Number: Up-716/18-8
Up-745/18-8
Date: 17 May 2018

ORDER

At a session on 17 May 2018, in proceedings to examine the constitutional complaints of Uroš Primc, Dobrnič, and Damijan Kozina, Mavčiče, representatives of the lists of candidates "Kangler & Primc Združena desnica – Glas za otroke in družine, Nova ljudska stranka Slovenije", the Constitutional Court

decided as follows:

1. The constitutional complaint against Supreme Court Judgment No. Uv 6/2018, dated 7 May 2018, is not accepted for consideration on the merits.

2. The constitutional complaint against Supreme Court Judgment No. Uv 7/2018, dated 10 May 2018, is not accepted for consideration on the merits.

REASONING

A

1. On 4 May 2018 and on 7 May 2018, the electoral commissions of the 6th and the 1st constituencies, respectively, (hereinafter referred to as the ECs) rejected the lists of candidates "Kangler & Primc Združena desnica – Glas za otroke in družine, Nova ljudska stranka Slovenije". They established that the lists were drawn up contrary to the sixth paragraph of Article 43 of the National Assembly Elections Act (Official Gazette RS, Nos. 109/06 – official consolidated text, and 23/17 – hereinafter referred to as the NAEA).[1] By means of the challenged judgments, the Supreme Court

[1] The electoral commission of the 6th constituency established that the list included six male and two female candidates, and the electoral commission of the 1st constituency established that the list contained five male and two female candidates. In both instances it was established that female

dismissed the complainants' appeals and confirmed the decisions of the ECs. It found that the ECs applied the sixth paragraph of Article 43 and the first paragraph of Article 56 of the NAEA correctly as the lists of candidates did not include a sufficient number of female candidates. It clarified that such are not formal, but substantive deficiencies of lists, and therefore in order to remedy them electoral tasks of a substantive character would have to be carried out anew. In order to remedy them the entire nomination process would allegedly have to be repeated, as a candidate who gave his or her consent in writing and who was included in a list of candidates in accordance with the procedure provided by law may not be arbitrarily struck off such list. The Supreme Court further clarified that the deficiencies affected the lists in their entirety and as a result they could not be remedied in the manner suggested by the complainants, i.e. that the ECs themselves should remedy the deficiencies by striking as many male candidates off the lists as necessary to ensure that the "gender quota" was met. In light of such, the principle of proportionality allegedly prevented the partial rejection of the lists on the basis of the third paragraph of Article 56 of the NAEA. Such is allegedly only possible if there exists a statutory basis for partial rejection that only affects an individual candidature. The Supreme Court held that the rejection of the lists of candidates in the relevant constituencies was a consequence of a lack of diligence on the part of the proposers of the lists, whereby the interpretation of the clear provision of Article 43 of the NAEA has been known for a considerable amount of time as it delineated such already in its Judgment No. Uv 12/2011, dated 15 November 2011.

2. The complainants assert that they already drew attention to the erroneous application of the sixth paragraph of Article 43 of the NAEA in their appeal to the Supreme Court. Therefore, they do not repeat their assertions but only provide additional reasons substantiating violations of constitutional provisions. They assert violations of Articles 1, 2, 3, 5, 15, 25, 44, and 80 of the Constitution. They stress that the electoral legislation currently in force does not attain sufficiently high standards of precision and predictability that would enable political parties and their candidates to unequivocally understand the rules and submit lists of candidates in accordance therewith. The fact that the complainants' understanding of the condition determined by the sixth paragraph of Article 43 of the NAEA differs from the interpretation thereof by the ECs allegedly proves that the law is imprecise, which is alleged to have grave consequences for the electoral process.

3. The complainants allege violations of the candidates' passive right to vote and the active right to vote of potential voters for the lists at issue (the second paragraph of Article 43 of the Constitution). They are of the opinion that the ECs and the Supreme Court interpreted the sixth paragraph of Article 43 and the first paragraph of Article 56 of the NAEA contrary to the Constitution because a failure to fulfil the condition of balanced gender representation may not result in the rejection of a list of candidates in its entirety. The statutory provision is thus allegedly either unconstitutional or it was erroneously interpreted by the ECs and the Supreme Court. Their interpretation

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candidates represented less than 35 percent of the total actual number of female and male candidates on each list.

allegedly did not take into consideration the principle of proportionality with regard to an interference with the right to vote; on the contrary, the NAEA should have been interpreted in a manner that would have entailed the use of a more lenient sanction. The complainants propose the more lenient measure of the EC only striking some of the candidates off the list or enabling the list's proposer to do so. They further allege that the ECs and the Supreme Court also adopted an erroneous position regarding the application of the second paragraph of Article 56 of the NAEA, which refers to the remedying of formal deficiencies. A constitutionally consistent application of this provision would allegedly allow for a remedying of deficiencies regarding the balanced gender composition of a list of candidates and thereby the candidates' passive right to vote could be protected. The complainants refer to the judgments of the European Court of Human Rights (hereinafter referred to as the ECtHR) in the following cases: *Podkolzina v. Latvia*, dated 9 April 2002; *Paksas v. Lithuania*, dated 6 January 2011; *Sejdić and Finci v. Bosnia in Herzegovina*, dated 22 December 2009; *Melnychenko v. Ukraine*, dated 19 October 2004; *Grosaru v. Romania*, dated 2 March 2010; *Kovach v. Ukraine*, dated 7 February 2008; *Aziz v. Cyprus*, dated 22 June 2004; *Lykourezos v. Greece*, dated 15 June 2006; *Russian Conservative Party of Entrepreneurs and others v. Russia*, dated 11 January 2007; *Petkov and others v. Bulgaria*, dated 11 June 2009; and *Tănase v. Moldavia*, dated 18 November 2008.

4. The rejection of a list in its entirety allegedly also entails a violation of the second paragraph of Article 14 of the Constitution as it leads to inequalities among candidates for deputies as well among voters in different constituencies. In this regard, the complainants also allege a violation of Article 3 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94 – hereinafter referred to as the ECHR), Article 25 of the International Covenant on Civil and Political Rights (Official Gazette SFRY, No. 7/71, and Official Gazette RS, No. 35/92, MP, No. 9/92 – hereinafter referred to as the ICCPR), and Article 7a of the Convention on the Elimination of All Forms of Discrimination against Women (Official Gazette SFRY, No. 11/81, and Official Gazette RS, No. 35/92, MP, No. 9/92 – hereinafter referred to as the CEDAW).

5. The complainants further allege a violation of the right to the equal protection of rights (Article 22 of the Constitution). They state that during the submission of the lists of candidates lists were treated differently in different constituencies. Staff members of certain constituencies allegedly rigorously reviewed lists already upon their submission and only accepted them after having established that they were complete and lawful. If the ECs had acted in such a manner also in the cases at issue, the lists of candidates could have been composed in accordance with the law. They allege that the Supreme Court also violated Articles 22 and 25 of the Constitution because it allegedly did not decide on the basis of the Constitution and it concurrently claimed that the electoral process has certain specificities which require short time limits and due to which possible errors cannot be remedied at a later time. Therefore, the burden that all electoral tasks be performed immediately and correctly lies entirely with the political party.

6. The complainants propose that the Constitutional Court grant the constitutional complaints, or – if it deems that the ECs and the Supreme Court decided in accordance with the law – that it establish a "potential unconstitutionality" of the NAEA and, after having previously suspended its implementation, abrogate the mentioned regulation.

7. The complainant Uroš Primc supplemented his constitutional complaint on 11 May 2018. He clarified that on 7 May 2018 he lodged a proposal in accordance with Article 134 of the General Administrative Procedure Act (Official Gazette RS, Nos. 24/06 – official consolidated text, 126/07, 65/08, 8/10, 82/13 – GAPA) for a partial withdrawal of candidates in the 6th constituency, thereby allegedly fulfilling the condition determined by the sixth paragraph of Article 43 of the NAEA. He attached to the supplement the internal acts of both political parties regarding the withdrawal of candidatures and a letter of the EC explaining that it had not taken the withdrawal into account because an application can no longer be supplemented or withdrawn following a decision to reject a candidature.

8. In addition, the complainant Damijan Kozina also challenges the position of the Supreme Court in Judgment No. Uv 7/2018, i.e. that it did not take into account the supplement to his appeal because it had been lodged after the expiry of the 48-hour time limit for lodging the appeal (the first paragraph of Article 105 of the NAEA). Such position allegedly violates the rights stemming from Articles 14, 22, 23, 25, and 43 of the Constitution, Articles 6 and 13 of the ECHR, as well as Points 96 and 3.3.g. of the Code of Good Practice in Electoral Matters adopted by the so-called Venice Commission. He additionally substantiates the violations of Articles 14 and 22 of the Constitution with the claim that the list of candidates in question did not receive the same treatment as the list of candidates that the Supreme Court confirmed by Judgment No. Uv 8/2018, dated 12 May 2018, even though it did not meet the condition determined by the sixth paragraph of Article 43 of the NAEA.

9. The complainants also filed a petition to initiate proceedings to review the constitutionality of Articles 43, 54, and 56 of the NAEA, which for the most part contains the same statements as the constitutional complaint. The petitioners allege that the challenged regulation is inconsistent with the principle of clarity and substantive precision (Article 2 of the Constitution). The lack of clarity of the challenged statutory regulation allegedly resulted in a different application of the challenged provisions in practice. The petitioners further claim that Article 56 of the NAEA draws an artificial distinction between formal and other deficiencies and unconstitutionally determines that the latter cannot be remedied. He alleges that the first paragraph of Article 56 of the NAEA interferes excessively with the passive right to vote of candidates (the second paragraph of Article 43 of the Constitution) and the right to participate in the management of public affairs (Article 44 of the Constitution), as well as, consequently, the outcome of the electoral process and the development of the democratic system in general, which allegedly is in evident contradiction to Article 1 of the Constitution.

10. The petitioners allege that the fourth paragraph of Article 43 of the Constitution does not determine that an electoral commission may deprive all female and male candidates on a list in a specific constituency of their passive right to vote in its entirety due to the failure to fulfil the condition determined by the sixth paragraph of Article 43 of the NAEA. A regulation that enabled such would allegedly also be inconsistent with the first, second, and third paragraphs of Article 15 of the Constitution. The petitioners claim that although legislation governing elections promotes the equal participation of both genders and seemingly pursues the constitutionally admissible aim defined by the fourth paragraph of Article 43 of the Constitution, the rejection of a list in its entirety due to failure to fulfil the condition determined by the sixth paragraph of Article 43 of the NAEA is not consistent with the principle of proportionality and is further inconsistent with the purpose underlying the fourth paragraph of Article 43 of the Constitution. The rejection of a list in its entirety without any fault on behalf of the candidates allegedly causes inequality before the law (the second paragraph of Article 14 of the Constitution) among the candidates for deputies and among voters and is allegedly contrary to the right to free elections determined by the First Protocol to the ECHR, Article 25 of the ICCPR, and Article 7 of the CEDAW. The petitioners maintain that the legislature should determine a less stringent sanction for failure to fulfil the condition of balanced gender representation.

11. The petitioners also challenge the first paragraph of Article 105 of the NAEA. They claim that the 48-hour time limit for lodging an appeal before the Supreme Court is extremely short. Therefore, it is allegedly inconsistent with the right to an effective legal remedy (Article 25 of the Constitution), the right to judicial protection (the first paragraph of Article 23 of the Constitution), and Article 13 of the ECHR. As it is shorter than three days, it is allegedly contrary to Point 3.3.g. of the Code of Good Practice in Electoral Matters.

12. On 15 May 2018, the complainant Damijan Kozina submitted two new supplements to his petition and constitutional complaint in which he included the opinion of Professor Dr Jurij Toplak, according to which allegedly only an interpretation of Articles 54 and 56 of the NAEA that allowed a list to be remedied would be consistent with the Constitution. If the mentioned provisions of the NAEA cannot be interpreted in such manner, they are allegedly unconstitutional.

B – I

13. At the outset, the Constitutional Court draws the attention of the legislature to the fact that it has to adopt a special regulation of the time limits in which a constitutional complaint against a decision to reject a candidature may be lodged if it allows for the filing of an appeal against such decision before a competent court prior to the day of the vote. Otherwise, effective and timely decision-making of the Constitutional Court cannot be ensured, as [in electoral matters] a decision must namely be adopted long before the expiry of the general time limit for lodging a constitutional complaint, which

is regulated by the first paragraph of Article 52 of the Constitutional Court Act (Official Gazette RS, Nos. 64/07 – official consolidated text, and 109/12 – hereinafter referred to as the CCA). In order to be able to fulfil its role [in the absence of such regulation], the Constitutional Court must thus itself determine acceptable time limits for consideration of the constant influx of supplements to the applications of petitioners and complainants. In the proceedings at issue, the Constitutional Court took into consideration the supplements it received by 15 May 2018.

14. In constitutional complaint proceedings the Constitutional Court only considers alleged violations of human rights. As Articles 1, 2, 3, 5, and 80 of the Constitution do not directly regulate human rights, they cannot be invoked with regard to individual violations of the Constitution in constitutional complaint proceedings. In accordance with established constitutional case law, a constitutional complaint can furthermore not be substantiated by means of general references to statements and substantiations contained in legal remedies that have been exhausted prior to the lodging of the constitutional complaint. A constitutional complaint is a special legal remedy with a particular scope as to the substance that may be challenged and reviewed. On the basis of the first paragraph of Article 53 of the CCA, the reasons substantiating a constitutional complaint have to be expressly stated.[2] Therefore, the Constitutional Court only took into account the assertions that the complainants made in the constitutional complaint, and not the assertions from the appeals to the Supreme Court.

B – II

15. The second paragraph of Article 43 of the Constitution regulates the active right to vote and the passive right to vote. In accordance with the second paragraph of Article 15 of the Constitution, the manner of its implementation must be regulated by a law. The law may also determine its limitations, *inter alia*, when such is envisaged by the Constitution (the third paragraph of Article 15 of the Constitution). The election of deputies is regulated by the NAEA. Article 48 thereof determines, *inter alia*, that the number of candidates on a list may not exceed the number of deputies that are to be elected in the constituency, whereby every candidate may only stand for election in one constituency. In accordance with the first paragraph of Article 49 of the NAEA, in determining a list of candidates, the electoral district in which the individual candidates are to stand for election must also be determined. Therefore, in accordance with the second paragraph of Article 51 of the NAEA, the allocation of candidates to electoral districts must be enclosed with the proposed list of candidates. Although the proposer of a list of candidates may freely decide which candidate from the list will stand for election in which electoral district in a constituency, the NAEA contains cogent rules regarding the composition of the list of candidates. These are determined by Article 43 of the NAEA. The competent electoral commission must verify whether a list of candidates fulfils all statutory

[2] See, e.g., Constitutional Court Order No. Up-80/16, dated 25 October 2016, Paragraph 9 of the reasoning.

requirements. If it fulfils such, it confirms the list (Article 58 of the NAEA); if it does not, it must reject the list of candidates (Articles 55 and 56 of the NAEA).

16. The sixth paragraph of Article 43 of the NAEA determines that on a list of candidates each gender may not comprise less than 35 percent of the total actual number of the female and male candidates on the list. In accordance with the Code of Good Practice in Electoral Matters, rules requiring a minimum percentage of persons of each gender among candidates should not be considered as contrary to the principle of equal suffrage if they have a constitutional basis (Point I.2.5. of the Code). In accordance with the fourth paragraph of Article 43 of the Constitution, a law shall provide measures for encouraging the equal opportunity of men and women in standing for election to state bodies and local community bodies. The legislature thus adopted the sixth paragraph of Article 43 of the NAEA on a constitutional basis. It determines that on a list of candidates each gender may not comprise less than 35 percent of the total actual number of the female and male candidates on the list. The provision is clear and comprehensible to anyone. As the legislature did not determine a specific sanction for not observing this rule, it is deemed that a list of candidates that does not observe it has not been determined in accordance with the law. An electoral commission must reject such a list on the basis of the first paragraph of Article 56 of the NAEA. It is true that some states that have also introduced this type of measure prescribe a different form of sanction for the non-observance thereof, such as fines (e.g. Albania and Croatia) or a decrease in the amount of the public funding of the political party, where such funding is in place (e.g. France). However, like Slovenia, some have determined the rejection of the list in its entirety. A study on gender equality carried out for the Directorate-General for Internal Policies of the European Parliament, which was also cited in the opinion of Professor Dr Jurij Toplak, expressly states that experience thus far shows that precisely the rejection of a list of candidates in its entirety by the competent electoral commission is the most effective way to ensure that the mentioned constitutional requirement is observed. Clear prior awareness of the fact that political parties will not be able to participate in elections unless they ensure balanced gender representation on their lists of candidates provides the strongest impetus to satisfying “gender quotas” (the study cites Belgium, Poland, and Slovenia as systems with such a regulation).[3] In Slovenia, such a statutory regulation has been in force since the year 2006, and the Supreme Court provided a clear interpretation thereof in its cited 2011 Judgment. All political parties thus had prior knowledge of the sanctions for disregarding the rule in question.

17. The complainants state that the rejection of the list of candidates in its entirety due to failure to fulfil the condition determined by the sixth paragraph of Article 43 of the NAEA is a disproportionate sanction, as it allegedly concerns a deficiency that, following a request of the ECs, the proposers of the list could have remedied by

[3] See L. Freidenval *et al.*, Electoral Gender Quota System and their Implementation in Europe, Update 2013, European Parliament, Directorate General for Internal Policies, Brussels 2013, p. 17. Accessible at: http://www.europarl.europa.eu/RegData/etudes/note/join/2013/493011/IPOL-FEMM_NT(2013)493011_EN.pdf.

striking some of the candidates off the lists. In accordance with the second paragraph of Article 54 of the NAEA, immediately after receiving a list of candidates the electoral commission of a constituency must verify whether the list was submitted in due time and whether it was determined in accordance with the NAEA. The verification does not fall within the competence of the individual official whom the electoral commission authorised to accept the submission of lists of candidates (along with all appendices), but within the competence of the electoral commission, a specific independent collegiate body established in accordance with the NAEA. As a number of lists of candidates may be submitted concurrently, the statutory provision has to be understood as meaning that the electoral commission must convene as soon as possible following the expiry of the time limit for submitting candidatures and verify whether these are composed in accordance with the statutory rules. The provision regarding the immediate verification of the submitted lists of candidates is one of many statutory provisions that determine very short time limits in order to ensure that all necessary electoral tasks are performed in time. If the electoral commission establishes that a submitted list of candidates has deficiencies, it acts in accordance with the first or second paragraph of Article 56 of the NAEA, depending on the type of deficiency. If it establishes formal deficiencies (the second paragraph of Article 56 of the NAEA), it requires the proposer to remedy such; if it establishes substantive deficiencies (the first paragraph of Article 56 of the NAEA), it rejects the list.

18. Already in Decision No. Up-304/98, dated 19 November 1998 (OdlUS VII, 240), the Constitutional Court clarified that elections entail a process that has to take place and be completed within an uninterrupted period of time, and therefore all tasks that have to be performed as part of this process are restricted by statutorily precisely determined time limits that are very short. It stressed that all bodies authorised to decide in this process have to take into account the particular nature of the right to vote, which must also be considered by all participants in the process. Therefore, a political party that wants to participate in an election must align its organisation and functioning with these requirements and ensure that all relevant statutory conditions are fulfilled upon the submission of a list of candidates. It is a task of the electoral commission to reject lists of candidates that are not determined in accordance with the statutorily determined rules. As the Constitutional Court has repeatedly stressed, including in the cited decision,[4] the right to vote has a particular nature, as it is a personal right, but all holders of this right can only exercise it concurrently in an organised procedure and within a precisely determined time frame. This restricted time frame and the ensuing extremely short time limits for carrying out individual acts are a consequence of the principle of periodic elections, which the Code of Good Practice in Electoral Matters determines as one of the fundamental principles of the European electoral heritage. The constitutional expression thereof with regard to the election of the deputies to the legislative body is not only the determination of the duration of their term of office, but also the express rule of the third paragraph of Article 81 of the Constitution, which determines the time frame in which a new

[4] *Cf.* also Constitutional Court Order No. U-I-100/13, Up-307/12, dated 10 April 2014, and Constitutional Court Decision No. Up-304/98, Paragraphs 11 and 14 of the reasoning.

election has to be held. The terms of office of the members of the National Assembly may only be extended during a war or state of emergency (the second paragraph of Article 81 of the Constitution). In Slovenia, the time limits determined by the Constitution are particularly short and thus the restricted time frame for carrying out elections is especially accentuated. Such substantiates the statutory determination of short time limits and the requirement that political parties that want to participate in the electoral process have to carry out all electoral tasks in accordance with the rules and within the time limits determined by law. These rules must apply to all political parties that are competing for power in an election, as only in such manner can the principle of equal suffrage enshrined in the first paragraph of Article 43 of the Constitution, which is a special expression of the general principle of equality determined by the second paragraph of Article 14 of the Constitution, be observed.

19. In accordance with the above, the competent electoral commission has the express statutory authorisation to only require the remedying of formal deficiencies. Already in Decision No. Up-304/98 the Constitutional Court clarified that the term "formal deficiencies" is an open-textured legal term and its precise content is subject to interpretation by the competent body; in the case at issue, these are the competent electoral commissions, which are not administrative authorities, but specific independent bodies in charge of organising an election. In Decision No. Up-2385/08, dated 9 September 2008 (Official Gazette RS, No. 88/08, and OdlUS XVII, 80, Paragraph 9 of the reasoning), the Constitutional Court adopted the position that a formal deficiency is a deficiency that can be remedied without the need to carry out any new electoral tasks in the nomination procedure.[5] In this light, the distinction between formal and substantive deficiencies is precisely and substantively defined, and at least since 2008 it has also been expressly and unequivocally defined by the Constitutional Court. The position of the Supreme Court in the challenged judgment follows such completely, as it already did in its cited 2011 Judgment.

20. The position of the Supreme Court that in order to remedy the deficiencies at issue here the entire nomination procedure would have to be repeated has to be affirmed. Two or more political parties may submit a joint list of candidates, whereby each of the political parties has to determine its candidates according to the procedure determined by its rules and by secret vote (the first and fifth paragraphs of Article 43 of the NAEA). A joint list of candidates may be submitted in a constituency if [a sufficient number of] either deputies or voters support it with their signatures (the second and fourth paragraphs of Article 43 of the NAEA). The political parties determine a joint list when collecting voters' signatures. In the case at issue, it is of particular relevance that the lists of candidates were submitted on the basis of voters' signatures. The determination of the candidates on a list, including the manner in which they obtained the support required by the NAEA, is an essential electoral task

[5] The case concerned a list of candidates that did not fulfil the condition determined by the third paragraph of Article 43 of the NAEA – i.e. fifty supporting signatures of voters with permanent residence in the constituency. The Constitutional Court found that such cannot be deemed to constitute a formal deficiency that could be remedied within the time limit and according to the procedure determined by the second paragraph of Article 56 of the NAEA.

within the nomination procedure. Therefore, a change in the candidates on a list after the expiry of the time limit for submitting the list cannot constitute the remedying of a formal deficiency, but entails the remedying of a substantive deficiency of such list.

21. The time limits for submitting lists of candidates were the same for all political parties. In accordance with the principle of equal suffrage (the first paragraph of Article 43 of the Constitution), the same rules applied to all. As is evident from the large number of confirmed lists of candidates for the upcoming election, the great majority of the proposers had no difficulty fulfilling their statutory obligations. Even the complainants fulfilled them as they submitted correct and lawful lists of candidates in six constituencies. Enabling substantive deficiencies of lists of candidates to be remedied after the expiry of the time limit for submitting lists of candidates would entail that the procedure for determining lists of candidates would be conducted anew. In order to observe the principle of equality, such would have to be applied to all proposers of lists[6] and would result in a significant prolongation of procedures and require that the date of the vote be postponed, which would not only entail disregard for the third paragraph of Article 81 of the Constitution, but also an inadmissible interference with the principle of periodic elections. As follows from Constitutional Court Decision No. Up-304/98, due to the particular nature of elections, it is vital that all proposers of lists of candidates ensure that they submit complete and lawful lists of candidates within the prescribed time limit[7] and thereby enable not only the timely conclusion of the electoral process, but above all enable their candidates to participate in the electoral battle, which entails the realisation of the passive right to vote of the candidates competing in an election. It is not inconsistent with the Constitution for political parties to be required to act diligently when exercising the right to vote. If they fail to act diligently, the rejection of a list of candidates entails an interference with the right to vote, not due to the conduct of state authorities, but due to a lack of diligence on the part of the proposer of the list. Therefore, an electoral commission cannot be held liable for such. The Constitutional Court has already granted the complaint of a proposer of a list of candidates when it established that the deficiency in connection with the composition of the list of candidates was a consequence of the conduct of a state authority during the process of the collection of voters' signatures in support of a list of candidates (see Decision No. Up-2385/08). The case at issue here is different. The reason underlying the illegality of the lists of candidates is the lack of diligence on the part of the proposer and not the conduct of a state authority.

22. The situation with regard to formal deficiencies is different, as they can be remedied without having to carry out any electoral tasks anew (i.e. determining the candidates on a list). The need for electoral tasks to be carried out (anew) is thus the reason for differentiating between substantively incomplete (i.e. unlawful) and

[6] Including in circumstances that are the same as those decided on in Decision No. Up-304/98.

[7] In accordance with the first paragraph of Article 54 of the NAEA, lists of candidates have to be submitted to the electoral commissions of the constituencies no later than on the 25th day prior to the election day. Support by signature may be given from the day determined for the start of electoral activities until the day determined for the submission of lists of candidates (the first paragraph of Article 46 of the NAEA).

formally incomplete lists of candidates. In instances of substantively adequate (i.e. lawful) lists that are formally incomplete, the competent electoral commissions have to require the proposers thereof to remedy the lists to ensure respect for the principle that decision-making should favour the right to vote.

23. The mentioned failure to fulfil the condition determined by the sixth paragraph of Article 43 of the NAEA is thus not a formal deficiency of a list that would compel the electoral commission to require that it be remedied. An electoral commission may not interfere with a list of candidates without an express statutory basis. Therefore, the complainants' assertion that the ECs could have themselves chosen individual candidates and struck them off the list of candidates cannot be affirmed. And this applies even more in instances where an electoral commission has previously rejected a list of candidates, which is what the complainants proposed regarding the case at issue (Paragraph 7 of the reasoning of this Order). The position of the Supreme Court that the ECs would have acted in such manner if one of the candidates had been included in the list contrary to the law (e.g. if one of the candidates did not enjoy the right to stand in the election) has to be affirmed. However, the requirement determined by the sixth paragraph of Article 43 of the NAEA is a requirement that applies to the list of candidates in its entirety. Therefore, the fact that a proposer disregards such cannot be attributed to anything other than the proposer's insufficient diligence. In light of such, it is thus not inadmissible if a list of candidates is rejected in its entirety.

24. From among the ECtHR judgments the complainants refer to in order to substantiate the alleged violation of the passive right to vote, only the Judgment in *Russian Conservative Party of Entrepreneurs and others v. Russia* refers to the rejection of a list of candidates in its entirety.[8] However, the essential characteristics of that case were different from the case at issue here. The rejection of the list of candidates in the mentioned case was a consequence of a candidate's conduct that the party and the remaining candidates could not influence. In the case at issue here, however, the substantive deficiency of the list in its entirety was caused exclusively by its proposer, who, together with the voters who provided supporting signatures, is the holder of the active right to vote. The proposer is the one responsible for submitting a complete and lawful list.

25. In light of the above, the allegation regarding the violation of the right to vote is unsubstantiated.

[8] That case concerned the national list of the Russian Conservative Party of Entrepreneurs, which competed in elections to the *Duma* – the lower chamber of the Russian Parliament. When verifying the list of candidates, the central electoral commission found that 17 candidates, including the candidate listed second, had not provided correct information about their financial situation. The central electoral commission deemed that the candidate listed second withdrew his candidature and, consequently, rejected the party's national list of candidates in its entirety. As the party was punished for circumstances that were not connected with its own conduct and over which it had no control (i.e. the actions of one of the candidates), the ECtHR decided that the reason underlying the adopted measure (i.e. the rejection of the list in its entirety) was disproportionate to the legitimate aim pursued (i.e. to disclose the financial situation of the candidates and promote the integrity of the lists of candidates and the parties).

26. As the complainants failed to provide reasons for their allegations that the Supreme Court violated Articles 22 and 25 of the Constitution, such cannot be examined. The violations of these human rights can namely not be substantiated solely by claiming that the court did not decide directly on the basis of the Constitution. Furthermore, the complainants failed to provide reasons for their allegations of violations of Article 25 of the ICCPR and point a) of Article 7 of the CEDAW. The Constitutional Court has already examined the allegation of a violation of Article 3 of the First Protocol to the ECHR in the framework of its consideration of the alleged violation of the right to vote as determined by the Constitution, as the Convention right does not ensure a greater scope of protection, but merely also explicitly highlights the principle of periodic elections.

27. With regard to the allegation of a violation of the right to the equal protection of rights (Article 22 of the Constitution) as lists of candidates in different constituencies were allegedly treated differently, it has to be noted that in their appeal to the Supreme Court the complainants neither alleged nor established that any EC required a proposer to remedy a list of candidates that did not fulfil the condition determined by the sixth paragraph of Article 43 of the NAEA.

28. In addition, the complainant Damijan Kozina also challenges the position of the Supreme Court from Judgment No. Uv 7/2018 as it allegedly did not consider a supplement to the appeal because it was submitted after the expiry of the 48-hour time limit for lodging the appeal (the first paragraph of Article 105 of the NAEA). Such position allegedly violates the rights stemming from Articles 14, 22, 23, 25, and 43 of the Constitution, Articles 6 and 13 of the ECHR, as well as Point 3.3.g. of the Code of Good Practice in Electoral Matters and Point 96 of the Explanatory Memorandum of the Code. By means of these allegations, the complainant essentially asserts a violation of the right to effective judicial protection (the first paragraph of Article 23 of the Constitution), which concurrently entails a legal remedy (Article 25 of the Constitution). By claiming that in order to protect the right to vote the Supreme Court should have deemed that the supplement to the appeal was lodged in time although it was lodged after the time limit had expired, the complainant requests that the court do something that neither the NAEA nor the Constitution compels it to do. The fact that the complainant lodged a timely appeal within the statutorily determined time limit and the Supreme Court considered it on the merits shows that the challenged time limit enables effective judicial protection and an effective legal remedy. The statutory regulation that determines a short time limit for lodging an appeal is completely clear. Insofar as through that allegation the complainant aims at the unconstitutionality of the statutory regulation, the Constitutional Court cannot decide on such in this decision due to the reasons stated in Paragraph 31 of the reasoning of this Order.

29. The complainant Damijan Kozina additionally substantiates the violations of Articles 14 and 22 of the Constitution with the claim that the list of candidates in question did not receive the same treatment as the list of candidates that the

Supreme Court confirmed by Judgment No. Uv 8/2018. Such allegation is also not substantiated, as the two cases are not comparable. By Judgment No. Uv 8/2018 the Supreme Court did in fact confirm a list of candidates that did not fulfil the condition determined by the sixth paragraph of Article 43 of the NAEA. However, it established that an instance wherein a proposer submits a list of candidates for registration that does not satisfy the required gender ratio of candidates already from the outset must be distinguished from an instance wherein a proposer submitted a list of candidates that initially fulfilled this condition but the ratio of representation by gender shifted due to the subsequently established invalidity of an individual candidate's nomination that was exclusively a consequence of the candidate's conduct and which could not have been known to the proposer of the list (see also Paragraphs 21 and 24 of the reasoning of this Order).

30. As the conditions determined by the second paragraph of Article 55b of the CCA are not fulfilled, the Constitutional Court did not accept the constitutional complaints for consideration on the merits.

B – III

31. The Constitutional Court did not decide on the petition to initiate proceedings to review the constitutionality of the challenged provisions of the NAEA. Already in the time leading up to an election, and even more so during the electoral process itself, the statutory rules that govern the carrying out of the election may not be amended; this is due to the fact that it is inadmissible to interfere with the principle of periodic elections and to extend the term of office of deputies, as well as in order to ensure respect for the equality of the political parties during an election. Therefore, the Constitutional Court will decide on the petition at a later date (Case No. U-I-360/18).

C

32. The Constitutional Court adopted this Order on the basis the second paragraph of Article 55 b of the CCA and the first 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. It adopted the Order by seven votes against two. Judges Jaklič and Šorli voted against.

Judge Jaklič submitted a dissenting opinion. Judges Mežnar and Sovdat submitted concurring opinions.

Dr Jadranka Sovdat
President