U-I-40/12
11 April 2013

DECISION

At a session held on 11 April 2013 in proceedings to review constitutionality initiated upon the request of the Supreme Court of the Republic of Slovenia, the Constitutional Court

decided as follows:

1. The first sentence of the first paragraph of Article 28 of the Prevention of Restriction of Competition Act (Official Gazette RS Nos. 36/08, 40/09, 26/11, 87/11, and 57/12) is inconsistent with the Constitution.

2. The National Assembly of the Republic of Slovenia must eliminate the unconstitutionality referred to in the preceding paragraph within one year following the publication of this Decision in the Official Gazette of the Republic of Slovenia.

3. Until the established unconstitutionality is eliminated, the first sentence of the first paragraph of Article 28 of the Prevention of Restriction of Competition Act shall apply.

4. Articles 54, 56, 57, 59, and 61 of the Prevention of Restriction of Competition Act are not inconsistent with the Constitution.

Reasoning

A.

1. The Supreme Court of the Republic of Slovenia filed a request to review the constitutionality of Articles 28, 29, and Articles 54 to 61 of the Prevention of Restriction of Competition Act (hereinafter referred to as the PRCA-1). Articles

28 and 29 of the PRCA-1 are allegedly inconsistent with the right to the inviolability of dwellings determined by Article 36 of the Constitution, with the right to the protection of the privacy of correspondence and other means of communication determined by Article 37 of the Constitution, and with the right to respect for private and family life determined by Article 8 of the European Convention on Human Rights and Fundamental Freedoms (Official Gazette RS No. 33/94, MP, No. 7/94 – hereinafter referred to as the ECHR). The other challenged provisions are allegedly inconsistent with the right to a legal remedy determined by Article 25 of the Constitution. The Supreme Court underlines that it proceeds from Articles 28 and 29 of the PRCA-1 that the legal basis for the search of a company against which a procedure is being conducted is a search order, which is issued by the Slovenian Competition Protection Agency (hereinafter referred to as the Agency) and which can only be challenged in appellate proceedings against the final decision. Allegedly, the Constitutional Court has not yet answered the question of whether also legal entities enjoy protection under Article 36 of the Constitution with regard to their business premises. The Supreme Court assesses that it can be logically concluded from the constitutional case law that Article 36 of the Constitution also protects legal entities. The second paragraph of Article 36 of the Constitution namely expressly mentions also "other premises of another person", which allegedly also include the business premises of legal entities subject to search by the Agency. The spatial aspect of the right to privacy determined by Article 36 of the Constitution is allegedly also ensured to legal entities on premises where they justly expect one – on business premises that are not generally publicly accessible. The Supreme Court is of the opinion that legal entities also enjoy protection under Article 37 of the Constitution, as they, through their representatives, also use means of communication or transferring data. Due to the fact that for entry onto business premises, the inspection thereof, and the inspection of business documentation, the PRCA-1 requires nothing but a search order issued by the Agency, which is a part of the executive branch of power, Articles 28 and 29 of the PRCA-1 are allegedly inconsistent with the requirements determined by Articles 36 and 37 of the Constitution. The Supreme Court also alleges that by their nature, procedures for determining violations of competition law are punitive procedures. Such is allegedly confirmed by the case law of the European Court of Human Rights (hereinafter referred to as the ECtHR). In addition, in the case *Société Calas Est and others v. France,* dated 16 April 2002, that Court allegedly ruled that the French legal regulation which allowed the national competition protection authority to conduct a search of a company without a court order violated Article 8 of the ECHR. The opinion of the Supreme Court is that the necessity of a court order being required to conduct a search in the procedure for determining a violation of competition law already proceeds from two facts:

firstly, in minor offence proceedings, as a general rule, the Agency refers to its findings from the procedure for determining a violation of competition law; secondly, evidence acquired on the basis of the challenged provisions of the PRCA-1 would most probably also be used in criminal proceedings.

2. With regard to Articles 54 to 61 of the PRCA-1, the Supreme Court underlines above all that the guarantees determined by Article 25 of the Constitution can only be protected in proceedings where the court has full jurisdiction, interpreted in such a manner that a court can assess both the factual and the legal basis of the challenged decision. The procedure determined in the PRCA-1 allegedly only envisages one administrative and one judicial instance. These judicial protection proceedings are allegedly not proceedings where the court has full jurisdiction. As the procedure before the Agency is allegedly comparable to a pre-trial procedure, it would be sensible to expect, in the opinion of the Supreme Court, that a party to judicial protection proceedings under the PRCA-1 would have more procedural rights ensured than in an administrative dispute. In reality, the situation is allegedly just the opposite. The Supreme Court draws attention firstly to the prohibition of stating new facts and of proposing new evidence in an action under Article 57 of the PRCA-1 (which allegedly logically excludes the possibility that the Supreme Court take new evidence *ex officio*), secondly, to the fact that the Supreme Court adjudicates, as a general rule, without a trial (Article 59 of the PRCA-1), and thirdly, to the exclusion of a complaint issued in judicial protection proceedings (Article 61 of the PRCA-1). Such proceedings allegedly do not enable a plaintiff to efficiently challenge the state of the facts determined by the Agency, as the assessment of the state of the facts before the Supreme Court is allegedly limited to what the Agency determined in the administrative procedure. For the protection of the rights of parties in competition cases it is allegedly crucial that the state of the facts be determined before a court. The Supreme Court faults the regulation of the judicial protection in the PRCA-1 for interfering with the right to judicial protection determined by Article 25 of the Constitution. The pursued objective of a speedy procedure and efficiency in the Agency's supervision is allegedly unable to outweigh the weight of such interference. The Supreme Court is of the opinion that such an objective would also be attained to a sufficient degree if in judicial protection proceedings under the PRCA-1 the Administrative Dispute Act (Official Gazette RS Nos. 105/06, 62/10, and 109/12 – hereinafter referred to as the ADA-1) were applicable in its entirety. The Supreme Court proposes that the Constitutional Court adopt a declaratory decision on the unconstitutionality of the challenged provisions, impose a deadline on the legislature by which it must eliminate the inconsistencies, and determine the manner of execution of its decision.

3. The request of the Supreme Court was served on the National Assembly of the Republic of Slovenia, which replied to it. The National Assembly is of the opinion that the challenged provisions of the PRCA-1 are not inconsistent with the Constitution. It stresses that the protection of competition is a constitutional category and a category of European Union law. The National Assembly describes in detail the characteristics of the legal regulation of the protection of competition in the European Union (hereinafter referred to as the EU). It draws attention to the fact that the Agency conducts minor offence procedures separately from administrative procedures. The Minor Offences Act (Official Gazette RS No. 29/11 – official consolidated text – hereinafter referred to as the MOA-1) predominantly applies for them, not the PRCA-1. The Agency is allegedly not the sole administrative authority to have the competence, within the framework of administrative procedures, to enter business premises and conduct a search thereof without a court order. The National Assembly substantiates such claim by citing specific provisions of the Tax Administration Act (Official Gazette RS Nos. 1/07 – official consolidated text, 40/09, and 33/11 – TAA-1), the Tax Procedure Act (Official Gazette RS Nos. 13/11 – official consolidated text, 32/12, and 94/12 – TPA-2), the Inspection Act (Official Gazette RS No. 43/07 – official consolidated text – hereinafter referred to as the IA), and the Customs Service Act (Official Gazette RS Nos. 103/04 – official consolidated text, 40/09, and 9/11 – CSA-1). The regulation of the search in the PRCA-1 is allegedly comparable to the regulation of various inspection procedures. The objective of the search procedure allegedly lies in ensuring efficient supervision and in establishing the existence of restrictive conduct causing immense damage to consumers and to the economy. The National Assembly opposes the position of the Supreme Court that the procedure for determining violations under the PRCA-1 is a punitive procedure. It makes reference to Order of the Constitutional Court No. U-I-108/99, dated 20 March 2003 (Official Gazette RS No. 33/03 and OdlUS XII, 22), in which the Constitutional Court allegedly determined that a tax inspection procedure is not a criminal procedure. It is of the opinion that in minor offence procedures the Agency cannot make use of a piece of evidence not obtained in conformity with the MOA-1. In the ECtHR case law, a request to obtain documents from a suspect is allegedly not inconsistent with the right to remain silent, which is allegedly even truer with regard to an administrative procedure in which the existence of an unlawful restriction of competition is established. The National Assembly claims that for legal entities it cannot be true that everything that is connected with their market operations and with acquiring profit is private. Allegedly, the protection of legal entities cannot, in such sense, equal that of natural persons. The National Assembly refers to Decision of the Constitutional Court No. Up-430/00, dated 3 April 2003 (Official Gazette RS No. 36/03 and OdlUS XII, 57), in which the connection between

an entry onto business premises and the guarantee of the inviolability of dwellings was allegedly not established. The ECtHR allegedly differentiates between the level of spatial privacy that natural persons enjoy, on one hand, and that legal entities enjoy, on the other. The regulation of the search under the PRCA-1 allegedly does not match the criteria that the ECtHR developed regarding the admissibility of interferences with Article 8 of the ECHR. With regard to the regulation of judicial protection in the PRCA-1, the National Assembly claims that the Supreme Court has all competence to assess substantive and procedural legal questions as well as the regularity and completeness of the determination of the state of the facts. The Supreme Court is allegedly not bound by the state of the facts established by the Agency. It allegedly proceeds from Decision of the Constitutional Court No. U-I-219/03, dated 1 December 2005 (Official Gazette RS No. 118/05 and OdlUS XIV, 88) that a multitude of legal remedies does not of itself guarantee more efficient protection of rights or higher quality and that Article 25 of the Constitution allows, under certain conditions, that a request for the judicial review of a decision serves as a legal remedy. Due to the similarity of the statutory provisions at issue, that Decision is allegedly legally important also for assessing the constitutionality of the PRCA-1. Such is allegedly true also for the limits and the scope of the assessment of a challenged administrative decision, for the preclusion of stating new facts, for suggesting new evidence, and for the Supreme Court deciding without a trial. The National Assembly is of the opinion that parties to proceedings already have, in the framework of administrative proceedings, sufficient possibilities to state their position on decisive aspects of the case. In addition, a party who discovers new facts or new evidence after the issuance of the decision allegedly would have at its disposal a retrial in conformity with the General Administrative Procedure Act (Official Gazette RS Nos. 24/06 – official consolidated text, 126/07, 65/08, and 8/10 – hereinafter referred to as the GAPA).

4. The Government of the Republic of Slovenia submitted its opinion on the request of the Supreme Court. Its position is that all of the challenged provisions are consistent with the Constitution. With regard to the issuance of a search order, it claims that companies – as legal entities – as a general rule cannot be holders of personal rights determined by the Constitution. From the hitherto decisions of the Constitutional Court, namely Decision No. Up-430/00 and Order No. U-I-36/03, dated 9 June 2005, it allegedly proceeds that the right to the inviolability of dwellings determined by Article 36 of the Constitution cannot refer to the business premises of legal entities. The regulation of inspection competences in the IA allegedly conforms with such. The Government claims that the premises of legal entities are not intended for living, but for carrying out the activities of the company, therefore the

protection determined by Article 36 of the Constitution does not apply thereto. In its assessment, individuals – who otherwise can invoke the constitutional provisions on privacy – also enjoy a lower degree of expected privacy at their workplace than in their residence. Also the Judgment of the Court of the European Union, dated 22 October 2002, in the case *Roquette Frères SA v. Directeur général de la concurrence, de la consommation et de la répression des fraudes*, C-94/00 allegedly cannot essentially influence these conclusions. It allegedly proceeds therefrom that on one hand the respect for privacy of one's home determined in Article 8 of the ECHR can, in certain circumstances, expand to include business premises of companies, while on the other hand the permitted interferences can be much more far-reaching with regard to professional or business premises or regarding activities than in other cases. The Government claims that EU law (regarding the competences of the European Commission) as well as the legal systems of a large number of EU Member States (regarding the competences of national competition regulatory authorities) allow for searches of the business premises of legal entities to be conducted without a prior court order. It is of the opinion that it does not proceed from the ECtHR Judgment in the case *Société Calas Est and others v. France* that Article 8 of the ECHR protects business premises *per se.* Only the private content of the documents searched can allegedly have an influence on the applicability of Article 8 of the ECHR. Therefore, Articles 28 and 29 of the PRCA-1 are allegedly not inconsistent with either Article 36 of the Constitution or Article 8 of the ECHR. In the opinion of the Government, Articles 28 and 29 of the PRCA-1 are allegedly not inconsistent even with Article 37 of the Constitution. Communication between natural persons on behalf and for the account of a company which is in its entirety of a business nature is allegedly not constitutionally protected from the viewpoint of privacy, as the natural person is merely a medium who transfers information for the company, whose personality rights are not recognised. All competences to conduct searches under the second paragraph of Article 29 of the PRCA-1 allegedly refer to business correspondence connected to the operations of the legal entity, which is not protected by Article 37 of the Constitution. The Government claims that the Slovenian Competition Protection Office [i.e. the competition authority preceding the Agency] (hereinafter referred to as the Office) cannot, without the competences determined by Article 29 of the PRCA-1, obtain data necessary for carrying out procedures and for efficient conduct of its tasks. As the business nature of a document allegedly cannot be established before its examination, the Government holds the position that, as a general rule, all documentation that is located in the registered office of a company is deemed business documentation (while the individual allegedly retains the right and duty to be present at the search and during the delimitation of his personal sphere from the business one). The Government

refers to Judgment of the Supreme Court No. G 3/2009, dated 30 June 2009, in which the Supreme Court allegedly explained that during the handing over of business documentation a selection must be made and personal correspondence must be eliminated. In the opinion of the Government, while communication of a business nature can certainly entail a business secret of a company, it cannot, however, entail a private piece of data of individual employees that they have a legitimate interest in hiding. The Government also stresses that the competences of the Office are determined so that they enable efficient implementation of Articles 101 and 102 of the Treaty on the Functioning of the European Union (consolidated version, OJ C 326, 26 October 2012 – hereinafter referred to as the TFEU). In the case at hand, it is allegedly not relevant for the deciding of the Constitutional Court whether the use of evidence from the administrative procedure is possible also in other proceedings (especially in criminal and minor offence proceedings) – this allegedly remains a matter to be decided by the competent courts.

5. Articles 54 to 61 are allegedly not inconsistent with Article 25 of the Constitution. The Government underlines the special importance of supervision over conduct that, contrary to EU legislation, the Constitution, and the PRCA-1, limits effective competition. Thus, the preclusion regarding new facts and new evidence is allegedly legitimate especially due to the emphasised principle of the speediness of proceedings. However, in procedures before the Office parties are allegedly already ensured sufficient possibilities to state facts and evidence that benefit them. In this regard, especially the obligatory provision of a summary of the relevant facts and the possibility to give a statement thereon are allegedly important. The Government does not concur with the criticisms of the Supreme Court regarding the inadmissible limitation of the judicial assessment of the factual basis of the Office's decision – allegedly, under Article 64 of the ADA-1 the Supreme Court has the possibility, due to incomplete findings on the state of the facts, to abrogate the administrative act and to remand the case for new adjudication to the Office. Likewise, under Article 65 of the ADA-1, it allegedly has the possibility to carry out a trial, to determine a different state of the facts, and to overturn the decision. The Government is of the opinion that the right to an effective judicial remedy is ensured with the possibility of judicial protection before the Supreme Court. The purpose of the single-stage administrative dispute is allegedly to accelerate proceedings and to attain standards of effective competition protection. Lastly, the Government stresses that the execution of the challenged provisions of the PRCA-1 is necessary for the fulfilment of the obligations of the Republic of Slovenia stemming from its membership in the EU, especially the obligation to effectively implement Articles 101 and 102 of the TFEU.

6. On the basis of the second paragraph of Article 28 of the Constitutional Court Act (Official Gazette RS Nos. 64/07 – official consolidated text and 109/12 – hereinafter referred to as the CCA), the Constitutional Court obtained the position of the Office on the request of the Supreme Court.[1] The Office is of the opinion that the addressee of the right to spatial privacy can only be a natural person. The possibility to enter the business premises of a legal entity without a court order, therefore, allegedly does not entail an interference with a human right of the legal entity. When assessing the proportionality of measures it is allegedly necessary to take into consideration that a search of business premises is always conducted in the presence of a person who can have a reasonable expectation of privacy. In the Office's estimation, too broad an interpretation of the right to privacy can supersede each and every possibility of the protection of public order and the rights of others. The protection of competition is allegedly impossible without the possibility to conduct unannounced searches of the premises of companies that violate competition rules. The same allegedly applies to the possibility of accessing company computers and e-mail. Therefore, the Office suggests such an interpretation of Article 37 of the Constitution that the phrase "criminal proceedings" is interpreted more broadly, such that it also includes punitive procedures, which procedures for the protection of competition are. The Office allegedly has always conducted searches of electronic data carriers and of e-mail in such a manner that users had the possibility to delimit private communications from business correspondence. The Office does not concur with the criticisms of the Supreme Court that judicial protection proceedings under the PRCA-1 are not proceedings where the court has full jurisdiction and that therefore there exists an inconsistency with Article 25 of the Constitution. It draws attention to the significant importance of the legal value of the effective competition and to the sophistication of the parties to a competition procedure. The Office does not concur with the position that in order to ensure the effectiveness of the procedure and the protection of the rights of parties, the ADA-1 should apply in its entirety in such a procedure. It stresses that in the challenged regulation there are no "exaggerated" limitations of the decision-making of the Supreme Court in proceedings where the court has full jurisdiction – in particular, the prohibition of stating new facts and of proposing new evidence and the exclusion of appeals against judicial decisions allegedly do not entail the exclusion of proceedings where the court has full jurisdiction. In the opinion of the Office, the Supreme Court can carry out a trial and determine, on the basis of the documentation from the file, a different state of the facts. The Supreme Court allegedly adopts a decision on the basis of those facts and evidence on which the Office grounded the decision challenged by the action, and on the basis of the facts and evidence that had been stated or proposed by the parties before the Office's decision

was issued. The Office explains in detail how parties to proceedings have enough possibilities to claim facts and propose evidence that benefit them already in the administrative procedure before the Office. The subsequent expansion of such possibilities in judicial proceedings would allegedly transfer the centre of gravity of decision-making in matters concerning the protection of competition to a court.

7. The reply of the National Assembly, the opinion of the Government, and the position of the Office were served on the Supreme Court, which announced that it would not reply to them.

8. The companies Unior Kovaška industrija PLC, Zreče and RTC Krvavec PLC, Cerklje na Gorenjskem, otherwise parties to the judicial proceedings that were halted by the Supreme Court due to the filing of the request for a constitutional review, confirmed participation in the Constitutional Court proceedings to decide the request. The participants concur with the arguments of the request and allege that the PRCA-1 permits very intense interferences with the human rights of parties, which in the search procedure and in the judicial proceedings are very limited. They draw attention to the confrontation of the public interest in the protection of efficient competition with the parties' human rights to the inviolability of dwellings, to the protection of the privacy of correspondence and other means of communication, to respect for one's private and family life, and to an effective legal remedy. In their opinion, the search competences of the Agency are very broad and before and during the search there is allegedly no external supervision over their execution. The participants expressly underline that the PRCA-1 permits entry into a residence or other premises and a search thereof without a court order and against the will of the entity subject to search only on the basis of a decision of the Office, therefore, of the executive authority. They claim that the regulation of judicial protection under PRCA-1 interferes with the right of the parties to effective judicial protection. They assess that it would be also sensible in competition protection procedure to ensure judicial protection under the ADA-1. The current regulation allegedly does not pass the proportionality test.

B. – I.

Determination of the Scope of Assessment

9. The Supreme Court claims that it challenges Articles 28 and 29 of the PRCA-1. However, it is evident from the content of the request that in its opinion in the stated provisions the only unconstitutional aspect is that the

decision on the basis of which the search of business premises and the examination of business documentation are conducted is adopted by the Agency instead of a court. This is determined by the first sentence of the first paragraph of Article 28 of the PRCA-1, under which the search order regarding a company against which a procedure is being conducted is issued by the Agency. Therefore, the Constitutional Court deemed that the applicant challenges only the first sentence of the first paragraph of Article 28 of the PRCA-1.

10. The applicant claims that it challenges all provisions from Article 54 to Article 61 of the PRCA-1. However, in its request there are no substantiated criticisms that refer to the regulation of the possibility of judicial protection against the decisions and orders of the Agency, to the priority treatment of judicial protection under the PRCA-1, to the limits of the assessment of the challenged acts, and to the regulation of parties' right to review the documents of the case before the court (which is regulated in Articles 55, 58, and 60 of the PRCA-1). Therefore, the Constitutional Court deemed that the applicant only challenges Articles 54, 56, 57, 59, and 61 of the PRCA-1.

11. Even though the Supreme Court challenges a part of the statutory regulation of searches of "companies against which a procedure is being conducted", wherein the notion of a company is defined by the first indent of Article 3 of the PRCA-1 so as to also include natural persons running a sole proprietorship (sole proprietors, freelance professionals),[2] the applicant challenges Article 28 of the PRCA-1 exclusively from the viewpoint of the protection of the human rights of companies – legal entities who are subject to a search. Therefore, the Constitutional Court assessed the criticisms only from such point of view.

B. – II.

The Right to Privacy

12. The first sentence of the first paragraph of Article 28 of the PRCA-1 determines: "The order on the search of a company against which a procedure is being conducted is issued by the Agency." The applicant claims that the challenged provision is inconsistent with Articles 36 and 37 of the Constitution and with Article 8 of the ECHR. It is of the opinion that these provisions of the Constitution and the ECHR also protect the privacy of legal entities on business premises that are not generally publicly accessible. Therefore, the

guarantees determined by the Constitution, among them especially the admissibility of interferences with the rights under the first paragraph of Article 36 and under the first paragraph of Article 37 of the Constitution, which are permitted only on the basis of a prior court order, should also apply to procedures under the PRCA-1, which by their nature should be punitive procedures.

13. In Article 35, the Constitution guarantees the inviolability of a person's physical and mental integrity, and the inviolability of his privacy and personality rights. In addition to this general provision on the protection of privacy, it also includes three special provisions which specifically protect the inviolability of dwellings (the first paragraph of Article 36 of the Constitution), the privacy of correspondence and other means of communication (the first paragraph of Article 37 of the Constitution), and the protection of personal data (the first paragraph of Article 38 of the Constitution).[3] The inviolability of dwellings, or the so-called spatial aspect of privacy, and the privacy of correspondence and other means of communication, or the so-called communication aspect of privacy, are thus specifically protected as constitutional values.[4] It is true, as the applicant states, that the Constitutional Court has in its hitherto constitutional case law already taken a position on what content is protected by both the general provision and the mentioned special provisions of the Constitution when natural persons are at issue. However, it has not yet taken a position on the question of whether also legal entities enjoy constitutional protection of privacy.

14. When what is at issue is the protection of natural persons, the Constitutional Court has defined that a human's privacy, the inviolability of which is guaranteed by Article 35 of the Constitution, "refers, in the context of man's existence, to a more or less complete whole of his or her behaviours and involvements, feelings, and relations, for which it is characteristic and essential that the person shapes and maintains it alone or alone with those near to him or her with whom he or she lives in intimate community, for example with a life partner, and that he or she lives in such community with a sense of being protected against intrusion by the public or any other undesirable person".[5] The right to privacy of an individual establishes a sphere of his or her own intimate functioning in which he or she is allowed to decide him- or herself which interferences with it he or she will allow. The more the field of the private life of the individual is intimate, the greater legal protection he or she must enjoy. This is even truer when it is admissible that the state or competent state authorities interfere with it. Matters that may not be revealed include personal matters which the individual wishes to keep hidden and which by the nature of the matter or with regard to moral or otherwise established rules of conduct in society have such status (for

instance, one’s sexual and family life, health status, confidential talks between close persons, and diary entries).[6]

15. The Constitutional Court has also defined the spatial aspect of constitutionally protected privacy. A matter is private also with regard to the space in which it happens. In the framework of the spatial aspect of privacy, an individual is protected from having his or her conduct revealed where he or she justifiably expects to be left undisturbed. His or her dwelling – a residence – is the first but not the only such location. He or she is protected everywhere where he or she, evidently for others, can justifiably expect that he or she will not be exposed to the eyes of the public.[7] A normal and an essential part or aspect of human privacy is one’s habitation or domicile; the material environment for a person is usually his or her dwelling, home, or residence. The factual and exclusive authority over the space of the residence and over everything substantial in it is an essential part and condition of residence as a part of human privacy.[8] The Constitutional Court underlined that the subject of protection of the right under the first paragraph of Article 36 of the Constitution is, proceeding from the purpose of the guarantee, the complete whole of the premises that a person uses as a dwelling, where he or she lives alone or with those nearest and dearest, hidden from the public view, and which he or she only permits persons whom he or she allows a view into the most hidden spheres of his or her life access to. Therefore, such are premises where the person justly expects to be left undisturbed because he or she lives there. Such is the manner the terms "dwelling" and "other premises of another person" under the second paragraph of Article 36 of the Constitution are to be interpreted.[9] The Constitutional Court specifically underlined that it is essential for the notions of dwelling and other premises of another person in the sense of the second paragraph of Article 36 of the Constitution that it is a complete spatial unit intended and used for living, and hidden from the eyes of the public.[10] It is not the space as such that is protected, but the individual's privacy in that space. Therefore, what is protected is the residence as a home, as the privacy existing in the living space in which the individual justly expects privacy and regards as his or her living space. The point of such privacy is the purpose of residence in a space where the individual's private life is developed, while privacy is protected against any interference against the will of the tenant or resident in that space.[11]

16. The right to communication privacy guaranteed by the first paragraph of Article 37 of the Constitution represents the "protection of the individual's interest that the state or uninvited third persons do not learn of the content of a message that he or she transfers via any means that allows remote exchange or transfer of information; just as the individual's interest in having control and freedom to decide to whom, to what degree, how, and under which conditions

he will transmit a certain message".[12] The subject of protection is free and uncontrolled communication and thus the protection of the confidentiality of relations into which the individual – when communicating – enters.[13] The protection of communication privacy cannot be reduced to only the content of communication, as this right also protects data on how the communication took place, who initiated it, with whom he or she initiated it, and whether it took place at all.[14] It also refers, for instance, to data on phone calls which constitute an integral part of the communication.[15] The statutory regulation of interferences with communication privacy must include detailed instructions that, while taking into consideration the express constitutional requirements, prevent the arbitrariness of state authorities and the misuse of special methods and means. Thus, for instance, when what are at issue are special investigation competences of the police, the categories of persons on whom the police can eavesdrop must be determined, the criminal offences, and the duration of eavesdropping have to be determined more precisely, the procedure under which summaries of verbal communications are handled must be prescribed, the circumstances and conditions for their destruction must be determined, and supervision mechanisms must be arranged.[16]

The Privacy of Legal Entities

17. On the basis of the hitherto constitutional assessments, it is thus possible to clearly conclude that natural persons enjoy the protection of privacy as guaranteed by the general provision of Article 35 of the Constitution as well as the first paragraph of Article 36 and the first paragraph of Article 37 of the Constitution in all the stated respects.[17] For the constitutional assessment at hand, however, it is first necessary to answer the question of whether also legal entities enjoy the right to privacy, including its spatial and communication aspects, which in this case are underlined by the applicant. The legal-ethical foundation of modern states which are based on the concept of constitutional democracy, i.e. on the presumption that the authority of the state has to be limited by some fundamental rights and freedoms which belong to a person due to his or her own worth, is respect for human dignity. Human dignity is the highest ethical value and the measure for limiting the functioning of the authority of the state.[18] The constitutional order is thus built on values that fundamentally belong to the individual – the free human being. Also the right to free enterprise under the first paragraph of Article 74 of the Constitution belongs, as a human right, to the individual. In order to be able to exercise it, he or she also has the right to establish legal entities – economic organisations. However, he or she is not entirely free in that, as in the first

sentence of the second paragraph of Article 74 the Constitution authorises the legislature to determine the conditions for establishing economic organisations and thus also their legal form of organisation. A typology of economic subjects regulated by law is necessary for the legal regulation of the market and for the unfolding of legal transactions, and thus for legal certainty.[19] In addition, one of the aspects of the freedom of association determined by the second paragraph of Article 42 of the Constitution is that individuals have the possibility to establish a legal entity in order to enable collective functioning in a field of common interests. An essential integral part of the freedom of association is that the law enables the association to obtain the status of a legal entity. Without this, the freedom of association would often have no sense.[20] Legal entities are thus important also for enforcing some rights of natural persons, including their human rights. Therefore, appropriate constitutional protection of legal entities is necessary.

18. Furthermore, developments as regards the establishment and functioning of legal entities have brought us to the point where also legal entities need to be ensured legal protection in some fields where otherwise natural persons are constitutionally protected, whereby such protection of legal entities is, by its nature, developed from the need to protect humans. Therefore, some of the rights that the Constitution guarantees to natural persons as human rights also need to be recognised to legal entities as constitutionally guaranteed rights. However, not because the legal entities and the human rights that they enjoy would be an objective of itself, but because the human rights of natural persons are protected through them.[21] Nevertheless, this protection of legal entities first depends on whether individual rights can apply to them with regard to their content and nature. The Constitutional Court has already decided that regarding property issues, legal entities enjoy rights equal to those of natural persons.[22] Likewise, the Constitutional Court has expressed its opinion that legal entities also enjoy constitutional protection under the first paragraph of Article 39 of the Constitution, which protects the right to freedom of expression,[23] protection of the general freedom of action (Article 35 of the Constitution)[24], protection of constitutional procedural guarantees[25], and the protection that the Constitution guarantees in Article 33 (private property) and in the first paragraph of Article 74 of the Constitution (free economic initiative).[26] Therefore, the right to free economic initiative, which is guaranteed by the Constitution as a human right of natural persons, also protects legal entities, once adapted to the nature of such right and to the nature of the legal entity at issue. On the constitutional level, we can thus speak of the constitutional protection of legal entities that encompasses – with regard to the above – rights that are adapted in comparison with those that the

Constitution guarantees to natural persons as human rights. Therefore, we can speak of the constitutional rights of legal entities.

19. The Constitution guarantees equal legal protection to legal entities only with regard to some rights that it otherwise recognises as the human rights of natural persons (for instance, with regard to constitutional procedural guarantees under Article 22 of the Constitution), a lower degree of protection than guaranteed to natural persons regarding some other rights, while legal entities cannot enjoy some rights at all due to the nature of human rights or legal entities. Therefore, it first has to be established – with regard to the above-mentioned aspects – whether a legal entity enjoys to any degree the right to privacy as a constitutional right. If we take into consideration only a literal interpretation of Article 35 of the Constitution, which speaks of the inviolability of a "person's privacy", such would indicate that the constitutional protection of privacy is reserved for humans (natural persons).[27] However, the sole literal interpretation of the Constitution does not suffice with regard to what was stated in the previous paragraph. When interpreting constitutional provisions, the Constitutional Court must also take into consideration their intention, as well as the legal nature of these provisions, whereby from the viewpoint of such assessment it is essential whether the individual rights that the Constitution otherwise guarantees to natural persons as human rights can, in light of their nature, apply to legal entities and to what extent. In the case at hand, the Constitutional Court must take a position on the question of whether also legal entities[28] enjoy privacy and especially whether they also enjoy the spatial and communication aspects of privacy. Therefore, it has to take a position on whether legal entities enjoy the constitutional rights under Article 35, the first paragraph of Article 36, and the first paragraph of Article 37 of the Constitution.

20. Legal entities are an artificial form within the legal order. Their establishment and functioning are derived from the human right to establish legal entities in order for natural persons to exercise their interests. However, it is also important for the existence of legal entities and for the normal performance of their activities for which they were established that they enjoy a certain inner circle that is protected and sheltered to a reasonable extent from outside intrusions. In this circle, members of their human substratum (partners, members, employees, management, etc.) can peacefully carry out the activities directed at the purpose for which the entity was established. The reason for this lies in the tendency to protect organisations (in which individuals associate) from arbitrary interference by state authorities, which is the primary objective of the protection of privacy. It is not possible to imagine how a legal entity could plan its activities and attain its objectives in an undisturbed manner if it did not have the possibility to protect the fact of and

data on its activities from (arbitrary) interferences by the state or from interferences by other individuals, or if it was not guaranteed a certain space safe from unwanted intrusions, and the possibility of safe and private communications, including at a distance. Also a legal entity has some functional, personnel, and spatially delimited internal sphere that it can justifiably expect to be protected from the intrusions of third persons who do not belong to the organisational structure of the legal entity. In such sense, also a legal entity enjoys the constitutional right to privacy, even though it is adapted to its nature. This starting point does not entail, however, that a legal entity must enjoy this constitutional right to the same extent as applies to the human rights of natural persons. As legal entities are artificial forms which are constitutionally protected in order for the sphere of individuals' freedom to be widened and protected, the level of their protection can from the outset be lower than for natural persons.

The Spatial Privacy of Legal Entities

21. The sphere of privacy of legal entities includes, *inter alia*, both the spatial aspect (on the business premises on which it exercises its activity) and the communication aspect (the possibility of free and undisturbed communication at a distance on behalf and for the account of the legal entity inside its structure and with the outside world). However, for both aspects the special nature of the legal entity and its functioning has to be taken into consideration. When the spatial aspect is at issue, firstly, it is necessary to distinguish the business premises of the legal entity that are intended to be used by the public with regard to the purpose of its establishment and functioning. On such business premises the legal entity enjoys no privacy at all. In addition, the legal entity also has business premises that are not generally publicly accessible. On those business premises, however, the legal entity does enjoy the constitutional right to privacy,[29] but it has to be realised that such is formed in two layers or circles of privacy in which the expectations of the legal entity to be left undisturbed essentially differentiate. Such is due to the legal nature of legal entities. In the wider, outer circle of this expected privacy, the legal entity cannot expect privacy which in terms of its quality would correspond to the privacy that, under the first paragraph of Article 36 of the Constitution, is protected to the highest degree with regard to the spatial aspect of natural persons. In the inner, narrower circle of such privacy, also a legal entity can expect the same constitutional protection of spatial privacy as a natural person.

22. The legal entities to which the constitutional assessment at issue applies are established for the purpose of exercising an economic activity. The

Constitution expressly prohibits that the economic activity is exercised contrary to the public benefit (the second sentence of the second paragraph of Article 74 of the Constitution), and equally expressly prohibits acts of unfair competition, as well as acts which contrary to law limit competition (the third paragraph of Article 74 of the Constitution). These constitutional prohibitions, which are also the basis for limitations of the right to free economic initiative (the first paragraph of Article 74 of the Constitution), require appropriate action by the legislature. In certain instances, they can be joined by other constitutional requirements, such as the authorisation of the legislature to determine the conditions and manner of exercising economic activity so as to ensure a healthy living environment (the second paragraph of Article 72 of the Constitution). In order for the legislature to be able to apply all the mentioned constitutional authorisations, it does not suffice that it merely regulates the exercise of individual economic activities in accordance with them, but it also has to ensure the effectiveness of such rules in daily life. It can thereby also interfere with other rights that are guaranteed to legal entities. In order to ensure the effectiveness of the stated constitutional authorisations, the legislature can envisage, for instance, inspection supervision, as well as other forms of supervision over the exercise of the activity, and usually, as a general rule, also criminal sanctions for the most undesirable deviations from respect for the rules. It follows therefrom that legal entities cannot expect that the state will not supervise their operations. In order to ensure respect for the mentioned and other constitutional provisions, the state will, if necessary (on the basis of express statutory rules and in a predetermined manner of exercise of the authorisations of the competent state authorities), also enter into the wider sphere of the spatial privacy of legal entities, therefore also on their business premises that are otherwise inaccessible to the public, which, however, are intended for the exercise of their economic activity. Such privacy is not equal to the spatial privacy of natural persons. The wider, outer circle of the legal entity's privacy on its business premises is thus not protected by the first paragraph of Article 36 of the Constitution. In it, however, the legal entity does enjoy the general protection of privacy guaranteed by Article 35 of the Constitution. Interferences with this constitutionally protected right are admissible also with regard to a legal entity if such pursue a constitutionally admissible objective and if they are proportionate. Therefore, the measures by which competent state authorities can interfere with the right protected by Article 35 of the Constitution must be determined by law and be consistent with the third paragraph of Article 15 and with Article 2 of the Constitution.

23. The wider circle of privacy of legal entities, in which for the mentioned reasons the legal entity cannot expect that interferences – on the basis of rules which are predetermined by law – will not occur there relatively often, is

not comparable with the expectancies of natural persons which are, as a human right, protected by the first paragraph of Article 36 of the Constitution. Namely, natural persons are very strongly protected in their residence and on other premises which they perceive as their home and in which they can (except in cases determined by the fifth paragraph of Article 36 of the Constitution) always expect to be left undisturbed (see paragraph 15 of this reasoning); this especially applies to interferences by the state with the right to their spatial privacy. The second, third, and fourth paragraphs of Article 36 of the Constitution are specifically intended for such protection. Therefore, the Constitution already protects natural persons from any interference with this expected field of spatial privacy with the express requirement of a prior court order, which is required just to enter the residence itself, not merely for a search thereof (the second paragraph of Article 36 of the Constitution). With regard to the above, by itself, entry onto the business premises (and visual inspection of the premises without opening hidden compartments and without the seizure of objects and equipment to be found in these hidden compartments) by, for instance, an inspector exercising his competence, cannot be regarded as an interference with the right of the legal entity protected by the first paragraph of Article 36 of the Constitution, despite the fact that these premises are otherwise not accessible to the public. In this part, therefore, with regard to their nature, the purpose of their establishment and functioning, and the fact that they cannot expect that the state will not supervise the conduct of business activities in conformity with the stated constitutional requirements, legal entities do not enjoy the same level of constitutional protection as natural persons do. For this reason, it is also not necessary that they are protected from interferences with their privacy from the spatial perspective in the same manner as are natural persons.

24. However, it has to be realised at the same time that even with regard to the legal entity there exists a narrower sphere of its spatial privacy in which it can expect – regardless of the above facts – that there will be no interferences with it. In that sphere even the legal entity can expect to be left undisturbed, which must also apply to [potential interferences by] the state. Therefore, in this part also the legal entity does have the constitutional right to spatial privacy determined by the first paragraph of Article 36 of the Constitution. Interferences with that narrower sphere of privacy of the legal entity are by their nature connected with the high intensity of the interference, which is reflected in such authorisations of the competent state authority that they correspond to the content of the term "search" from the second paragraph of Article 36 of the Constitution. Then, it no longer concerns – for instance – the personnel of the legal entity being obliged to allow a certain limited inspection of the premises, but authorisations on the basis of which authorised persons of

competent state authorities can, against the will of the legal entity,[30] execute a thorough search of the business premises, including the hidden compartments thereof.[31] Such a search is conducted for the purpose of obtaining data and seizing documents and other media on the basis of which competent officials can evaluate whether the legal entity conforms to the legal rules which the legislature enacted for the purpose of ensuring the effectiveness of constitutional prohibitions regarding the exercise of economic activities. In this manner, an interference with the privacy of a legal entity passes from the wider into the narrower sphere of its privacy, which is protected as a constitutional right of the legal entity by the first paragraph of Article 36 of the Constitution. In this regard, the privacy of the legal entity – with regard to the need for constitutional protection against intrusions – namely matches that level of expected spatial privacy that is essentially guaranteed by the first paragraph of Article 36 of the Constitution to natural persons. In such manner, it depends, above all, on the content and the intensity of the authorisations of the state authority whether an interference resulting from such authorisations entails an interference with the right of the legal entity protected by the first paragraph of Article 36 of the Constitution, for the admissibility of which, except in the instances determined by the fifth paragraph of Article 36 of the Constitution, a prior court order is required.

25. The ECHR does not contain a special provision regarding the spatial aspect of privacy, as such is protected by the general provision of the first paragraph of Article 8 of the ECHR. However, it also proceeds from the case law of the ECtHR that the term "home" in the mentioned provision of the ECHR in certain circumstances also includes the right to respect for the registered office of the company, of a branch thereof, or other business premises.[32] The second paragraph of Article 8 of the ECHR, which determines under which conditions interferences with the right determined by the first paragraph of that Article are admissible, does not otherwise specifically require a prior court order.[33] However, in instances in which, with regard to the circumstances of the case, it is necessary to recognise the spatial aspect of the right under the first paragraph of Article 8 of the ECHR to a legal entity, the ECtHR has also introduced the requirement of a prior court order as one of the conditions for ensuring the proportionality of a measure when such measure is very intense. Nonetheless, at the same time it allowed that interferences with this right with regard to legal entities can be more intense than with regard to natural persons.[34] In such a manner, we can realise that in instances when the competent state authorities intensely interfere with the narrowest protected circle of the spatial aspect of a legal entity's privacy by exercising statutorily determined authorisations, an essentially equal level of protection of the constitutional right to the spatial

aspect of the privacy of the legal entity – from the viewpoint of the requirement of a prior court order before the search – is guaranteed by both the Constitution (the second paragraph of Article 36) and by the ECHR (Article 8). Therefore, in the case at issue, the constitutional assessment has to be conducted from the viewpoint of the Constitution.

The Communication Privacy of Legal Entities

26. In addition to Article 35 of the Constitution, it is especially the first paragraph of Article 37 of the Constitution that protects the communication aspect of privacy. Also when legal entities are at issue there are communications at a distance that the legal entity can regard as confidential – and with regard to which it is entitled to expect privacy. Therefore, also legal entities are entitled to protection under the first paragraph of Article 37 of the Constitution and thus, in instances when they do not wish to disclose their communications at a distance, to claim protection of their communication privacy. Also the ECtHR in its case law has broadened the protection under the first paragraph of Article 8 of the ECHR to include legal entities with regard to electronic data in a computer system which fall under the term "correspondence" from the Convention.[35] The second paragraph of Article 8 of the ECHR allows the limitation of all aspects of the right to privacy when such is determined by law and necessary in a democratic society due to the security of the state, public safety, or the economic welfare of the state, in order for disorder or crime to be prevented, for the protection of health or morals, or for the protection of the rights and freedoms of other people. It can be therefore stated that from the viewpoint of the ECHR, interferences with the right to privacy protected by Article 8 of the ECHR are admissible from all the aspects from which limitations of constitutional rights are admissible also in the Slovene legal order (the third paragraph of Article 15 of the Constitution).

27. The second paragraph of Article 37 of the Constitution contains in this regard a somewhat different provision than the ECHR and states that a law can prescribe "that on the basis of a court order, the protection of the privacy of correspondence and other means of communication and the inviolability of personal privacy [may] be suspended for a set time where such is necessary for the institution or course of criminal proceedings or for reasons of national security." If the Constitution did not contain the stated provision, interferences with this right would be possible under the same conditions as are generally determined for limiting rights. This, however, would not entail that a prior court order is not necessary for interferences with this constitutional right of legal entities, as the Constitutional Court has already adopted the position that in cases of the most serious interferences with the right to privacy (with regard to an interference with Article 35 of the Constitution), the requirement of a court

order already proceeds from the principle of proportionality.[36] However, by the second paragraph of Article 37, the Constitution delimits the possibility to interfere with the right to communication privacy also from the viewpoint of the possible objectives that the statutory regulation pursues. In the instances that it determines, it namely allows its limitation only when such is urgent for the initiation or course of criminal proceedings, or for the security of the state. It does not allow, however, the legislature to determine different objectives of such interferences with the right to communication privacy, such as the economic welfare of the state, which is expressly stated among the objectives in the second paragraph of Article 8 of the ECHR. Whenever the standards of protection of a particular right enshrined by the Constitution are stricter than those in a treaty, which is what the ECHR is, the Constitutional Court must base its decision on constitutional rules.

28. The notion of the security of the state can be interpreted as including both state and public safety. The question is, however, what is included under the constitutional meaning of the term "criminal proceedings". The sole literal interpretation of the second paragraph of Article 37 of the Constitution would lead to an interpretation that by the use of this term the constitution-framer envisaged only what, with regard to the respective positive law, is punished as a criminal offence. It is also true that the provisions that are the basis for liming constitutional rights cannot be interpreted widely. When they are interpreted, however, their content and purpose have to be taken into consideration and, in the assessment of the case at hand, also the nature of legal entities. The second paragraph of Article 37 of the Constitution limits the objectives due to which it is admissible to interfere with communication privacy, but the content of these objectives entails the protection of other constitutional goods, and possibly also of human rights. The goals of such protection cannot be reached if they are always interpreted restrictively. When the constitution-framer defined the constitutionally admissible objectives, it undoubtedly wanted to protect some goods which in certain social circumstances would be assessed to also require protection under criminal law – which entails that an interference with the right to communication privacy is admissible, but only on the basis of a prior court order. When legal entities are at issue, the legislature does not necessarily achieve such objective only by defining criminal offences, but possibly also by defining other socially highly dangerous conduct which it penalises as minor offence when such is, by its nature and by the severity of the sanctions which are imposed for it, comparable to criminal offences. The fines prescribed for legal entities for minor offences are in certain instances even higher than the fines prescribed for criminal offences. Therefore, the starting point on the basis of which the Constitutional Court has already interpreted the term "criminal offence", which is used in the Constitution, with

regard to the content of proscribed conduct and the weight of the prescribed sanction can be used so that the constitutional provisions that refer to it also apply for minor offences.[37] When legal entities are at issue, it depends primarily on whether what is at issue is forbidden conduct which by its nature and weight is comparable with a criminal offence for the term "criminal proceedings" determined by the second paragraph of Article 37 of the Constitution to also possibly apply to such**.** The term criminal proceedings in this constitutional provision is, when the communication privacy of legal entities is at issue, therefore not connected only to criminal proceedings as such are established in positive law. This term entails, constitutionally speaking, proceedings which are carried out in order to ensure the protection of individual goods which due to their high social importance must be highly protected. Such is also reflected in the fact that these goods are also protected by means of punitive law, which in the stated framework can also include minor offences.

29. All of the above means that when assessing the admissibility of an interference with the constitutional right of legal entities to communication privacy under the first paragraph of Article 37 of the Constitution it first has to be assessed whether such interference pursues a constitutionally admissible objective under the second paragraph of the mentioned constitutional provision. If it does, the interference can only be admissible on the basis of a court order, which is specifically required by the second paragraph of Article 37. Such constitutional requirement must also apply to legal entities. With a prior court order, the arbitrary conduct of the state power and its possible misuse are namely prevented. As was already mentioned in paragraph 20 of the reasoning of this Decision, also legal entities must be protected from such actions. With regard to the fact that communication privacy is more strictly protected by Article 37 of the Constitution than by Article 8 of the ECHR, the constitutional assessment also from this point of view has to be conducted on the basis of the Constitution and not on the basis of the ECHR.

B. – III.

Assessment of the First Sentence of the First Paragraph of Article 28 of the PRCA-1

a) The Challenged Regulation

30. The challenged provision of the PRCA-1 is placed in Section 3 of Chapter 2 of Part V of the PRCA-1, whose title is The Search Procedure. The PRCA-1 otherwise regulates restrictive conduct, concentrations of companies, authoritarian limitations of competition and measures for preventing restrictive conduct, and concentrations that substantially limit efficient competition when they have or can have an effect in the territory of the Republic of Slovenia (the first paragraph of Article 1 of the PRCA-1). The PRCA-1 applies, in conformity with Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4 January 2003 – hereinafter referred to as Regulation 1/2003), also to violations of Articles 101 and 102 of the TFEU[38] (the second paragraph of Article 4 of the PRCA-1).[39] The Agency is namely not competent only to exercise control over the implementation of the PRCA-1, but also to exercise control over respect for both of the mentioned Articles of the TFEU (the first paragraph of Article 12 of the PRCA-1). The search procedure is a part of the procedure regarding restrictive conduct (i.e. restrictive agreements and abuses of a dominant position), which are otherwise defined in Articles 6 to 9 of the PRCA-1 and by Articles 101 and 102 of the TFEU. The Agency can namely issue an order on the initiation of the procedure *ex officio* when it discovers circumstances that indicate the probability of a violation of either Articles 6 or 9 of the PRCA-1, or Articles 101 or 102 of the TFEU (Article 23 of the PRCA-1). In the search procedure, which is intended for determining the existence of restrictive conduct, the Agency has at its disposal multiple investigation instruments. In addition to the request to convey data under Article 27 of the PRCA-1, the most important instrument is precisely the search of the company against which the procedure is being conducted, which is determined especially in Articles 28 and 29 of the PRCA-1. The search is the main tool for uncovering evidence connected with the most serious violations of competition law, such as trusts and abuses of a dominant position.[40] Numerous provisions of the PRCA-1 on the search procedure with regard to restrictive conduct – including Articles 28 and 29 of the PRCA-1 – are applied *mutatis mutandis* also for the procedure with regard to concentrations (see Articles 47 to 49 of the PRCA-1).

31. Article 28 of the PRCA-1 determines that the Agency issue an order to search the company[41] against which the procedure is being conducted. In addition, it determines the obligatory components of the search order (the subject and the purpose of the search, the date of the beginning of the search, the name of the authorised person who will lead the search, the scope of the authorisations of the Agency, and a warning stating the prescribed fine for declining to cooperate or obstructing the search), the manner of it being served on the company (at the beginning of conducting the search, possibly

together with the serving of the order on the initiation of the procedure) and that there exists no direct judicial remedy against such order.[43] The search of business premises and residences of "third party" natural persons or legal entities (regarding a company against which the procedure is not being conducted or in the residences of members of the managing or supervisory body, employees, or other associates of a company against which the procedure is not being conducted), however, cannot be ordered by the Agency itself, as it has to obtain, in conformity with the first paragraph of Article 33 of the PRCA-1, an order issued by the competent court.

b) Authorisations of the Agency

32. Article 29 of the PRCA-1 determines who and when can conduct a search and, above all, enumerates the competences of the competent persons who are to conduct the search. The competent persons can conduct the search also against the will of the company (the fourth paragraph of Article 29 of the PRCA-1),[44] with regard to which they may enter and inspect premises, plots of land, and means of transport, inspect books and other business documentation regardless of the media carrying data, seize or obtain copies or summaries from books and other documentation in whatever form, seal all business premises, books, and other documentation for the period of the of investigation, seize objects and documents for a limited period of time, request oral and written explanations from the representatives and employees of the company with regard to the subject and the purpose of the search, inspect documents by means of which the identity of persons can be established, and conduct other actions which are in line with the objective of the search. The only thing excluded from the search is communication between the company against which the investigation is being conducted and its legal counsellor, insofar as such refers to this procedure. Article 32 of the PRCA-1 regulates a special procedure for resolving any dispute between the Agency and the company with regard to the existence of such privileged communication, in which the Administrative Court decides.

33. For the regulation of the search of a company against which the procedure is being conducted which is ordered independently by the Agency, which is not a court, wide and intense authorisations of the Agency are typical. There is no hierarchy among the acts of investigation and the Agency can freely choose among them, and, in conformity with the search order, apply one or more of the statutory measures. It is admissible to inspect premises that are (in any manner) connected with the activity and business from which there arises the probability of a violation of competition law. It is not necessary that in the search order it is precisely determined which documents the authorised persons wish to inspect, as often even the Agency cannot know what

documents the company has. Authorised persons have the right to actively seek potentially relevant documents on the searched premises.[45] It is evident from the intention of the legislature to give the Agency efficient and sufficient authorisations so that the Agency may, by force, enter the premises of a company which are not freely publicly accessible, at its registered office or at some other location (a branch, an office, etc.), and inspect such premises, i.e. open closets, drawers, safes, closed boxes, and do everything necessary to achieve the objective of the search. The Agency may also review business books and other documents which concern the functioning of the company, regardless of the type of media which carry such data, and make copies or summaries (which also applies to business letters, e-mails, and SMSs stored on a computer or on a telephone, and to various other forms of communication saved in information systems of the company or accessible therefrom, etc.). The search authorisations of the Agency are thus such that the Agency has, on their basis, the possibility to inspect the whole internal sphere of the company, so that nothing remains hidden from those searching. This exceeds the viewing and acquisition of documents which the legal entity must – already on the basis of numerous statutory provisions – submit to competent state authorities when such exercise supervision over its operations. Furthermore, the Agency independently decides on the number of searches necessary and which premises of the company are to be searched.

34. A search is possible whenever there exists a suspicion of restrictive conduct as determined in the PRCA-1. It is, however, not possible to conduct a search before the supervision procedure is initiated against the company. For such, it is required that the Agency discovers circumstances from which there arises the "probability of a violation" of either Articles 6 or 9 of the PRCA-1, or Article 101 or 102 of the TFEU (Article 23 of the PRCA-1). In addition, the first indent of the second paragraph of Article 29 of the PRCA-1 determines that a search is to be carried out where the company exercises its activities and business from which there arises the "probability of a violation". This provision is to be interpreted so that the search is carried out where it is probable that it will be possible to find appropriate evidence of a violation.[46] By conducting a search determined in Articles 28 and 29 of the PRCA-1 it is possible to gather data which allow the discovery and limitation of restrictive conduct. It is reasonable to expect that evidence of the existence of restrictive conduct and abuse of a dominant position are concealed on such premises which are inaccessible to the public, and in the written and electronic documentation of the company.

c) The Legal Nature of the Procedure before the Agency

35. The applicant and the Agency claim that the procedure in which the stated authorisations of the Agency are exercised is, by its nature, a punitive procedure. In fact, the PRCA-1 regulates two different kinds of procedures regarding the assessment of violations of competition law. On one hand, it regulates such procedures as were conducted in cases in which the Supreme Court halted the proceedings and requested an assessment of the constitutionality of a law and which are in their entirety held under the provisions of the PRCA-1, and on the other hand, procedures on minor offences which are carried out under the provisions of Part VIII of the Act in conformity with the MOA-1, while the PRCA-1 includes only a few special provisions on these minor offence procedures. On this basis it would be possible to assume that the procedures for determining violations of competition law which are carried out in their entirety under the PRCA-1 are not, by their nature, punitive procedures.[47] It would be possible to qualify them as special procedures for supervising the conduct of subjects on the market, which are conducted by a specialised authority, i.e. the Agency. At the same time, however, it has to be realised that under the first paragraph of Article 12 of the PRCA-1, the Agency is competent to exercise control over the execution of the PRCA-1 and of "Articles 81 and 82 of the Treaty Establishing the European Community" (now Articles 101 and 102 of the TFEU), and that the Agency is, under the second paragraph of Article 12 of the PRCA-1, also a minor offence authority which decides on minor offences due to violations of the provisions of the PRCA-1 and the TFEU. As a minor offence authority, the Agency has no discretion over the initiation of minor offence procedures, but it has to carry out, in instances when it determines the existence of the elements of a minor offence, also the minor offence procedure. The data gathered on the basis of the search order will thus regularly be used in two procedures before the same authority which deal with the same state of the facts, even though they are different in terms of their legal nature.[48]

36. The supervisory authorisations of the Agency are directed towards the elimination of the unconstitutional situation and towards the reestablishment of the compliance of the market with the rules on competition. In its procedure for assessing restrictive conduct, the Agency determines *ex officio* the existence of a violation of the prohibition of concluding restrictive agreements and a violation of the prohibition of the abuse of a dominant position (Article 23 of the PRCA-1), and it also conducts procedures regarding assessments of concentrations (Article 11 of the PRCA-1). In the supervision procedure, the Agency enjoys wide authorisations, as it has the power to determine, by a decision, the existence of a violation of the prohibition of concluding restrictive agreements or a violation of the prohibition of the abuse of a dominant position, and to demand that the company cease such violation. It also may

impose on the company measures which it considers suitable for the elimination of the stated violation and its consequences, it can accept commitments voluntarily proposed by the company for the elimination of the unlawful situation (Articles 37 and 39 of the PRCA-1), and it may also prohibit concentrations inconsistent with competition rules, demand the elimination of the effects of unconstitutional concentrations, and adopt proposed corrective measures which can eliminate the serious suspicion regarding the compliance of the concentration with competition rules (Articles 50, 51, and 53 of the PRCA-1). In the valid statutory regulation, the supervision procedure under the PRCA-1 is thus, in itself, essentially not regulated as a punitive procedure. Supervision over the legality of the decision-making of the Agency in this procedure is granted to the Supreme Court (Article 56 of the PRCA-1), which decides in special judicial proceedings in which the provisions of the Act regulating administrative disputes apply *mutatis mutandis* insofar as the PRCA-1 itself does not contain certain special provisions that regulate those proceedings differently.

37. In the minor offence procedure, the Agency imposes a fine as a repressive measure for general, special-preventive, and retributive purposes (therefore, it is a punitive sanction). The amount of the fine that it may impose is high. In minor offence procedures, judicial control, which includes a request for judicial protection before the competent court, under the provisions of the MOA-1, is guaranteed against the decisions of the Agency. It seems that the supervision procedure and the minor offence procedure under the PRCA-1 are formally separated procedures. However, they are both conducted by the same authority (the Agency), they refer to the same state of the facts,[49] and evidence acquired in the search procedure (also on the basis of the search order), which is a phase of the supervision procedure, will also regularly and expectedly be used in the minor offence procedure.[50] Moreover, they may even find their way into criminal proceedings.[51] In instances where the Agency, when exercising its authorisations under Article 29 of the PRCA-1, also establishes elements of a minor offence, the search will thus continue in the minor offence procedure – therefore in a punitive procedure – and the evidence acquired therein will possibly even serve as the basis for initiating criminal proceedings. Therefore, it is not that relevant whether the procedure which the applicant halted before having filed the request is in itself a punitive procedure[52] – what is decisive is that the data and evidence acquired in the search conducted on the basis of the authorisations under Article 29 of the PRCA-1 will subsequently serve as the basis of all the stated procedures. Most often this will be the minor offence procedure which is carried out *ex officio* by the Agency. Therefore, the stated authorisations of the Agency are to be interpreted as authorisations given to a state authority in order to carry out

a punitive procedure and, with regard to the possible reuse of the acquired evidence in the criminal proceedings before the competent court, also to conduct criminal proceedings. Efficient execution of the supervision procedure under the PRCA-1 during the search is namely also a necessary condition for successfully imposing sanctions on the legal entity which by violating competition rules committed a minor offence[53] and possibly also a criminal offence.[54]

d) Assessment of Consistency with the Constitutional Rights to Spatial and Communication Privacy

38. As is regulated by Articles 28 and 29 of the PRCA-1, the search corresponds in terms of its content to the notion of a search as is referred to by the Constitution in the second paragraph of Article 36. Such a search represents an invasive interference with the right of the companies against which the procedure under the first paragraph of Article 36 of the Constitution is being conducted. With regard to the intensity of the search, it entails an interference with the narrowest sphere of the right to spatial privacy. Therefore, the constitutional requirement of a prior court order under the second paragraph of Article 36 of the Constitution must apply in order to limit the search. With regard to the authorisation of the Agency to also search all data carriers and communication contained therein, the search also entails an interference with the right of companies determined by the first paragraph of Article 37 of the Constitution. Therefore, the challenged regulation entails an interference with the rights that protect the spatial and communication aspect of the privacy of legal entities. At this point it is necessary to again draw attention (see paragraphs 17 and 20 of the reasoning of this Decision) to the fact that even though these constitutional rights of legal entities are protected by the Constitution, they are protected less intensely than the privacy of natural persons. The constitution-framer did not make use of this value-based starting point under Articles 36 and 37 of the Constitution to set milder fundamental formal conditions for interferences of the state with these two constitutional rights of legal entities. A lower degree of protection of legal entities could thus be reflected – in comparison with natural persons – especially in milder conditions for ordering the measure (with regard to the degree of suspicion, reasons for the measure, etc.) both on the abstract level and in concrete procedures, in the possibility to order more invasive and lengthy measures, etc. Such lowering of such constitutional protection cannot, however, be reflected in dispensing with the requirement of a court order – especially because of the purpose due to which this constitutional requirement was set. The purpose of prior authorisation, adopted by an independent and

unbiased court, to interfere with this constitutional right is, as was underlined above (see paragraph 29 of the reasoning of this Decision), to prevent abuses and to ensure respect for the equal legal treatment of all subjects. Also legal entities must be protected from arbitrary interferences by the state.

39. The Constitution envisages the court order as one of the conditions for the admissibility of both interferences whereby the only admissible exception therefrom is determined by the fifth paragraph of Article 36 of the Constitution.[55] The first sentence of the first paragraph of Article 28 of the PRCA-1 is not a statutory provision which under this authorisation of the constitution-framer would regulate the conditions for the urgent arrest of criminal offenders and for protecting people and property in dwellings and on other premises of other persons in a more detailed manner. Therefore, the fifth paragraph of Article 36 of the Constitution is not relevant for the constitutional review in the case at hand. What is decisive is that the first paragraph of Article 28 of the PRCA-1 determines that the measures which interfere with the spatial privacy of companies are ordered by the Agency, not a court, including when such measures are ordered and executed against the will of legal entities.[56] This is inconsistent with the express requirement under the second paragraph of Article 36 of the Constitution, which requires a prior court order in such instances. When exercising these authorisations, the Agency will – by the nature of the matter and with regard to the degree of their invasiveness which allows the Agency to conduct a complete search of business premises and the objects thereon – also interfere with the narrower circle of the spatial privacy of the legal entity. Therefore, it is necessary to concur with the applicant that the challenged provision, inadmissibly and inconsistently with the second paragraph of Article 36 of the Constitution, limits the constitutional right determined by the first paragraph of Article 36 of the Constitution and is thus inconsistent therewith.

40. The challenged statutory provision also allows interferences by authorised persons with the right that is guaranteed also to legal entities by the first paragraph of Article 37 of the Constitution. With regard to what is stated in paragraphs 27 and 36 of the reasoning of this Decision, it is necessary to realise that interferences with that right by the exercise of the authorisations of the Agency determined by Article 29 of the PRCA-1 pursue a constitutionally admissible objective. Under the notion of criminal proceedings under the second paragraph of Article 37 of the Constitution, it is namely possible to also include, on the basis of the reasons stated in the mentioned paragraphs of the reasoning of this Decision, the procedure which the Agency conducts during the search, the constitutional admissibility of which is the subject of this review. However, the regulation that allows the Agency to carry out a search

without a prior court order, which is expressly required by the second paragraph of Article 37 of the Constitution when interferences with communication privacy are at issue, is inconsistent with the stated provision and thus also with the right under the first paragraph of Article 37 of the Constitution.

e) Determination of the Unconstitutionality and the Manner of Execution of the Decision

41. Under the challenged statutory provision, it is admissible for the Agency, by exercising the authorisations under Article 29 of the PRCA-1, to interfere with the spatial and communication privacy of a legal entity without having, regarding such measures against the will of the legal entity, the prior authorisation of the judicial authority. With regard to the statutory regulation of such measures, the legislature could, in conformity with the positions in this Decision, determine some lower standards for the protection of the constitutional rights to privacy of legal entities (see paragraph 38 of the reasoning of this Decision), but it would thereby have to take into consideration that in instances where the search interferes with the spatial and communication privacy of legal entities against their will, it should not dispense with the requirement of a prior court order. From this point of view, the PRCA-1 does not contain the regulation that the Constitution requires for ensuring the mentioned constitutional rights of legal entities. Therefore, in conformity with the first paragraph of Article 48 of the CCA, the Constitutional Court determined the challenged statutory provision to be unconstitutional and imposed on the legislature a time limit for the elimination of the unconstitutionality (the first and second points of the operative provisions). With regard to the presented starting points, the statutory regulation must at the same time respect the stated constitutional rights of legal entities[57] and ensure protection of the important constitutional goods based on constitutional provisions, especially on those that prohibit the pursuit of commercial activities contrary to the public interest (the second sentence of the second paragraph of Article 74 of the Constitution), that prohibit unfair competition practices and practices which restrict competition in a manner contrary to the law (the third paragraph of Article 74 of the Constitution), and that require the effectiveness of Articles 101 and 102 of the TFEU (the third sentence of Article 3a of the Constitution) to be ensured. The legislature must adopt a complex legal regulation in order to ensure a balance between the mentioned constitutional goods. Therefore, in conformity with the second paragraph of Article 40 of the CCA, the Constitutional Court decided that until the established unconstitutionality is eliminated, the first sentence of the first paragraph of

Article 28 of the PRCA-1 shall continue to apply (the third point of the operative provisions). This entails that the Agency has had and still has (until the established unconstitutionality is eliminated) a lawful basis for conducting appropriate searches in the PRCA-1, which will also have to be taken into consideration by the competent court when assessing the constitutionality and legality of the Agency's work.

B. – IV.

Assessment of Articles 54, 56, 57, 59, and 61 of the PRCA-1

a) Consistency with the Right to a Complaint

42. The applicant alleges the inconsistency of Articles 54, 56, 57, 59, and 61 of the PRCA-1 from Chapter 4 of Part V of the PRCA-1 (Judicial Protection) with the right to legal remedies under Article 25 of the Constitution. The applicant is of the opinion that judicial protection can, in conformity with the mentioned right, be attained only in proceedings where the court has full jurisdiction, in which the Administrative Court – the court of first instance – would assess both legal and factual questions, in which the parties would not be precluded from stating new facts and evidence, and in which the right to an appeal would be guaranteed against decisions of the court of first instance.

43. From the right to legal remedies guaranteed by Article 25 of the Constitution (the right to a complaint or to any other legal remedy) there proceeds the obligation of the legislature to respect the principle of appellate review, the essential content of which is that the authority of second instance can assess the decision of the authority of first instance from the viewpoint of all questions necessary for deciding on rights and obligations.[58] The "any other" legal remedy in the sense referred to in Article 25 of the Constitution can also be a legal remedy by which the judicial proceedings are initiated, if such corresponds to the stated constitutional requirements.[59]

44. The Constitutional Court has already adopted the position that, under certain conditions[60], a request to review the decision of a specialised state authority in judicial proceedings can assume the function of a legal remedy.[61] If in judicial proceedings that at the same time function as a legal remedy it is allowed to state all the legal and factual aspects of the case, such

a regulation is not inconsistent with Article 25 of the Constitution. The challenged provisions ensure such judicial decision-making in proceedings before the Supreme Court. The Supreme Court can, in the framework of the reasons for the claim, verify without limitations the correctness and completeness of the establishment of the state of the facts as was established by the Agency (the Supreme Court is not bound by this), even though it cannot in such manner correct with finality the established errors and decide on the matter by a judgment. In the judicial protection proceedings under the PRCA-1, the Supreme Court has sufficient authorisations to verify a decision of the Agency from the viewpoint of all issues that are important for deciding on a right or obligation, or with regard to the existence of factual, material, or procedural errors. The Supreme Court then substantively[62] (on the basis of a substantive analysis and assessment) decides on the correctness of the challenged act of the Agency regardless of the fact whether it rejects the action for not being substantiated, abrogates the challenged act and remands the case to the Agency for a renewed procedure, abrogates the challenged act and decides itself on the matter by a judgment, by an order declares the act of the Agency to be null, or, if the Agency remains silent, orders what administrative act it is to issue, or, if the decision has not been served, orders it to serve the decision (see Articles 63 to 65 and 67 to 69 of the ADA-1). Therefore, Articles 54, 56, and 59 do not limit the right to a complaint and are not inconsistent with it. As the right to a legal remedy is already ensured in the case at issue, the regulation, which does not allow an appeal against a decision by the Supreme Court (Article 61 of the PRCA-1), is also not inconsistent with the stated provision of the Constitution, as it does not guarantee a further right to legal remedy after such has already been invoked and is thus exhausted.[63]

b) Consistency with the Right to Judicial Protection

45. Insofar as the applicant alleges that judicial proceedings should be regulated such that they unfold as so-called proceedings where the court has full jurisdiction, its allegations are to be interpreted as finding fault with the inconsistency with the first paragraph of Article 23 of the Constitution. As long as the decision of the Agency is reviewed from all factual and legal aspects that the legal entity has the right to invoke in proceedings before the Supreme Court, as is explained in the preceding paragraph of the reasoning herein, the statutory regulation does not interfere with the right to judicial protection under the first paragraph of Article 23 of the Constitution. A different position would namely entail that also the statutory regulation of the ADA-1, which regulates judicial protection in a comparable manner, is unconstitutional from the viewpoint of the mentioned right. Regulation of the manner of exercise of the

right to judicial protection in these instances falls within the legislature's sphere of discretion. If the legislature decides to establish a special state authority that is to conduct appropriate procedures in which constitutional procedural guarantees are respected, and allows judicial protection against its decisions in a manner *mutatis mutandis* equal to the requirements under the first paragraph of Article 157 of the Constitution, such a regulation would not interfere with the right to judicial protection under the first paragraph of Article 23 of the Constitution.

c) Consistency with the Right to the Equal Protection of Rights

46. The applicant's allegations that in proceedings before the Supreme Court a legal entity cannot state new facts and evidence, entail alleging an inconsistency of Article 57 of the PRCA-1 with Article 22 of the Constitution. In conformity with the latter provision, everyone enjoys the equal protection of rights in proceedings before a court and before other state authorities, local community authorities, and bearers of public authority that decide on his or her rights, duties, or legal interests. This right guarantees, among other things, the right of a party to make a statement and thus the entitlement that the party may state facts and propose evidence to its benefit. This ensures the right to adversarial proceedings, on the basis of which the court must regard the party as an active participant in the proceedings and enable it an effective defence of its rights and thus the possibility to actively influence the decision in matters that interfere with its rights and interests.[64] By Decision No. U-I-219/03, the Constitutional Court already adopted the position that a regulation which limits the right of a party to make a statement (i.e. the right to state facts and to propose evidence to its benefit) to a certain period during the course of the procedure entails an interference with the right under Article 22 of the Constitution. For the same reasons, also Article 57 of the PRCA-1 interferes with this human right of parties to competition procedures.

47. Human rights may only be limited in instances determined by the Constitution in order for the rights of others to be protected or for reasons in the public benefit (the third paragraph of Article 15 of the Constitution). If the legislature pursues a constitutionally admissible objective and if the limitation is consistent with the principles of a state governed by the rule of law (Article 2 of the Constitution), i.e. with those principles that prohibit excessive measures of the state (the general principle of proportionality), the limitation of the human right is admissible under the established constitutional case law[65].

48. The objectives of the prescribed measure proceed from the reply of the National Assembly, from the opinion of the Government, and from the opinion of the Agency. The constitutionally admissible objectives that are pursued by the challenged limitation of the human right to the equal protection of rights include ensuring free and fair competition, a fast and efficient procedure for exercising supervision over violations of competition, ensuring the efficient execution of the obligations of the Republic of Slovenia under Articles 101 and 102 of the TFEU, and the suspension of the "centre of gravity" of the decision-making of the Agency as a specialised authority on matters regarding the protection of competition. As the regulation under Article 57 of the PRCA-1 can accelerate the judicial control proceedings and at the same time ensure that in proceedings only those facts can be established that had been established or were at least stated by a party in the procedure before the Agency, as the most suitable and specialised authority for that purpose, the preclusion of stating new facts and proposing new evidence at issue is an appropriate measure for attaining the stated objectives.

49. In order to attain these objectives in the judicial control proceedings over the decisions of the Agency adopted in procedures for the protection of competition, it is necessary to prevent the possibility of stating new facts and proposing new evidence as late as in the judicial proceedings. It is thereby necessary to take into consideration that while assessing the necessity of a certain measure, the Constitutional Court assesses whether the measure is necessary for the desired objective to be attained as successfully and to such a degree as is possible for that measure. Stated differently, another measure (that interferes more mildly or even does not interfere with human rights) can undermine the necessity of a stricter measure only if it is in no manner less efficient than it. In the case at issue, it is important that the introduction of the authorisation of the court to assess, in an individual case, whether the plaintiff had justifiably stated certain facts only as late as in the legal action, obviously cannot in an equally successful manner ensure the pursued objective of fast, efficient, and economical implementation of control over respect for the legal regulation of competition. The need of the Supreme Court to deal with (sometimes) complex admissibility questions regarding the subsequent submission of procedural documentation can namely make judicial proceedings more complicated and could also prolong them. Even more obvious is the necessity of the preclusion of stating new facts and proposing new evidence in order to prevent the separation of the factual basis of the dispute from the state of the facts that was outlined in the procedure before the Agency, which is an authority specialised for the protection of competition.

50. Whether the weight of the consequences of the examined measure is proportionate to the weight of the pursued objective depends above all on

whether the party had sufficient opportunities to make a statement on all the relevant aspects of the case, whereby the party itself must contribute to the acceleration of the procedure. In the procedure before the Agency, the party has sufficient possibilities to suggest appropriate facts by means of which it challenges the accusations of the Agency regarding the existence of prohibited conduct under the PRCA-1, to prove these facts with appropriate motions for evidence, to present its legal positions, and to state its position in general with regard to all legally relevant aspects of the case. If the PRCA-1 does not state otherwise, the GAPA is applicable in the decision-making procedure of the Agency (the second paragraph of Article 15 of the PRCA-1), which in Article 9 states the principle of hearing parties.[66] Also the special regulation under the PRCA-1 guarantees adversarial proceedings.[67] It is especially important that the company against which the search was carried out can submit comments on the report on the search within fifteen days following its service (Article 34 of the PRCA-1) and that before a decision that is negative for the party is adopted, the party must be provided a summary of the relevant facts, which includes findings on the facts and evidence important for the decision. The party has the right to make a statement, within an appropriate period of time, on the summary of the relevant facts (Article 36 of the PRCA-1). The PRCA-1 even includes certain special procedural possibilities enabling proactivity, whereby the party can prevent the establishment of the existence of restrictive conduct or the adoption of a decision on the prohibition of a concentration due to an inconsistency with competition rules (the commitments referred to in Article 39 of the PRCA-1 and corrective measures under Article 51 of the PRCA-1). Article 57 of the PRCA-1 does not limit the parties when stating facts and evidence to their benefit, to such an extent that the weight of the interference with the right to the equal protection of rights would be disproportionate with the pursued objectives. For this reason, it is not inconsistent with Article 22 of the Constitution.

51. With regard to all of the above, Articles 54, 56, 57, 59, and 61 of the PRCA-1 are not inconsistent with the Constitution (the fourth point of the operative provisions).

C.

52. The Constitutional Court reached this decision on the basis of Articles 21 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, and 56/11), composed of: Dr. Ernest Petrič, President, and Judges Dr. Mitja Deisinger, Mag. Marta Klampfer, Dr. Etelka Korpič – Horvat, Mag. Miroslav Mozetič, Jasna Pogačar, Dr. Jadranka Sovdat, and Jan Zobec. Judge Dr. Dunja Jadek Pensa was disqualified from deciding on the case. The first to third points of the operative provisions were adopted by seven votes against one; Judge Mozetič voted against. The fourth point of the operative provisions was adopted unanimously. Judge Mozetič submitted a partly dissenting opinion. Judge Zobec submitted a concurring opinion.

Dr. Ernest Petrič
President

Notes:
[1] After this position was adopted, the Agency, which was registered in the register of companies on 31 December 2012, assumed the tasks and authorisations of the Office.
[2] A company is an entity that exercises an economic activity, regardless of its legal form and ownership. An association of sole proprietors that does not directly exercise an economic activity, but influences or could have an influence on the conduct of companies under the first sentence of the mentioned indent on the market is also a company.
[3] In paragraph 19 of the reasoning of Decision No. U-I-272/98, dated 8 May 2003 (Official Gazette RS 48/03, and OdlUS XII, 42), the Constitutional Court stressed that the aspects of privacy that are traditionally protected include the inviolability of dwellings, the privacy of communication, and – in recent times – also the protection of personal data. However, the content of the protected privacy is not exhausted by the three special guarantees mentioned.
[4] Cf. paragraphs 40 and 75 of Decision of the Constitutional Court No. U-I-25/95, dated 27 November 1997 (Official Gazette RS No. 5/98, and OdlUS VI, 158).
[5] Decision of the Constitutional Court No. Up-32/94, dated 13 April 1995 (OdlUS IV, 38).
[6] Compare with Decision of the Constitutional Court No U-I-272/98, paragraph 20 of the reasoning.
[7] *Ibidem* and Decision of the Constitutional Court No. U-I-25/95, paragraph 38 of the reasoning.
[8] Decision of the Constitutional Court No. Up-32/94, paragraph 12 of the reasoning.
[9] Decision of the Constitutional Court No. Up-430/00, paragraph 13 of the

reasoning.
[10] *Ibidem*, paragraph 19 of the reasoning.
[11] Decision of the Constitutional Court No. Up-3381/07, dated 4 March 2010 (Official Gazette RS No. 25/10), paragraph 5 of the reasoning.
[12] G. Klemenčič in: L. Šturm (Ed.), Komentar Ustave Republike Slovenije, dopolnitev – A, Graduate School of Government and European Studies, Ljubljana 2011, p. 522.
[13] *Ibidem*.
[14] *Ibidem*, pp. 522–523.
[15] See Decision of the Constitutional Court No. Up-106/05, dated 2 October 2008 (Official Gazette RS No. 100/08 and OdlUS XVII, 84).
[16] See Decision of the Constitutional Court No. U-I-158/95, dated 2 April 1998 (Official Gazette RS Nos. 31/98 and 70/98; OdlUS VII, 56, and OdlUS VII, 194). In Decision No. Up-412/03, dated 8 December 2005 (Official Gazette RS No. 117/05, and OdlUS XIV, 104), the Constitutional Court, modelling itself on the case law of the ECtHR, developed additional criteria regarding the necessary clarity and precision of the legal basis for interfering with communication privacy and with regard to preventing abuses.
[17] The right to privacy with all the stated aspects is also protected by the ECHR. In Article 8, which regulates the right to respect for private and family life, it determines that everyone has the right to respect for his private and family life, his home, and his correspondence. With regard to the presented aspects of privacy, the ECHR does not ensure a higher level of protection of the right to privacy than the mentioned constitutional provisions.
[18] Cf. paragraph 6 of the reasoning of Decision of the Constitutional Court No. U-I-109/10, dated 26 September 2011 (Official Gazette RS No. 78/11).
[19] Order of the Constitutional Court No. U-I-49/94, dated 6 October 1994 (OdlUS III, 101).
[20] Decision of the Constitutional Court No. U-I-155/07, dated 9 April 2009 (Official Gazette RS No. 32/09, and OdlUS XVIII, 17).
[21] Legal entities function through natural persons who act on their behalf and for their account, or to their benefit, thereby even their responsibility for unlawful conduct can only be established through the conduct of natural persons. See Article 4 of the Liability of Legal Entities for Criminal Offences Act (Official Gazette RS Nos. 98/04 – official consolidated text, 65/08, 57/12 – LLECOA). Cf. M. Deisinger, Odgovornost pravnih oseb za kazniva dejanja, GV Založba, Ljubljana 2007, p. 50.
[22] Order of the Constitutional Court No. Up-10/93, dated 20 June 1995 (OdlUS IV, 164).
[23] Decision of the Constitutional Court No. U-I-141/97, dated 22 November 2001 (Official Gazette RS No. 104/01 and OdlUS X, 193).

[24] Decision of the Constitutional Court No. U-I-290/96, dated 11 June 1998 (Official Gazette RS No. 49/98 and OdlUS VII, 124).
[25] Order of the Constitutional Court No. Up-199/98, dated 25 March 1999.
[26] See, for instance, Decisions of the Constitutional Court No. U-I-117/07, dated 21 June 2007 (Official Gazette RS Nos. 38/07 and 58/07, and OdlUS XVI, 64), and No. U-I-189/10, dated 15 March 2012 (Official Gazette RS No. 27/12).
[27] The same can also be seen in the second paragraph of Article 37 of the Constitution.
[28] In the case at hand, the notion of legal entities entails private law legal entities that can be subject to a search under the PRCA-1, because they can be categorised as "companies" – i.e. subjects who exercise economic activities (see also paragraph 11 of the reasoning of this Decision). In order to decide in this case, the Constitutional Court namely does not have to adopt a position with regard to other legal entities and especially not with regard to public law legal entities.
[29] T. Keresteš and M. Repas state that the term dwelling or other premises under the second paragraph of Article 36 of the Constitution must be interpreted widely, so as to include also business premises, especially those to which public access is restricted. See T. Keresteš, M. Repas, Nekateri ustavnopravni vidiki pooblastil Urada za varstvo konkurence, LeXonomica – Revija za pravo in ekonomijo, year IV, No. 2 (2012), p. 229.
[30] The free and uncoerced consent of a legal entity to a search of any degree of thoroughness, i.e. voluntarily enabling an examination and the submission of confidential documents of any degree excludes the obligation to fulfil the requirements under the second to fourth paragraphs of Article 36 of the Constitution.
[31] The inspection of data saved on some information-communication media always entails, in this sense, the inspection of a "hidden compartment", even though such media is, for instance, easily accessible and visible during a simple visual inspection of the premises of the legal entity.
[32] See, for instance, the Judgment of the ECtHR in the case *Société Colas Est and others v. France*, paragraphs 40 and 41.
[33] With regard to the mentioned right, the ECtHR stressed that an interference therewith is only admissible if: (a) it is in accordance with the law, which entails that it has an appropriate basis in the domestic law, which must be accessible and predictable in the sense that its provisions are sufficiently detailed, clear, and precise for the citizens to understand under which conditions and in which circumstances the state authorities can exercise the measure at issue, while the national law must, in conformity with the principle of the rule of law, include appropriate and efficient safeguards against arbitrary interferences and abuses; b) there exists one of the legitimate objectives

under the second paragraph of Article 8 of the ECHR; and c) it is necessary in a democratic society. In the framework of the last criterion, the ECtHR assesses whether the measure corresponds to a pressing social need and if there exists proportionality between the measure and its legitimate objective. The reasons for the admissibility of the measure under the second paragraph of Article 8 of the ECHR must be interpreted narrowly and in every individual case it must be convincingly determined whether the measure is necessary. See, for instance, the decisions of the ECtHR in *Chappell v. United Kingdom*, dated 30 March 1989, *Petri Sallinen and others v. Finland*, dated 27 September 2005, and *Buck v. Germany*, dated 28 April 2005.

[34] See the Judgment in *Société Colas Est and others v. France*, paragraph 49. In that case, an extensive search of the business premises of 56 companies was conducted and the investigators of the National Investigation Agency (the authority was a part of the executive branch of power) seized a couple of thousand documents. Subsequently, another extensive search was conducted. The investigators entered the business premises without the consent of the companies' management and (which was then permitted by the law) without a prior court order. On the basis of the materials collected, procedures against the complainants before the competition regulator were later initiated due to the suspicion of a violation of competition rules, which concluded with the imposition of fines, which the courts upheld (with the exception of a change in the amount of certain fines). The ECtHR concluded that the actions of the investigators, due to the manner they were conducted (a detailed, far-reaching, and burdensome search of an extensive number of premises), fulfilled the elements of an interference with the complainants' home (domicile). The legislation and the practice did not offer appropriate and efficient safeguards against abuses. The executive authority namely had very extensive authorisations and exclusive competence to determine the necessity, number, length, and scope of searches. In addition, the searches were conducted without a prior court order and without the presence of a high ranking police officer. Due to the disproportionate measure, the complainants' right under Article 8 of the ECHR was violated.

[35] See the ECtHR Judgment in *Wieser and Bicos Beteiligungen GmbH v. Austria*, dated 16 October 2007, paragraph 45.

[36] Decision of the Constitutional Court No. U-I-272/98, paragraph 37 of the reasoning. The Constitutional Court reiterated such position in paragraph 23 of the reasoning of Decision No. Up-1293/08, dated 6 July 2011 (Official Gazette RS No. 60/11).

[37] In Decision No. Up-120/97, dated 18 March 1999 (Official Gazette RS No. 31/99, and OdlUS VIII, 126), the Constitutional Court adopted the position that "also a defendant in minor offence proceedings must be ensured the fundamental guarantees of fair trial, however the level of ensured rights can

be, in instances of less serious violations, lower than that guaranteed in criminal proceedings". The criterion for the assessment whether in minor offence proceedings a fair trial was ensured to the defendant is the guarantee of the equal protection of rights under Article 22 of the Constitution in conjunction with Article 29 of the Constitution on legal guarantees in criminal proceedings (The Constitutional Court held the same in Decision No. U-I-295/05, dated 19 June 2008, Official Gazette RS No. 73/08, and OdlUS XVII, 44). With regard to the constitutional requirement for *lex certa* for minor offences, see, e.g., Decision No. Up-456/10, U-I-89/10, dated 24 February 2011 (Official Gazette RS No. 26/11).

[38] Due to the fact that the text of PRCA-1, which literally reads "Articles 81 and 82 of the Treaty establishing the European Community", is to be (everywhere) interpreted after the entry into force of the TFEU.

[39] Article 2 of the PRCA-1 determines that the PRCA-1 regulates the procedure and competence regarding the implementation of Regulation No. 1/2003 and Council Regulation (ES) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29 January 2004 – Regulation No. 139/2004).

[40] T. Bratina in: P. Grilc (Ed.), Zakon o preprečevanju omejevanja konkurence (ZPOmK-1) s komentarjem, GV Založba, Ljubljana 2009, p. 314.

[41] With regard to the first indent of the second paragraph of Article 29 of the PRCA-1, a search can be carried out in the registered office of the company against which the procedure is being conducted and in other places where this company carries out the activity and business from which there arises the probability of a violation of competition rules. The same as applies to a company against which the procedure is being conducted also applies to a company operating under its authority.

[42] The supervision procedure is initiated by a special order (Article 23 of the PRCA-1), which under the first paragraph of Article 24 of the PRCA-1 includes a description of the conduct which is the reason for the initiation of the procedure, the statement of the provisions of the Act for which the probability of a violation has been demonstrated, and the substantiation of the reasons for the initiation of the procedure.

[43] The search order can be challenged in judicial protection proceedings against the decision of the Agency (the second indent of the third paragraph of Article 55 of the PRCA-1).

[44] If a company disallows entry onto its premises, obstructs it, or disallows access to its business books or other documentation, obstructs such, in any other way obstructs the search, or if such is justifiably expected, an authorised person can enter the premises or access the business books or other documentation against the company's will with the assistance of the police (the first paragraph of Article 31 of the PRCA-1). The second to fifth paragraphs of

Article 31 of the PRCA-1 prescribe high fines for obstructing and preventing a search.
[45] T. Bratina, M. Kocmut in: P. Grilc (Ed.), op. cit., pp. 325–328.
[46] In addition to the above mentioned, the PRCA-1 must be interpreted (consistently with the Constitution) so that it is not admissible to order and conduct a search if the relevant information can be obtained in a less severe manner, especially by means of a request to transfer information under Article 27 of the PRCA-1.
[47] The Constitutional Court has already stressed that not every definition of prohibited conduct and sanctions for violating such prohibition can be regarded as defining criminal offences – such would require that the substantive guarantees that the Constitution specifically determines for criminal offences be fulfilled. Likewise, decision-making on the imposition of sanctions for violations of these prohibitions cannot always be regarded as criminal proceedings in which, therefore, all the constitutional procedural guarantees that specifically refer to criminal proceedings would have to be fulfilled (see Decision of the Constitutional Court No. U-I-145/03, dated 23 June 2005, Official Gazette RS No. 69/05, and OdlUS XIV, 62).
[48] For instance, from the first and second indent of the first paragraph of Article 73 of the PRCA-1 it proceeds that the conclusion of a restrictive agreement and the abuse of a dominant position, therefore restrictive conduct under Articles 6 and 9 of the PRCA-1, also constitute minor offences.
[49] See the preceding note.
[50] As a general rule, the supervision procedure precedes the minor offence procedure. Extensive data on the functioning of the company are gathered therein and the company is thereby also warned that the public authority is seeking evidence of its unlawful conduct. If such evidence is subsequently not used in the minor offence procedure, it is difficult to imagine how the Agency would obtain equivalent (or any) evidence that would be sufficient for the imposition of a punitive sanction.
[51] In Article 225, the Penal Code (Official Gazette RS No. 51/12 – official consolidated text – PC-1) regulates the criminal offence of the unlawful restriction of competition that is committed by whoever, contrary to the rules that regulate the protection of competition, violates, while exercising a business activity, the prohibition of restrictive agreements between companies, abuses the dominant position of one or more companies, or creates a prohibited concentration of companies and thus prevents or significantly distorts competition in the Republic of Slovenia or on the EU market or on a significant part thereof, or significantly influences trade between Member States which results in a significant pecuniary advantage for such company or companies or in a significant pecuniary loss for another company.
[52] With regard to the current legal regulation presented, this is not a punitive

procedure, despite the allegation of the applicant to the contrary.
[53] These minor offences are comparatively distinctly grave and serious, which is reflected in the prescribed fines under Articles 73 and 74 of the PRCA-1.
[54] The Constitutional Court has, for instance with regard to the privilege against self-incrimination, in Decision No. Up-1293/08 already adopted the position that its scope encompasses all the procedures in which *de facto* a criminal investigation is conducted under the guise of an inspection or supervision procedure and procedures in which the activity of officials is directed towards collecting data for subsequent criminal proceedings.
[55] The stated constitutional provision allows that a law determine the detailed conditions under which an official may enter the dwelling of another person or other premises and in such place exceptionally without the presence of witnesses conduct a search, if such is absolutely necessary for the direct apprehension of a person who has committed a criminal offence or to protect people or property.
[56] If a company disallows entry onto its premises, obstructs such, or disallows access to its business books or other documentation, obstructs such, obstructs the search in any other way, or if such is justifiably expected, the Agency can enter the premises or access business books or other documentation against the company's will with the assistance of the police. The costs of the entry or access and possible damages are to be covered by the company (the first paragraph of Article 31 of the PRCA-1).
[57] With regard to the regulation of inspections conducted by the European Commission on the basis of EU law, when the national law in the case of a company's resistance [against the carrying out of an inspection] requires a prior court order (such a situation is allowed by the sixth and the seventh paragraphs of Article 20 of Regulation No. 1/2003), the legislature will have to take into consideration also the distribution of competences between the European Commission and the national court under the eighth paragraph of Article 20 of Regulation No. 1/2003. See also the Judgment of the Court of Justice of the European Union in *Roquette Frères SA v. Directeur général de la concurrence, de la consommation et de la répression des fraudes*.
[58] Order of the Constitutional Court No. U-I-309/94, dated 16 February 1996 (OdlUS V, 21).
[59] See Decisions of the Constitutional Court No. U-I-219/03 and No. U-I-56/06, dated 15 March 2007 (Official Gazette RS No. 29/07 and OdlUS XVI, 21).
[60] If the legal remedy before the court still ensures the fundamental purpose of the appellate review, as is guaranteed by the right under Article 25 of the Constitution – i.e. that the legal remedy is, by its nature, as efficient as an appeal against a decision of the specialised authority would be.

[61] Decision of the Constitutional Court No. U-I-219/03.
[62] Of course, only on the basis of a legal action which fulfils the substantive prerequisites for carrying out the assessment.
[63] Compare with paragraph 50 of Decision of the Constitutional Court No. U-I-219/03.
[64] Decision of the Constitutional Court No. U-I-146/07, dated 13 November 2008 (Official Gazette RS No. 111/08 and OdlUS XVII, 59).
[65] See Decision of the Constitutional Court No. U-I-18/02, dated 24 October 2003 (Official Gazette RS No 108/03 and OdlUS XII, 86), paragraph 25 of the reasoning.
[66] The first paragraph of Article 9 of the GAPA determines that before a decision is issued the party must be given the possibility to make a statement on all the facts and circumstances relevant for the decision. The third paragraph of Article 9 of the GAPA determines that the authority cannot base its decision on facts with regard to which all the parties were not given the possibility to make a statement thereon, except in instances determined by law.
[67] Article 19 of the PRCA-1 determines that in order for the right to a defence to be ensured, the decision of the Agency must not be based on facts and evidence with regard to which the company against which the procedure is being conducted and the party submitting notice of a concentration were not given the possibility to make a statement thereon.