

U-I-92/94 7 December 1995

## DECISION

At a session held on 7 December 1995 in a procedure to examine constitutionality, begun at the initiative of the Sindikat železničarjev Slovenije (Slovenian Railway Workers Union), the Constitutional Court

decided as follows:

The provision of the third paragraph of Article 16 and the provision of Article 18 of the Law on the Manner of Performing and Financing Transport on the Existing Railway Network and on the Reorganisation and Ownership Transformation of the Slovenian Railways Public Company (Off. Gaz. RS, No. 71/93) are not contrary to the Constitution.

Reasoning:

A.

The initiator contests the third paragraph of Article 16 and Article 18 of the Law on the Manner of Performing and Financing Transport on the Existing Railway Network and on the Reorganisation and Ownership Transformation of the Slovenian Railways Public Company (Off. Gaz. RS, No. 71/93, hereinafter: the LMPFT), in the part that applies accordingly to Article 64 of the Law on Workers' Participation in Management (Official Gazette RS, No. 42/93 - hereinafter the LWPM). In the opinion of the initiator, the contested provisions of the LMPFT violate Articles 75, 14 and 15 of the Constitution because they limit the workers' right to participate in the management of the Slovenian Railways Public Company and, in respect of the exercising of their rights, puts them in a position unequal to that of the workers in other public companies. A public company employing around 10,000 people should, in accordance with Article 64 of the LWPM, have 17 professional members, while the contested arrangement stipulates only five. The initiator proposes that the Constitutional Court accept the initiative and annul the contested provisions of the LMPFT.

In its reply to the initiative, the National Assembly expressed the opinion that the contested arrangement is not a justifiable reason to claim that Article 15 is not in accordance with the Constitution, as the right to participate in management does not in principle depend on, nor is it conditioned or restricted by, the number of members in the body exercising this right of the workers. In connection with this issue the National Assembly drew attention to the provision of Article 75 of the Constitution, according to which the manner and the conditions for workers' participation in management are prescribed by law.

The law whose constitutionality is being contested by the initiator stipulates that one professional member is to be elected to the works council for every 2,000 workers due to the specific nature of the public company and the large number of workers, which justifies a different arrangement and, in the opinion of the National Assembly, does not mean a violation of the principle of equality.

Replying to the National Assembly's statement, the initiator objects to the legislator's viewpoint. The initiator claims that the specific nature of the activities in the public company is not such as would justify three times fewer members on the works council

than that prescribed by the LWPM or in other companies with the same number of workers, and that in view of the size of the company, which covers the entire national territory, and the number and structural diversity of the employees, a five-member-council cannot ensure and successfully enforce the workers' right to participate in management.

B.

The initiator proved its legal interest in lodging the initiative as the Union of Slovenian Railway Workers representing the interests of its members. The contested legal provision interferes with the (legal) interest of the workers in a public company to effectively exercise their constitutional right to participate in management, whereby their representatives in the works council perform this function professionally.

The Constitutional Court accepted the initiative and, given that the conditions under the fourth paragraph of Article 25 of the Law on the Constitutional Court (Official Gazette RS, No. 15/94) were met, it continued with its adjudication on the matter.

Article 75 of the Constitution (Participation in Management), which is part of Chapter III on Economic and Social Relations, provides for workers' participation in the management of business enterprises in the manner and under such conditions as determined by law. Therefore the Constitution guarantees workers the right to participate in management, and hence by its nature this right belongs among human rights standards which must be guaranteed to all, and which demand particularly vigorous legal protection, including the protection of equality before the law as stipulated by Article 14 of the Constitution. As far as the manner in which the issue of workers' participation in management is concerned, Article 75 of the Constitution, in accordance with the provision of the second paragraph of Article 15, which states that the law may prescribe the manner in which human rights and fundamental freedoms are exercised when such regulation is authorised by the Constitution, refers to a separate law which should regulate the manner and conditions for participation in management.

The LWPM was adopted on the basis of Article 75 of the Constitution as a systemic regulation governing the manner in which the constitutional right of workers to participate in management is exercised, by systematically regulating the question of the influence on decision-making in various organisations of workers and of their directly elected representatives. The LWPM defines the manner of and conditions for workers' participation in the management of business enterprises, irrespective of their form of ownership, in cooperatives (first paragraph of Article 1) and in companies performing commercial public services, while for banks and insurance companies it applies only where not otherwise specified by a separate law (second paragraph of Article 1 of the LWPM).

The LMPFT is that separate law, regulating the specific field of railway transport as a commercial public service, and, within this framework, also the organisation of the Slovenian Railways Public Company. The LMPFT regulates workers' participation in the management of the company in Articles 16 and 18 of Chapter V (Reorganisation). According to the provisions of Article 18, all provisions of the LWPM except the provisions of the first paragraph of Article 79 and Article 64, apply to workers' participation in the management of the Slovenian Railways Public Company. It is therefore specified that a public company has a different structure in its supervisory board (first paragraph of Article 16), and the contested provision of the third paragraph of

Article 16, according to which one professional member is elected for every 2,000 workers, provides a formula for the determination of the number of professional members in the works council that is different to that contained in Article 64 of the LWPM.

Given this arrangement, the contested provisions are in conflict neither with Article 15 nor with Article 75 of the Constitution, since, based on the cited constitutional provisions and the LWPM as a general regulation, the legislator has the power to independently (unlike in the LWPM) regulate the manner of and the conditions for workers' participation in the management of the Slovenian Railways Public Company as a public commercial service.

The second paragraph of Article 14 prescribes equality of all before the law. The Constitutional Court has in many cases taken the position that this constitutional principle does not prevent the legislator from applying different arrangements but does oblige him to regulate the same relations in the same manner and different relations in different manners. Therefore, the principle of equality is violated when the legislator's differentiation can be described as arbitrary, i.e. without real justification.

In this case the contested provision of the third paragraph of Article 16 of the LMPFT applies the option given by the Constitution and the LWPM of regulating the manner of and conditions for workers' participation in management differently, prescribing a formula for defining the number of professional members according to which this number is lower for the Slovenian Railways Public Company than for business enterprises for which Article 64 of the LWPM is applied.

The provision of Article 64 belongs among those LWPM provisions in Chapter II which regulate the manner of work (point 3), the formation, composition, mandate and election of members (point 1), the protection of voting rights and election costs (point 2) of the works council as one of the bodies through which the workers exercise their rights in connection with participation in management. According to the LWPM, the workers exercise their constitutional right to participate in management primarily through a works council as a special body, or, in companies with less than 20 employees, through a workers' trustee. This form of workers' participation in management is, according to the LWPM, complemented by participation through the workers' assembly and the constituent bodies of the company. The exercising of the right to participate in management through the works council is a right and not an obligation: if the workers do not elect a council or if the council's mandate has expired, then the workers do not participate in management in this manner.

The most important of the provisions of the LWPM applying to the works council are those determining the powers of the council (Article 87) and those in Chapter VI (Workers' participation in company management), which specify in greater detail the manner in which the rights under Article 2 may be exercised through the works council (Article 89 and 89). The LWPM specifies in greater detail the formation, composition, mandate and election of the works council, the protection of the right to vote and election costs, and the manner in which the works council operates (Chapter II - The Works Council and Workers Trustees). The legislator included among the provisions on the manner of work of the works council the benefits enjoyed by the workers' representatives, such as the right to remuneration for consultation with workers and for participation in workers' sessions, the right to remuneration for education, with the option

of negotiating with the employer and the works council greater or other benefits (Articles 62 and 63). These provisions also include Article 64 of the LWPM, which provides the formula for the determination of the number of (semi-)professional representatives on the works council, i.e. workers who, as members of the council, do not perform their regular job in the company but are instead paid part-time or full-time to work as members of the works council. Only companies that employ less than 50 people have no professional members. Which council members will perform the function professionally is determined by the works council and not by the employer. The wages of a professional member may not be lower than the full-time wages he was receiving prior to election as a member of the works council.

Therefore the substance of the contested provision of the LMPFT replacing Article 64 of the LWPM represents a relief or a benefit that the workers' representatives enjoy in order to quickly and effectively perform their function as a member of the works council, and thus exercise the right to participate in management as provided for by the Constitution. In accordance with Article 2 of the ratified ILO Convention No. 135 on the Protection and Reliefs for Workers' Representatives in Companies (Official Gazette SFRY, No. 14/82), the reliefs must be appropriate both from the point of view of the company as well as of the workers' representatives. The setting of these reliefs must take into consideration the characteristics of the system of relations within the industry of the particular country as well as the needs, size and possibilities of a particular company and the efficiency of the company's performance, which may not be reduced as a result of the reliefs.

The content of the contested provision, its position within the system for the exercising of the workers' right to participate in management, and the decisions on whether members of a works council perform their function professionally and on the number of professional members, belong, in the judgement of the Constitutional Court, in the sphere of free decision-making by the legislator. The Constitutional Court may interfere with the legislator's decision only if it was clearly incomprehensible or obviously not in accordance with the intent of the system.

In this case the Constitutional Court established that the reasons for the different arrangement as provided for by the legislator, i.e. the specific nature of the activity and the large number of Slovenian Railways employees, are not irrational, since the above-average number of public company employees would, if the LWPM arrangement were followed, dictate an above-average number of professional members on the council, which would place a huge financial burden on the public company and, indirectly, on the national budget. Nor can there be any talk of a clear disproportion with the goal of the contested arrangement. The contested arrangement only reduces (not abolishes) one of the benefits and therefore in the mildest possible way interferes with the workers' right to participate in management.

Another fact that needs to be taken into account is that the smaller number of professional works council members in this case cannot have a serious impact on the effectiveness of the exercising of the workers' right to participate in management in general and in particular through the works council since, pursuant to the provisions of Article 18 of the LMPFT, all provisions of the LWPM except the contested one are applied to the Slovenian Railways Public Company, including that which stipulates the (absolute)

number of works council members, and is therefore the same for the Slovenian Railways Public Company as it is for business enterprises. The contested provision cannot be understood in the way it was understood by the initiator (in his reply to the National Assembly), i.e. as a reduction in the number of members on the works council. The way to determine the number of council members is specified by Article 10 of the LWPM, which also applies to a public company, while Article 64 applies exclusively for the determination of professional members in works councils. While it is true that the contested third paragraph of Article 16 contains the troublesome word "elect", when according to the LWPM it is the representatives who are elected to the works council and professional members are "appointed" within the council, in view of the remaining text of the law this is obviously just an inconsistent formulation on the legislator's part.

Also applied are those provisions of the LWPM according to which the works council and the employer may come to a written agreement to give workers more rights to participate in management than prescribed by law (Article 5), as well as greater benefits for council members than stipulated by law (Article 63), which means that the extent of the rights provided for by law represents a minimum and can therefore always be expanded upon by agreement.

Based on these findings the Constitutional Court established that with the contested arrangement the legislator did not violate the constitutional principle of equality before the law under Article 14 of the Constitution, and therefore made the ruling contained in the disposition of this resolution.

C.

The Constitutional Court passed this Resolution on the basis of Article 21 of the Law on the Constitutional Court, at a session composed as follows: chairman Dr Tone Jerovšek and judges Dr Peter Jambreč, Matevž Krivic M.Law, Janez Snoj M.Law, Lovro Šturm, LL.D., Franc Testen, Dr Lojze Ude and Dr Boštjan M. Zupančič. The resolution was passed by seven votes to one. Judge Krivic voted against, giving a dissenting opinion.

Chairman,

Anton Jerovšek, LL.D.

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