of other democratic states and the European Court of Human Rights, and from international organisations (i.e. the Organization for Security and Co-operation in Europe and the Council of Europe), that courts must be exceptionally strict and sensitive to the slightest irregularities as regards elections. The appellant also disagrees with the statement of the Supreme Court that the RPIA should determine some sort of quorum or a minimum number of voters who jointly can claim a violation in a referendum procedure, as this would allegedly entail a limitation and even an encroachment on both his and other voters’ human right to a legal remedy. He proposes that the Constitutional Court in this part dismiss the request of the Supreme Court as unfounded and require it to apply the RPIA in a constitutionally consistent manner, namely such that it enables the appellant [to exercise] all the rights he has in proceedings before a court, including the right to a public hearing and to hear witnesses, and [ensures that courts] are exceptionally sensitive to irregularities and, if they establish irregularities, that they annul the results of the referendum and order that the referendum be repeated. The appellant concurs with the findings of the Supreme Court as to the unconstitutionality of the sixth paragraph of Article 4 of the ERCA. In his submission dated 5 January 2018, he additionally states that in the event the Constitutional Court does not concur with his allegations, he is submitting a “subordinate separate petition” for the initiation of a procedure for the review of the constitutionality of Article 3 and the sixth paragraph of Article 4 of the ERCA and Order of the Government No. 02401-7-2017/2, dated 20 July 2017, by which the Government appointed a task force to

organise a referendum campaign in favour of the entry into force of the ARCOMST and for coordinating communication therein, as well as of Government Order No. 41012-50/2017/2, dated 27 July 2017 on the allocation of funds to this task force enabling it to participate in the referendum campaign regarding the ARCOMST.

8. The submission of the appellant was submitted to the applicant and the National Assembly.

9. The Constitutional Court sent the reply of the National Assembly and the opinion of the Government to the applicant and the appellant, who replied thereto. The appellant insists upon his position stated in his submission to the Constitutional Court dated 5 January 2018 and in his petition for the initiation of proceedings for a review of constitutionality. He alleges that the EUR 97,000 that the Government allocated to itself for the campaign, together with the other discriminatory conditions, significantly affected the number of voters participating in the referendum and the results thereof. He also draws attention to other irregularities in the referendum campaign that the Government allegedly committed and that allegedly put him, a participant [in the procedure], as a petitioner of the referendum and as the organiser of a referendum campaign regarding the ARCOMST, in an unequal position, and affected the referendum results. He claims that the abrogation of the ARCOMST in a referendum is in the public interest, not its entry into force, which would entail the most expensive, the longest in terms of time needed for construction, and the most harmful solution as regards the construction of the second track of the railway line. He proposes that the Constitutional Court carry out a public hearing.

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10. The Constitutional Court did not accept the proposal of the appellant to decide after carrying out a public hearing because it is not necessary to hold a public hearing in order to adopt a decision after reviewing the constitutionality of challenged laws.

11. Furthermore, the Constitutional Court also did not decide on the subordinate petition of the appellant in the proceedings at issue. In proceedings for a review of constitutionality, a party to proceedings stayed by a court on the basis of Article 156 of the Constitution has the right to make a statement on the allegations of the participants in such proceedings. However, in such a framework, he or she does not have the right to file subordinate legal remedies.

Review of the RPIA

12. The right to vote in a referendum referred to in the third paragraph of Article 90 of the Constitution entails a form of citizens' direct participation in the management of public affairs, therefore it is constitutionally protected by Article 44 of the Constitution. Like any other right, also the right to vote in a referendum has to be ensured judicial protection (the first paragraph of Article 23 of the Constitution). Since Article 44 of the Constitution protects this right also as a human right, the fourth paragraph of Article 15 of the Constitution applies thereto as well, which in particular and expressly guarantees judicial protection of human rights and fundamental freedoms.[1] The obligation of the legislature to designate the competent courts and to determine the decision-making procedure and powers thereof (the types of decisions) in order to ensure effective exercise of the right to judicial protection follows already from these constitutional provisions. Furthermore, the requirement that laws must regulate rights in a clear and precise manner (i.e. the principle of the clarity and precision of regulations) follows already from the principles of a state governed by the rule of law (Article 2 of the Constitution). Not least at all, also the second paragraph of Article 15 of the Constitution determines that the manner in which human rights and fundamental freedoms are exercised shall be regulated by law where this is necessary due to the particular nature of an individual right or freedom. Clear and precise statutory regulation is necessary in order to ensure effective exercise of the right to judicial protection of the right to vote in a referendum.

13. The right to vote in a referendum has (like the right to vote) a special legal nature; namely, despite being a personal right, it can only be exercised in a collective manner, i.e. together with other voters in a manner organised in advance and according to a procedure determined in advance.[2] Essentially, certain principles apply thereto that are equal to those that apply to the right to vote, in particular the principles of universal suffrage, equality, and free and secret voting. Due to these similarities, also the requirements as to judicial protection of the right to vote in a referendum are similar to the requirements concerning judicial protection of the right to vote in an election which in both instances must be adapted to the special nature of these rights. Judicial protection of the right to vote in a referendum is not primarily intended to protect the subjective legal position of individual voters, but rather the public interest and constitutional values. These constitutional values include a fair referendum procedure (i.e. observance of referendum rules), the correctness of the referendum results, and the trust of the citizens in the fair implementation of the referendum.[3] The objective character of judicial protection of the right to vote in a referendum is ensured in such a manner that not all established irregularities in the referendum procedure are taken into account, but only those that affected or

could have affected the referendum results.^[4] The irregularities that could not have affected the referendum results cannot be taken into account, as this would inadmissibly affect the effective exercise of the right of other voters to vote in a referendum and the effective implementation of the referendum in general. The collective exercise of the right to vote [in a referendum] entails that it is an inherent characteristic of this right that only those irregularities that could have had a decisive influence on the “collective” referendum results can be relevant. The only possible exception could be irregularities whose quality (not quantity) would fundamentally compromise the objective fairness of the referendum procedure (e.g. the discrimination of certain groups as regards the existence of the right to vote [in a referendum]). In such instances, it is necessary to assess whether – considering the circumstances of the case and the established irregularities – a reasonable person would doubt the fairness of the referendum results.

14. In a legislative referendum, voters decide whether to confirm a law adopted by the National Assembly prior to its promulgation (Article 9 of the RPIA). Within eight days following the finality of the report of the SEC on the referendum results, the National Assembly promulgates the decision adopted in the referendum and publishes it in the Official Gazette of the RS (Article 53b of the RPIA). Only after such publication does the National Assembly send the law that was confirmed in the referendum to the President of the Republic for promulgation (the first paragraph of Article 91 of the Constitution). Since a referendum dispute suspends the finality of and causes uncertainty as to the entry into force of the law in question, it is necessary that it be reasonably time limited.

15. The special character of the right to vote in a referendum and the requirement that referendum disputes be resolved as quickly as possible require special, expeditious, and effective judicial protection in such a dispute. To this end, the legislature must adopt a regulation that fulfils the fundamental requirements of judicial proceedings – i.e. it must determine who, when, and how referendum results can be challenged and which irregularities in the referendum procedure can be claimed. The legislature must determine by law the legal remedy (e.g. an appeal, an action, a request), the entitled applicants who may file the legal remedy, the phase of the referendum procedure in which the legal remedy may be filed and the time limit therefor, the grounds on which the legal remedy may be filed (i.e. the substance of objections), the competent court, the rules of judicial proceedings, and the powers of the court when deciding on a case. The law in question must *inter alia* determine appropriate time limits for the procedural steps of the parties and the court, the rules regarding the burden of allegation

and the burden of proof of the parties, the rules regarding the adversarial procedure, and substantive assessment criteria.

16. Due to the pronounced objective nature of judicial protection of the right to vote in a referendum, only referendum results as such can be challenged in a referendum dispute, and all the alleged irregularities can be claimed therein, including the irregularities in the referendum campaign that affected or could have affected the fairness of the procedure as a whole (not only from the viewpoint of individual voters), and thus the correctness of the results.^[5] The irregularities that can lead to the abrogation in part or in whole of the voting or to its repetition are only those that affected or could have affected the referendum results due to their quantity or quality.^[6] Affecting the referendum results means that an irregularity is of such nature that it could have led to different (i.e. opposite) final results of the voting. If the [competent] court establishes such irregularities in the procedure, it must have the power to annul in full or in part the voting and to order new voting in full or in part. In the event established irregularities that affected or could have affected the referendum results can be eliminated by merely establishing different referendum results, courts must have the power to do so. In view of the above, a person that has the right to initiate judicial protection proceedings must allege and substantiate that in the referendum procedure such irregularities occurred that affected or could have affected the referendum results, such that the results would have been different had the irregularities not occurred. The court must verify the person's allegations and establish whether they are justified, and decide on the basis of the established state of the facts. The person claiming the existence of conduct that entails a relevant irregularity must provide appropriate proof substantiating the claims. If irregularities occurred that affected or could have affected the referendum results, the court must annul the voting in the referendum and order that it be repeated if these irregularities cannot be eliminated by establishing different referendum results (even by possibly establishing different partial results of voting at individual polling stations that lead to different results of the referendum as a whole). Which established irregularities in the referendum procedure are such that affected or could have affected the referendum results can only be a matter of assessment of the competent court in each individual referendum dispute. Provided that, on the basis of the established facts, the [competent] court establishes that no irregularities have occurred that affected or could have affected the referendum results, it must have the power to dismiss the legal remedy.

17. Also the Code of Good Practice on Referendums (hereinafter referred to as the Code) adopted by the so-called Venice Commission draws attention to the need for appropriate regulation of judicial protection of the right to vote in a

referendum. In fact, the Code is not a directly binding legal source; however, the recommendations therein to a significant degree overlap with the requirements in the Constitution, therefore they can be constitutionally relevant. Chapter 3.3 [Section II] of the Code, which refers to the system of effective judicial protection, determines a series of recommendations that the Member States of the Council of Europe should observe. The recommendations that in particular merit mention state that the final decision regarding observance of the rules of a referendum procedure must always be reserved for a court, and that the decision-making procedure, the competent authorities, and the powers thereof must be clearly determined, and courts must have the authority to annul the referendum in full or in part if they establish irregularities that may have affected the outcome, and to order that the voting be repeated. The Code also stresses that all voters must be entitled to a legal remedy, with regard to which a reasonable quorum may be imposed regarding the legal remedies of voters against the results of a referendum. Short time limits must be prescribed for filing legal remedies and for deciding thereon, and the adversarial principle must be observed in such procedure.

18. The Constitution does not include provisions on judicial protection of the right to vote in a referendum.^[7] In light of the absence of express constitutional provisions, it falls within the discretion of the legislature as to which court is to be competent for ensuring judicial protection of the right to vote in a referendum. The legislature conferred the competence of the adjudicating authority on the Administrative Court insofar as irregularities relating to the work of voting authorities are concerned (the third paragraph of Article 52 and Article 53 of the RPIA). The competence of the adjudicating authority as regards the report of the SEC on referendum results was conferred on the Supreme Court. The legislature determined in Article 53a of the RPIA that any voter may file an appeal against the report of the SEC on the results of voting in a referendum within three days of its publication in the Official Gazette of the Republic of Slovenia. The Supreme Court must decide on an appeal within thirty days. No appeal is allowed against the decision of the Supreme Court. The Supreme Court decides by *mutatis mutandis* application of the law regulating proceedings for the judicial review of administrative acts. The RPIA does not contain any other provisions concerning judicial protection of the right to vote in a referendum.

19. In light of the request of the applicant for a review of the constitutionality of the RPIA, the Constitutional Court only carried out a review insofar as it refers to a referendum dispute before the Supreme Court, which is competent to decide on a referendum dispute as a regular court of the first and last instance. The Constitutional Court did not have to adopt a position as to whether the legislature, in order to prevent a potentially excessive number of appeals, should require a

quorum of voters who may file an appeal before the Supreme Court against established referendum results. Namely, the appeal was filed in conformity with the regulation in force, which allows every voter to initiate a referendum dispute.^[8]

20. In a referendum dispute, the Supreme Court decides by *mutatis mutandis* application of the law regulating proceedings for the judicial review of administrative acts (the third paragraph of Article 53a in conjunction with the third paragraph of Article 53 of the RPIA). *Mutatis mutandis* application of statutory provisions does not allow the Supreme Court to substantively adapt, complement, or modify legal sources to the degree that the Supreme Court would substitute for the legislature. *Mutatis mutandis* application of a law entails statutorily determined analogous application of other statutory provisions that otherwise do not expressly refer to a legally unregulated legal situation. In this context, the statutory provisions referred to by a law can be appropriately (e.g. literally, systematically, or logically) adapted. If the Supreme Court does not have support for analogous application of the procedural rules referred to by a law because the elements of both procedures do not match in substantive terms, this entails a classic legal gap in the law.^[9] The existence of legal gaps in the legal order is in itself not inconsistent with the Constitution. Legal gaps can be filled by the established means of legal interpretation. If this is not possible and if the requirement of express statutory regulation follows from the Constitution, without which an individual human right cannot be exercised, this entails a so-called unconstitutional legal gap.

21. Proceedings for the judicial review of administrative acts as regulated by the AJRAA-1, which, *mutatis mutandis*, also apply in judicial protection proceedings regarding the right to vote in a referendum before the Supreme Court (i.e. a referendum dispute) do not include all of the elements that should be determined in order for the right to judicial protection determined by the first paragraph of Article 23 of the Constitution and the fourth paragraph of Article 15 of the Constitution to be effectively exercised as regards the right to vote in a referendum (the third paragraph of Article 90 in conjunction with Article 44 of the Constitution). From this perspective, the regulation in the RPIA is deficient. It does not follow from any law which irregularities can be alleged in a referendum dispute, nor are the criteria in accordance with which courts should assess a violation of the rules of a referendum procedure or the powers that the Supreme Court has during decision-making determined. The powers the Supreme Court has in accordance with the AJRAA-1 merely entail the authorisation to annul the report of the SEC and the possibility to assess the correctness and legality of the report as such, as well as the legality of the decision-making procedure of the SEC. Neither the RPIA nor the AJRAA-1 determine the power to annul a

referendum or to order new voting, especially if the established irregularities do not stem from the sphere of the SEC. There are also no special procedural provisions in laws that are adapted to the special nature of the right to vote in a referendum and the special nature of a referendum dispute (e.g. shorter procedural time limits, the determination of the burden of allegation, and the burden of proof).

22. The National Assembly and the Government allege that Article 53a of the RPIA is a consequence of Decision No. U-I-63/99, in which the Constitutional Court established the unconstitutionality of the RPIA in force at the time because it did not ensure effective and comprehensive protection of the right to vote in a referendum. The Constitutional Court also adopted the manner of execution of its decision, namely by determining, *inter alia*, (1) that any voter can file an appeal against the report of the State Election Commission on referendum results within three days of the publication thereof in the Official Gazette of the Republic of Slovenia, (2) that the Supreme Court shall decide on the appeal within thirty days and that no appeal is allowed against its decision, and (3) that the first paragraph of Article 52 and the second and third paragraphs of Article 53 of the RPIA apply *mutatis mutandis* in deciding. On the basis of that Decision of the Constitutional Court, the legislature adopted, by the Act Amending the Referendum and Popular Initiative Act (Official Gazette RS, No. 83/04 – hereinafter referred to as the RPIA-C), the new Article 53a of the RPIA, which is currently in force. The Government opines that Article 53a of the RPIA is not inconsistent with the Constitution, as only the manner of execution determined in the mentioned Decision of the Constitutional Court was allegedly transferred into law; a manner of execution as such cannot be unconstitutional. The legislature reacted to the mentioned Decision of the Constitutional Court by integrating the manner of execution into the RPIA-C, however with a significant difference – in Article 53a it determined that only the second and third paragraphs of Article 53 of the RPIA shall apply in proceedings before the Supreme Court, while the legislature did not also prescribe the application of the first paragraph of Article 52, which is crucial because it contains the (SEC's) authorisation to annul voting and order new voting. In this context, it must be underlined that it is precisely in the mentioned Decision that the Constitutional Court held that so-called subsidiary proceedings for the judicial review of administrative acts referred to in the second paragraph of Article 157 of the Constitution do not fulfil the requirements of judicial protection of the right to vote in a referendum. It expressly drew attention to the fact that, in addition to the issues mentioned in the present Decision, the legislature must also regulate other issues that may arise in order to ensure effective judicial protection of the right to vote in a referendum. When, in a decision by which it establishes that a statutory regulation is unconstitutional, the Constitutional Court temporarily regulates, via the means of execution of its

decision, individual issues that were the subject of the constitutional review, it limits itself to establishing the most urgent rules in light of the constitutional review that it carried out. The question of whether the authorisations of a court determined by the AJRAA-1 are consistent with the Constitution is not addressed in the present Decision. In remedying an established unconstitutionality, the legislature must not only ensure that it remedy the expressly established unconstitutionality, but also that it regulate all the issues related thereto. In doing so, it is bound by the Constitution. It follows from the opinion of the Government that the legislature did not have to regulate the powers of the Supreme Court already due to the fact that, in accordance with *mutatis mutandis* application of the first paragraph of Article 66 of the AJRAA-1 (subsidiary proceedings for the judicial review of administrative acts), the Supreme Court has the power “to determine whatever necessary to eliminate an interference with human rights and fundamental freedoms and to re-establish a lawful situation,” which allegedly also includes annulling [the results of] voting in a referendum. The powers referred to in the mentioned provision of the AJRAA-1 are intended for a court deciding precisely in subsidiary proceedings for the judicial review of administrative acts, in accordance with which courts may only decide if the legislature did not provide any other judicial protection. The legislature regulated referendum disputes by law. The court deciding therein must have powers determined clearly and in advance that it can use when deciding. The choice thereof cannot be subject to the court’s discretion. The voters and the proposer of a referendum must know even prior to the beginning of the referendum procedure what possible irregularities can be claimed in judicial proceedings and what powers the court will have [therein], provided that it grants their legal remedy. Only in such a manner will they be able to appropriately substantiate their legal remedy and request that the court, considering the nature of the claimed irregularities, adopt an appropriate decision. Therefore, it is impossible to concur with the position of the opposing party and the Government. It follows already from the principles of the legal certainty and predictability of statutory regulation, which are two principles of a state governed by the rule of law (Article 2 of the Constitution), that all of the essential elements of judicial protection must be clearly and precisely determined by law, when so required by the special nature of the right at issue and of judicial protection. The right to vote in a referendum and referendum disputes are certainly such instances that require clear, precise, and comprehensive statutory regulation of judicial protection, to which attention is expressly drawn by the recommendations in the Code.

23. In view of the above, it is evident that neither the RPIA nor the AJRAA-1 contain provisions adapted to resolving referendum disputes, which entails that judicial protection of the right to vote in a referendum is not regulated in a constitutionally consistent manner. Although such indeterminacy and deficiency

(i.e. a legal gap) in the statutory regulation significantly affect the exercise of the right to judicial protection of the right to vote in a referendum (the first paragraph of Article 23 and the third paragraph of Article 90 in conjunction with Article 44 of the Constitution), the Constitutional Court established that the challenged regulation is unconstitutional already because it does not fulfil the requirement of the clarity and precision of regulations stemming from Article 2 of the Constitution (Point 1 of the operative provisions). Consequently, it did not assess the other allegations of the applicant. As the case at issue concerns an instance where the legislature did not regulate a certain issue that it should have regulated, abrogation is not possible. Therefore, on the basis of the first paragraph of Article 48 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text and 109/12 – hereinafter referred to as the CCA), the Constitutional Court adopted a declaratory decision. On the basis of the second paragraph of Article 48 of the CCA, it imposed on the legislature the obligation to remedy the established inconsistency within the usual time period (Point 3 of the operative provisions).

24. In order for the Supreme Court to be able to decide in the judicial proceedings it stayed, on the basis of the second paragraph of Article 40 of the CCA the Constitutional Court adopted the manner of implementation of its Decision (Points 4 and 5 of the operative provisions). In this respect, the Constitutional Court draws attention to the fact that by such manner of implementation of its Decision, in view of the constitutional review it carried out, also this time it temporarily determined only the most necessary rules enabling the Supreme Court to decide in the judicial proceedings it stayed due to the filing of the request for a review of the constitutionality of the laws that it has to apply in its decision-making. The legislature will have to respond appropriately to the Decision of the Constitutional Court and ensure that it comprehensively regulates all the questions relating to referendum disputes. This entails the extensive, systemic regulation of the legal (not merely judicial) protection of the referendum, which also has to take into consideration the position and powers of the SEC and Articles 51 through 53 of the RPIA (the issue of double judicial protection before the Administrative Court and the Supreme Court).

25. In the stayed proceedings the Supreme Court will have to take into account the reasons that led to the establishment of the unconstitutionality of the challenged Act. As the Constitutional Court has already stressed a number of times,^[10] in the event a declaratory judgment [is adopted], both the operative provisions and the reasons from the reasoning due to which the Constitutional Court established the unconstitutionality of the law are binding on courts. The Supreme Court can dismiss an appeal if it decides that the claimed irregularities are such that they were utterly incapable of affecting the results of the

referendum. If during the decision-making the Supreme Court establishes that in the course of preparations for voting, or during the exercise thereof, violations of the referendum procedure occurred and that the established possible irregularities are such that they affected or could have affected the referendum results, it annuls the voting and orders new voting. If the effect of the irregularities cannot be established in terms of numbers, it has to be assessed according to all the circumstances of the case and at the discretion of the Supreme Court whether the claimed irregularity could have affected the referendum results. In doing so, all the circumstances of the case must be taken into consideration, in particular the participation percentage (the fourth paragraph of Article 90 of the Constitution), the difference in the number of votes *pro* and *contra*, the weight of all the established irregularities, as well as their nature and importance within the framework of voting. If there exists a possibility that without the established irregularities the referendum results would have been different, but in light of all the circumstances, this possibility is so minuscule that logically it is not even relevant, then the court does not have to annul the referendum results.[11] Taking the above into consideration, in the manner of execution the Constitutional Court also determined the powers of the Supreme Court when deciding. On the basis of the above, the Supreme Court will be able to determine the concrete state of the facts regarding the alleged irregularities in the referendum procedure and, with respect thereto, adopt an appropriate decision in conformity with the determined powers as listed in Points 4 and 5 of the reasoning of the present Decision. If it does not establish irregularities that affected or could have affected the referendum results, it shall dismiss the appeal. If it establishes irregularities that affected or could have affected the referendum results, the Supreme Court also has the power to annul the voting and to order new voting. In the event of such, the SEC will have to implement its decision in a short period of time. If the Supreme Court annuls referendum results due to irregularities in the referendum campaign, then, when determining the new date of voting, the SEC will have to take into consideration that prior to the day of voting a new 30-day referendum campaign will be carried out. In such instances, the SEC will also have to carry out all the actions that fall within its competence in order to allow new voting to be carried out. The Judgment of the Supreme Court according to which referendum results are annulled, a new vote ordered, or different results established, and the order of the SEC, must be published in the Official Gazette of the Republic of Slovenia in order to allow all voters to promptly learn thereof.

B – II

The Review of the ERCA

26. The applicant alleges the unconstitutionality of the sixth paragraph of Article 4 of the ERCA, which determines that, by an order, the Government may allocate funds for a referendum campaign to the competent Government service when the latter is the organiser of a referendum campaign. The funds for a referendum campaign allocated to the competent Government service must not exceed 25% of the admissible amount of funds that other organisers of referendum campaigns may receive (the sixth paragraph of Article 23 of the ERCA). The Government must not obtain other funds for carrying out the referendum campaign.

27. With respect to the challenged regulation and the allegations of the applicant, four questions arise, namely the following: 1) whether, in accordance with the ERCA, the Government (or a service thereof) may carry out its own referendum campaign; 2) provided that it may organise one, whether it may allocate budgetary funds to itself for carrying out the campaign; 3) provided that the Government must not carry out a referendum campaign, whether it may nevertheless participate in the referendum procedure; and 4) provided that it may participate in the referendum procedure, whether it may use budgetary funds for such purpose. The first question must be answered first. However, this is not possible by merely assessing the sixth paragraph of Article 4 of the ERCA, which is expressly challenged by the applicant, as also a review of the first paragraph of Article 3 of the ERCA must be carried out, which enables the Government or a service thereof to become the organiser of a referendum campaign. Since the two statutory provisions are interconnected, the Constitutional Court, on the basis of Article 30 of the CCA, initiated proceedings to review the constitutionality of the mentioned provision of the ERCA. As the participants in proceedings have already made a statement as to the content of both of them, the Constitutional Court did not repeat the request that they make a statement on the constitutionality of the first paragraph of Article 3 of the ERCA.

28. Certain general principles that apply to the right to vote determined by Article 43 of the Constitution, including the right to free voting, [also] apply to the right to vote in a referendum, which is protected as a human right within the framework of Article 44 of the Constitution. Substantively, this right includes the possibility of voters to freely form an opinion or their political will as regards certain issues that are the subject of a referendum, i.e. on the basis of their own beliefs, perceptions, and understanding of the content that is the subject of a referendum. Being informed is crucial to exercise of the right to free voting, i.e. knowing all the data, content, circumstances, and reasons that may be important for freely forming one's informed opinion. In referendum decision-making

entailing voting in favour of or against the entry into force of a law that the legislature has already adopted, voters must be informed of the arguments of both sides, both those supporting the law and those opposing it. Particularly in a legislative referendum, where a decision is made to vote for or against a legislative proposal, it is crucial that objective, comprehensive, and transparent information be provided to voters.

29. That voters are adequately informed can be ensured in various ways and in different periods of time. One of the key ways is the referendum campaign, which lasts a short period of time directly prior to the day of the voting in the referendum and is the formalised form of informing voters of the referendum question. In the formal sense, the referendum campaign is defined by the ERCA, which determines in the third paragraph of Article 1 that a referendum campaign encompasses advertisements and other types of propaganda whose purpose is to influence the decision-making of voters in a referendum. This mainly includes propaganda in the media, electronic publications, and propaganda by means of telecommunication services, the posting of posters, and public gatherings (the fifth paragraph of Article 1 in conjunction with the fourth paragraph of Article 1 of the ERCA). The referendum campaign thus encompasses activities that are precisely determined by law in terms of substance and time.^[12] A referendum campaign is a series of organised communication activities that include mass media and pursue a precisely determined goal, namely to convince voters to vote for a law or against it. Therefore, by its nature, a campaign is biased and directed towards a precisely determined goal. It promotes either the confirmation or rejection of a law. Because it ensures a plurality of perspectives, a campaign is important for the effective exercise of the right to free voting in a referendum,^[13] which entails the realisation of voters' free choice. Therefore, it is important that both those advocating the law and those opposing it have the possibility to freely participate in a campaign.

30. It is precisely in order to enable voters to have a free choice that the Government has a position in a referendum campaign that is different than that of those who may in a biased manner promote only one or the other solution, which is a reflection of their freedom of expression.

31. The Government is an authority of the executive power (the second paragraph of Article 3 of the Constitution) and the highest authority of the state administration of the Republic of Slovenia (Article 1 of the Government of the Republic of Slovenia Act, Official Gazette RS Nos. 24/05 – official consolidated text, 109/08, 8/12, 21/13, 65/14, and 55/17 – hereinafter referred to as the GRSA). The Government determines, directs, and coordinates the implementation of the state's policies in accordance with the Constitution, laws,

and other general acts of the National Assembly. To this end, it issues regulations and adopts legal, political, economic, financial, organisational, and other measures necessary for ensuring the development of the state and for regulating the conditions in all fields falling within the competences of the state. It proposes that the National Assembly adopt laws, the budget of the state, national programmes, and other general acts by which principled and long-term political orientations for individual fields falling within the competences of the state are determined. The Government is accountable to the National Assembly (Article 110 of the Constitution), in particular regarding the policies of the state it pursues and the conditions in all fields falling within the competences of the state; it is also responsible for implementing laws and other regulations of the National Assembly and for the overall functioning of the state administration (the first paragraph of Article 4 of the GRSA). The Government pursues the policies of the state, acts on behalf of the state, and is responsible for the situation in all fields. As the proposer of the majority of the laws, it is in its interest that they are adopted and that they enter into force.

32. Considering the described position of the Government, one must concur with the applicant that the mere possibility of the Government participating in a referendum procedure is not constitutionally disputable. The Government is authorised to advocate in a public debate a law adopted by the National Assembly and to present its position thereon, and it may also present the consequences of the law not entering into force that it deems negative. The Government may even have the duty to inform the public of all information necessary for individual voters to form their political will. The Government can also fulfil this duty during a referendum campaign. However, in proceeding in such a manner, it must not hinder or restrict the freedom to form a position in the referendum procedure. The Government must convey information in a fair and reserved manner, namely information both in favour of and opposing the law at issue. Nevertheless, the Government may express its position thereon. Thus, such provision of information must be objective, comprehensive, and transparent. In these efforts, the Government must act diligently and must not distort or conceal the information it is in possession of. It is logical that the described duties of the Government concurrently also entail the admissible limitation of the freedom of expression of members of the Government and of its other representatives determined by the first paragraph of Article 39 of the Constitution.

33. In a similar manner, the position of the authorities in a referendum campaign is also regulated by the Code (in Chapter 3.1). The Code requires that those supporting the law that is to be decided on in a referendum and those opposing it have equal opportunities, and in particular emphasises the requirement that the authorities maintain a neutral attitude in the referendum campaign. In contrast to

elections, with respect to a referendum, the Code does not require the complete impartiality of public authorities or excludes their participation in favour of or against the law that is the subject of decision-making in the referendum. It does require, however, that public authorities refrain from influencing the results by means of biased interventions. It also determines that the authorities must provide voters balanced information regarding the subject of decision-making in a referendum that includes the positions of both the executive and legislative branches of power and their supporters, as well as the positions of opponents. Paragraph 13 of the Explanatory Memorandum of the Code additionally draws attention to the fact that the prohibition of a biased campaign does not entail that the authorities must not present their positions, but rather entails that they must provide voters adequate information to enable them to freely form an opinion.

34. As regards the participation of state authorities and legal entities of public law in a referendum campaign, the ERCA follows the general approach, which obliges such to have a neutral attitude towards referendum campaigns. Namely, the first paragraph of Article 4 of the ERCA determines that public gatherings are not allowed on the premises of state authorities, municipalities, public institutions, or other entities of public law. Furthermore, it expressly prohibits the use of public funds for the purposes of a campaign, as it is not allowed to finance a campaign with budgetary funds (except with the funds that political parties obtain from the budget in accordance with the law regulating political parties). The only exception to the statutorily prescribed neutral attitude of public authorities are the challenged provisions, in accordance with which a governmental service may participate in a referendum campaign as a campaign organiser, for which the Government may allocate it budgetary funds.

35. In a referendum campaign as defined by the ERCA, the organisers of the referendum campaign may act in a biased manner and, in accordance with the third paragraph of Article 1, affect by means of propaganda the decision-making of voters as to voting *pro* or *contra* in the referendum. Hence, the Act does not presuppose objectivity, comprehensiveness, and transparency as to the manner in which voters are informed. In this respect, the right to freedom of expression is not limited. This holds true for both the organisers favouring and against the entry into force of the law. From such a perspective, the equality of organisers is ensured as a starting point, as each of them freely decides in which direction – towards confirming or rejecting the law – it will direct its participation in a referendum campaign. Referendum propaganda is incompatible with the position of the Government in the system of state power (see Paragraph 31 of the reasoning of the present Decision). Therefore, it is manifest that the position of the Government is not equal to that of other organisers of a referendum campaign. Cooperation in the performance of public tasks in particular binds the

Government to protect the constitutionally guaranteed freedom of voters to form and express their political will. Therefore, it cannot be admissible for the Government to participate in a referendum campaign in the same manner as other organisers. On the contrary, because the Government possesses key information, it is tasked with ensuring that the public, amid diverse opinions, is informed objectively, comprehensively, and transparently. In such a manner, the Government, as the bearer of the executive branch of power, ensures the equal treatment of citizens in respect of their fundamental rights. This is important in particular as regards laws that are of key importance to the development of the state or that are supposed to have complex (legal, economic, etc.) national or international consequences that the Government is most acquainted with. If amid an information asymmetry the Government were allowed to participate in a campaign in the same manner as the other organisers, such role would significantly jeopardise the objective, comprehensive, and transparent manner of informing the public. Namely, for voters to be able to freely express their will as to the subject of decision-making in a referendum, the most important element is precisely that they have at their disposal all information and also different views.

36. In light of the above, the statutory regulation determined by the first paragraph of Article 3 of the ERCA, which enables the Government to participate in a referendum campaign as an organiser in the same manner as all other organisers, entails an excessive interference with the right to participate in the management of public affairs determined by Article 44 of the Constitution, which protects the right to vote in a legislative referendum determined by the third paragraph of Article 90 of the Constitution.

37. In accordance with the established constitutional case law, interferences with human rights and fundamental freedoms are admissible if they are in conformity with the principle of proportionality. The Constitutional Court carries out an assessment of whether an interference with a human right is admissible on the basis of criteria from the established constitutional case law (see Decision No. U-I-18/02, dated 24 October 2003, Official Gazette RS, No. 108/03, and OdIUS XII, 86; Para. 25 of the reasoning). The Constitutional Court must first establish whether the legislature pursued a constitutionally admissible objective. Once it is established that the interference pursues a constitutionally admissible objective, it always also needs to be assessed whether this objective is consistent with the principles of a state governed by the rule of law (Article 2 of the Constitution), namely with that principle that prohibits excessive interferences (the general principle of proportionality). The Constitutional Court performs an assessment of whether an interference is possibly excessive on the basis of the so-called strict test of proportionality. This test comprises a review of three aspects:

appropriateness, necessity, and proportionality in the narrower sense (see Decision of the Constitutional Court No. U-I-18/02).

38. As regards the existence of an admissible objective of the challenged regulation, the Constitutional Court deems that it is manifestly demonstrated as it is impossible to deny the right and duty of the Government to inform voters of the subject of the referendum at issue. It is equally undisputable that the regulation that allows the Government to formally participate in a referendum campaign is appropriate for attaining the objective of informing the public. However, the statutory regulation does not pass the test of necessity, within the framework of which the Constitutional Court assesses whether the statutory regulation is even necessary in the sense that the objective cannot be attained without it or whether it would be possible to attain the objective in some other manner that would be less restrictive. Since from the right to free voting in a referendum there follow certain duties of the Government (and of other authorities of the state) regarding its participation in the referendum procedure (see Paragraphs 31 through 35 of the reasoning of the present Decision), it is clear that the Government may only ensure that voters are informed by not participating as an organiser of the referendum campaign but by participating therein either within the framework of its regular functioning or with additional activities by which it objectively, comprehensively, and transparently informs voters of the possible choices. The Government is the authority of state power that has, in light of the nature of its work and the fact that also all administrative authorities with specialist services operate under its umbrella, the most information regarding the subject of the referendum procedure, and also the most diverse information, both for and against the solutions enacted by the National Assembly. Naturally, the Government may also transmit such information during the referendum campaign. However, it is not necessary for it to also formally participate in the referendum campaign as an organiser. The statutory regulation that gives the Government this position thus excessively interferes with the right to free voting in a referendum (the third paragraph of Article 90 in conjunction with Article 44 of the Constitution) and is inconsistent therewith.

39. By Decision No. U-I-295/07, dated 22 October 2008 (Official Gazette RS, No. 105/08, and OdlUS XVII, 56), the Constitutional Court held that, under the previous constitutional regulation of the legislative referendum, funds for a referendum campaign had to be allocated to the National Council from the budget of the state when the National Council was the proposer of the legislative referendum. In the mentioned Decision, the Constitutional Court did not assess whether it is admissible from the viewpoint of Article 44 of the Constitution that the National Council acts as the organiser of a referendum campaign, and also did not *sua sponte* assess the consistency with the Constitution of the first

paragraph of Article 3 of the ERCA in force at the time, which allowed all proposers of a referendum to act as organisers of a referendum campaign. Considering the fact that the Constitutional Court indirectly confirmed that the National Council participating in a referendum campaign and spending budgetary funds to this end are consistent with the Constitution, it hereby upgrades this position with the reasons stated in the present Decision. Both the Government and the National Council are authorities of the state, therefore equivalent limitations determined by Article 44 of the Constitution regarding participating in a referendum procedure apply to both of them. The Constitutional Court adds that the current regulation of the legislative referendum is different, as in accordance with the Constitution only voters have the possibility to require that a legislative referendum be held (the first paragraph of Article 90 of the Constitution). The National Council no longer has this possibility.

40. In view of the above, the first paragraph of Article 3 of the ERCA is inconsistent with the Constitution (Point 2 of the operative provisions). Given that the Government (or a service thereof) must not be the organiser of a referendum campaign, it is logical that it must not allocate to itself budgetary funds for acting as the organiser of a referendum campaign. For the same reasons, also the sixth paragraph of Article 4 of the ERCA is inconsistent with the Constitution (Point 2 of the operative provisions). However, the above stated does not entail that the Government does not have the authorisation to allocate budgetary funds for financing the transmission of information in accordance with its constitutional position and its role in a referendum procedure that stems therefrom, as described in Paragraphs 31 through 35 of the reasoning of the present Decision. Whether an individual case concerns informing voters in an objective, comprehensive, and transparent manner or an inadmissible referendum campaign can only be a subject of assessment in a concrete referendum dispute, in which the competent court shall establish all the necessary facts for such a conclusion (Points 16 and 25 of the reasoning of the present Decision). The Constitutional Court is not competent to adopt a position thereon within the framework of proceedings for a review of the constitutionality of a law.

41. When the Constitutional Court establishes that a law is inconsistent with the Constitution, it shall abrogate it, as a general rule. However, considering the reasons for the present Decision, it is not disputable that the Government may participate in a referendum procedure also during a referendum campaign (but not as a campaign organiser) and that it may also allocate budgetary funds to this end. The abrogation of the challenged provisions would entail that the position and functioning of the Government during a referendum campaign would not be regulated. From the viewpoint of Article 2 of the Constitution (the principle of the clarity and precision of regulations as regards their content), this would create an

unconstitutional legal gap. Therefore, it is not possible to abrogate the challenged provisions. On the basis of the first paragraph of Article 48 of the CCA, the Constitutional Court adopted a declaratory decision (Point 2 of the operative provisions).

42. In conformity with the second paragraph of Article 48 of the CCA, the Constitutional Court imposed on the legislature a one-year time limit in which to remedy the established unconstitutionality (Point 3 of the operative provisions). From the viewpoint of the requirement of a fair referendum procedure, [the legislature] must take into account that the functioning of the Government during a referendum campaign must be regulated by law. Taking into account the specific constitutional position of the Government (see Paragraphs 31 and 32 of the reasoning of the present Decision), the law must in particular regulate the manner of its functioning during a campaign and the use of budgetary funds.

43. A declaratory decision means that the unconstitutional law remains in force and, as explained above in this Decision (Paragraph 25 of the reasoning), in the event a declaratory decision is adopted, both the operative provisions and the reasons in the reasoning due to which the Constitutional Court has established an unconstitutionality of the law are binding. Such entails that the Government – until the legislature responds and adopts a different statutory regulation – must perform its activities during a referendum campaign in conformity with the substantive reasons contained in the present Decision that refer to the limitations applicable to the Government during such time.

44. The unconstitutionality of the statutory regulation on the basis of which the Government organised a referendum campaign does not in itself entail irregularities that affected or could have affected the referendum results. In the referendum dispute it stayed, the Supreme Court will have to decide whether the concrete activities that the Government carried out in the referendum procedure (i.e. also during the referendum campaign) were in conformity with the starting points stated in the present Decision. It will have to decide whether the Government, as the organiser of the referendum campaign, informed voters objectively, comprehensively, and transparently (Paragraphs 25 and 32 of the reasoning of the present Decision). It will also have to assess whether, in light of the reasons stated in the reasoning, the appellant must be given the possibility to file a supplementary appeal (Article 22 of the Constitution). If it establishes irregularities, it will also have to decide whether they affected or could have affected the results of the voting in the referendum.

45. The Constitutional Court adopted this Decision on the basis of Articles 30 and 48 and the second paragraph of Article 40 of the CCA, and the second indent of the second paragraph of Article 46 of the Rules of Procedure of the Constitutional Court (Official Gazette RS Nos. 86/07, 54/10, 56/11, and 70/17), composed of: Dr Jadranka Sovdat, President, and Judges Dr Matej Accetto, Dr Dunja Jadek Pensa, Dr. Dr. Klemen Jaklič, Dr Rajko Knez, Dr Etelka Korpič – Horvat, Dr Špelca Mežnar, Dr Marijan Pavčnik, and Marko Šorli. The decision was reached unanimously. Judges Sovdat and Jaklič submitted concurring opinions.

Dr Jadranka Sovdat
President

[1] See Decision of the Constitutional Court No. U-I-76/14, dated 17 April 2014 (Official Gazette RS, No. 28/14, and OdlUS XX, 25), Para. 14 of the reasoning.

[2] Cf. F. Grad in: I. Kaučič (Ed.), *Zakonodajni referendum* [The Legislative Referendum], Inštitut za primerjalno pravo, GV Založba, Ljubljana 2010, p. 164.

[3] Cf. J. Sovdat, *Sodno varstvo referendumu* [Judicial Protection of a Referendum], *Pravnik*, Nos. 9–10 (2013), p. 623.

[4] Cf. Order of the Constitutional Court No. U-I-130/17, Up-732/17, Para. 8 of the reasoning.

[5] Cf. Order of the Constitutional Court No. U-I-130/17, Up-732/17, Para. 6 of the reasoning.

[6] Cf. J. Sovdat, *op. cit.*, pp. 640 and 641.

[7] In accordance with the third paragraph of Article 82 of the Constitution, the Constitutional Court is the adjudicating authority when the election of deputies of the National Assembly is at issue.

[8] Cf. Order of the Constitutional Court No. U-I-130/17, Up-732/17, Para. 6 of the reasoning.

[9] M. Pavčnik, *Argumentacija v pravu* [Argumentation in Law], GV Založba, Ljubljana 2013, p. 152.

[10] See, e.g., Decision of the Constitutional Court No. Up-624/11, dated 3 July 2014 (Official Gazette RS, No. 55/14, and OdlUS XX, 36).

[11] See also Para. 13 of the reasoning of this Decision.

[12] In accordance with Article 2 of the ERCA, a referendum campaign may not begin sooner than 30 days prior to the day of voting and must, at the latest, end twenty-four hours prior to the day of the voting.

[\[13\]](#) Cf. Order of the Constitutional Court No. U-I-108/17, dated 13 July 2017 (Official Gazette RS, No. 41/17), Para. 3 of the reasoning.