



# THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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## JUDGMENT

on behalf of the Republic of Latvia

Riga, 2 December 2022

Case No. 2021-42-01

The Constitutional Court, composed of Chairperson of the Court Hearing Aldis Laviņš, Justices Irēna Kucina, Gunārs Kusiņš, Jānis Neimanis, Artūrs Kučs, Anita Rodiņa and Jautrīte Briede,

on the basis of an application by Alvis Pīlāgs,

based on Article 85 of the Constitution of the Republic of Latvia and Section 16, Clause 1, Section 17, Paragraph one, Clause 11, Sections 19.<sup>2</sup> and 28.<sup>1</sup> of the Constitutional Court Law,

at the hearing on 2 November 2022, in the written procedure, examined the case

**“On Compliance of Section 500, Paragraph six of the Criminal Procedure Law with Article 92 of the Constitution of the Republic of Latvia”.**

### Establishing Part

1. On 21 April 2005, the Parliament of the Republic of Latvia (hereinafter – *Saeima*) accepted the Criminal Procedure Law, which entered into force on 1 October 2005.

By the amendments of 29 May 2014, Section 500 of the Criminal Procedure Law was supplemented with a fourth paragraph, which read as follows: “If the information obtained in operational activity measures is used in a criminal case as evidence, only the court upon a reasoned request of the prosecutor, victim, accused or his or her defence counsel may become acquainted with materials of operational activities (hereinafter also – operational materials) which are not appended to the

criminal case and are related to the object of evidence, indicating in the case materials and ruling that such materials have been evaluated.”

By the amendments to the Criminal Procedure Law, which entered into force on 1 January 2021, Section 500 of the Criminal Procedure Law was reworded and the content of its fourth part was moved to the sixth part. The contested provision is now valid in the following wording: “If the information obtained in operational activity measures is used in a criminal case as evidence, only the court upon a reasoned request of the prosecutor, victim, accused or his or her defence counsel may become acquainted with such materials of operational activities which are not appended to the criminal case and are related to the object of evidence, indicating in the case materials and ruling that such materials have been evaluated.”

**2. The Applicant – Alvis Pilāgs** (hereinafter also – the Applicant) – holds that the contested provision is incompatible with Article 92 of the Constitution of the Republic of Latvia (hereinafter – the Constitution).

By the judgment of the Court, the Applicant was found guilty of the offence provided for in Section 20, Paragraph four and Section 218, Paragraph two of the Criminal Law and the offence provided for in Section 318, Paragraph two of the Criminal Law (in the wording of the law in force until 23 December 2009).

The contested provision was said to be incompatible with Article 92 of the Constitution because it disproportionately restricts the principle of equality of arms and the right of a person to be heard arising from the Applicant's right to a fair court. On the basis of the contested provision, the Applicant was denied access to the materials of the operational activity, which were not appended to the criminal case but related to the object of evidence, although the information obtained during the operational activity measures was used as evidence in the criminal case and the prosecutor has not been denied the right to become acquainted with these materials. Thus, in the criminal case, the Applicant had not been guaranteed the right to fully prepare for the examination of the case in all instances of court.

It follows from the content of the right to a fair court that both the prosecution and the person entitled to defence must have the opportunity to examine and comment on the arguments and evidence of the other party. The restriction of the Applicant's fundamental rights has a legitimate aim, i.e., national security and preservation of official secret, but this restriction is said to be disproportionate. The Applicant believes

that the adverse consequences the contested provision has on them outweigh the benefit which the society as a whole derives from this restriction. In particular, the Applicant is placed in a situation less more favourable than the prosecutor, since they were not able to verify whether the arguments based on the materials of the operational activity were justified and corresponded to the truth, nor to refute and comment on these arguments in a justified manner. The Applicant would also have needed to become acquainted with the operational materials or a part thereof to be able to ascertain the facts related to the defence position that the Applicant was provoked to commit a crime and to be able to comment on those facts.

The contested provision provides for the absolute restriction for, inter alia, the accused to become acquainted with the materials of operational activities, which are not appended to the criminal case and which are related to the object of evidence. In particular, the contested provision does not provide the court with the discretion to assess and decide whether and to what extent a person may become acquainted with the materials of operational activity, taking into account the interests of national security and the need to preserve official secret.

The Applicant believes that the legitimate aim can be achieved by means which are less restrictive of fundamental rights, for example, by providing the court with discretion to decide whether and to what extent a person may be acquainted with the materials of an operational activity, or by warning a person that information containing official secret may not be disclosed and that its disclosure entails criminal liability. It would also be possible to lay down in the contested provision the criteria to be used by the court when deciding whether and to what extent a person may be allowed to get acquainted with the materials of operational activity.

To remedy the infringement of the Applicant's fundamental rights, it is necessary to declare the contested provision null and void in respect of them from the moment of the infringement of their fundamental rights, i.e. from the date on which the case was received by the court of first instance, i.e. from 9 June 2010. The damage to the Applicant had already been caused, and it would not be remedied if the contested provision would lose its force from the moment when the Constitutional Court adopts its judgment.

**3. The institution which issued the contested act, the *Saeima*, holds that the contested provision complies with Article 92 of the Constitution.**

It is crucial that, according to the contested provision, the right to become acquainted with the materials of operational activity is reserved for the court only. This is based on the fact that according to Section 24, Paragraph one of the Operational Activities Law, information obtained in the course of operational activities measures shall be classified as restricted access information or an official secrets object, while according to Section 8, Paragraph three of the Operational Activities Law, the organisation, methodology and tactics of operational activities measures are an official secret. Disclosure of such information to the parties to a case, including the accused, is not permissible.

The principle of equality of arms arising from the concept of a fair court requires that the rights of the parties must be fairly balanced in the course of the proceedings. In particular, each party to proceedings must have adequate opportunities to access procedural remedies, and no party to proceedings can be unduly disadvantaged in comparison with other parties to those proceedings. The principle of equality of arms in criminal proceedings means that each party must have the opportunity to examine and provide explanations on the comments and evidence submitted by the other party. Moreover, whatever the method chosen by the national legal system to achieve this objective, it must ensure that each party is aware of the submissions made by the other and is given a meaningful opportunity to submit its observations on them.

However, the principle of equality of arms is not absolute and may be limited in the public interest to ensure a fair balance between the right to a fair court and the protection of classified information. The Senate has also expressed similar views, referring to the case law of the European Court of Human Rights (hereinafter – ECHR). Namely, the Senate has indicated that the right to a fair court is not infringed if the case file is not supplemented with the materials of the operational activity, provided that the court has familiarised itself with them and assessed the reasons why the operational investigation was initiated, why the accused was taken into the operational register and why the operational activity was approved. However, under Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention), only strictly necessary restrictions of the defence's rights are permissible. Moreover, to ensure the right of the accused to a fair court, an appropriate balance must be struck between such restrictions and the supervision provided by the judicial authorities.

If the operational materials which are not appended to the criminal file but which relate to the object of evidence were disclosed to the accused or their defence counsel, the confidentiality of the operational material and the interests for which the information contained therein is specially protected would be jeopardised. In other words, not only official secret and national security would be at risk, but also the life and health of the bodies and the covert assistants performing the operational activity, as well as the conduct of further operational activities. However, the court, as the person directing the proceedings, needs to be acquainted with the materials to be able to guarantee the right to a fair court.unambiguously

If the information on facts obtained during operational activities is used as evidence in a criminal case, such evidence must be appended to the criminal case file, together with a note on which authority, when, and for what time period accepted the performance of the operational activity measures. However, operational materials which are not appended to the criminal case but which relate to the object of evidence do not constitute new evidence that a criminal offence has been committed and that a particular person is guilty of committing it. Namely, by examining the materials of the operational activity which are not appended to the criminal case and are related to the object of evidence, the court ascertains the admissibility of the evidence only in cases where information on facts obtained during the operational activity is used as evidence in the criminal case and a party to the proceedings questions the admissibility of this information as evidence. However, if the information on the facts obtained in the course of operational activities is used as evidence in a criminal case, it is disclosed to the accused or their defence counsel, and information is provided as to which authority, when, and for what period of time accepted the performance of the operational activity measures. Moreover, the accused or their defence counsel, like the prosecutor, has the right to submit a reasoned request for the court to examine and assess the relevant material. Thus, taking into account the specific nature of the operational materials which are not appended to the criminal case and are related to the object of evidence, as well as the purpose those materials are used for and the fact that the court has the right to inspect and examine those materials if the accused or their counsel so requests, a fair balance is struck between ensuring the right to a fair court and protecting classified information.

In addition, the *Saeima* points out that the regulation that only a court may become acquainted with materials of operational activities which are not appended to

the criminal case and are related to the object of evidence has been in force since 25 June 2014. Until 1 January 2021, this regulation was contained in Section 500, Paragraph four of the Criminal Procedure Law. The trial of criminal case No 16870002408 was initiated before 25 June 2014, however, Section 500, Paragraph four of the Criminal Procedure Law, as a procedural legal provision, was applicable also to those criminal cases which were in the process of hearing before the date of entry into force of this provision. The applicant did not have the right to get acquainted with the materials of operational activity which were not appended to the criminal case and were related to the object of evidence in criminal case No 16870002408 since 25 June 2014. The contested provision is imperative and is worded unambiguously, and the Applicant is in a situation typical for the scope of the contested provision. Thus, the Applicant had no possibility to defend their rights by means of general legal remedies and the time-limit for submitting a constitutional complaint to the Constitutional Court should be counted from the moment when the infringement of the Applicant's fundamental rights occurred, i.e. from 25 June 2014. Therefore it must be concluded that the time-limit for submitting a constitutional complaint has not been complied with.

**4. Other party to the proceedings — the Ministry of Justice** — holds that the contested provision complies with Article 92 of the Constitution.

The contested provision does not restrict the Applicant's right to a fair court enshrined in Article 92 of the Constitution. Pursuant to the contested provision, a person is deprived of the right to get acquainted with the materials of operational activities which are not appended to the criminal case and are related to the object of evidence, and not with the evidence itself, which is information about the facts which the persons involved in criminal proceedings use within their competence to substantiate the existence or non-existence of the circumstances which are the object of evidence. Operational materials that are not appended to a criminal case cannot be admitted as evidence in the case, and the court cannot base its ruling on them. Thus, the right to a fair court enshrined in Article 92 of the Constitution is not restricted by denying the defence the right to get acquainted with the materials of operational activity.

The contested provision ensures a legitimate aim, i.e., protection of national security and official secret. The operational materials may contain information which cannot be disclosed to the parties, as it may endanger the life and health of the covert assistants, further operational activities, as well as cooperation possibilities with foreign

countries. Thus, by imposing an absolute prohibition on the parties to become acquainted with the relevant material, not only public safety is ensured but also the success of further operational activities and the possibility of carrying out those activities.

In the present case, there are no more lenient means of achieving the legitimate aims in the same quality. Operational materials may contain information on the organisation, methodology and tactics of operational activities, which is an official secret. According to the Law On Judicial Power and the Law On Official Secret, the court is not competent to assess whether the information in question corresponds to an object of official secret and whether, except in the case referred to in Section 12, Paragraph five of the Law On Judicial Power, persons may be granted the right of access to information containing an object of official secret. Thus, it would not be proportionate to include in the regulation governing criminal proceedings the right of a judge to assess the scope of the information in question and, accordingly, to decide on granting the parties to the case access to operational materials. However, a person's signing a statement that they have been warned of criminal liability for disclosure of official secret may not be a sufficiently effective means, given that disclosure of official secret may have irreversible consequences in terms of risks to national security.

Moreover, Section 24.<sup>1</sup> of the Operational Activities Law provides that, upon completion of an operational activities proceeding, the body performing operational activities informs the person regarding a special method operational activities measure and time of performance thereof against whom the abovementioned measure has been performed, except in the cases provided for in that Section. This ensures the right of a person to know that and what operational activities have been carried out against them, as well as the possibility to refer to these operational activities in court to defend their rights. Consequently, the legislator has respected the balance between the interests of the individual and the public interest.

**5. Other party to the proceedings – the Prosecutor General's Office –** holds that the contested provision complies with Article 92 of the Constitution.

The right of the accused to become acquainted with the case file is not unlimited. In particular, a refusal to disclose information may be justified if it has a legitimate aim. It follows from the case law of the ECHR that the protection of national security, the non-disclosure of operational methods, and the protection of the personal identity of

those who cooperated with the police and provided them with information relevant to uncovering a crime are legitimate aims, namely the protection of important public interests. It also follows from the case law of the ECHR that, in any case where a party's access to information on a case is restricted, such a restriction must be necessary and proportionate to the protection of the rights of the party whose interests are affected by the refusal. Proportionality is achieved by balancing the beneficial consequences of non-disclosure against the adverse consequences for the party whose rights to prepare their defence are restricted. If a party is denied access to information, the court must evaluate the necessity and proportionality of such a prohibition. This conclusion also follows from the case law of the Senate.

It follows from the above that, in its ruling, the court must give an opinion on the information it has familiarised itself with by examining the materials of the investigatory process matter. In this ruling, the Court is not required to state specific information and facts identified in the course of examining the investigatory process matter materials, but rather to give its assessment of them. This ensures that the reliability of the evidence is verified and that there is a basis for drawing conclusions as to whether the right to a fair court enshrined in Article 6 of the Convention and Article 92 of the Constitution has been infringed in the proceedings. The contested provision expressly requires the court to state in its ruling that the materials of the operational activity have been assessed, as well as to provide a redacted summary of the information assessed. The provision that the Court gives its assessment of the information it has acquainted with in its ruling balances the public interest in protecting classified information with the defendant's interest in knowing that information, which is consistent with the right to a fair court enshrined in the first sentence of Article 92 of the Constitution. The case law contains instances where the court, in its assessment of the materials of the operational procedure, has rendered an acquittal judgment, which proves that such an assessment is not merely formal.

In addition, Section 127, Paragraph three of the Criminal Procedure Law provides that information regarding facts acquired in operational activities measures, including information which indicates the committing of a criminal offence committed by another person, also information that has been recorded with the assistance of technical means, shall be used as evidence only if it is possible to examine such information in accordance with the procedures laid down in this Law. The fourth paragraph of the same Article provides: if the information referred to in Paragraph three

of this Section is used as evidence in criminal proceedings, a reference shall be attached thereto regarding which institution, when and for what time period has accepted the performance of operational activities measures. According to Section 24, Paragraph one of the Operational Activities Law, information obtained in the course of operational activities measures shall be classified as restricted access information or an official secrets object. Such information may be used as evidence in a criminal proceeding only in accordance with the procedures laid down in the Criminal Procedure Law, ensuring the implementation of the investigatory measures and the confidentiality and safety of the persons involved therein. It follows from the content of the above provisions that information obtained in the course of operational activities may be used as evidence only if the security of the implementation of operational activities and the anonymity and safety of the persons involved therein are ensured. These requirements could not be met if the information obtained in the course of the operational activity measures were made known to the accused and their defence counsel. This conclusion also applies to the question of whether the court should be allowed to assess the possibility of allowing the accused or their defence counsel to become acquainted with the information obtained in the course of operational activity measures which is classified as restricted information or information containing official secret.

Moreover, information contained in the operational materials, even if related to the object of evidence, cannot be regarded as evidence within the meaning of Section 127, Paragraph one of the Criminal Procedure Law, since it is not used to substantiate the existence or non-existence of the circumstances which are the object of evidence.

**6. Other party to the proceedings – Kristīne Līce, representative of Latvia to international human rights institutions** – considers that the contested provision could ensure a person's right to a fair court within the meaning of Article 6(1) of the Convention if applied effectively in criminal proceedings.

In the circumstances of the present case, there is no doubt that the applicant is entitled to a fair court under Article 6 of the Convention. The case law of the ECHR on the application of Article 6 of the Convention is therefore also applicable to the present case.

Similarly to the Constitutional Court, the ECHR has also concluded that the right to a fair court has two aspects, institutional and procedural, and individual

complaints regarding alleged violations of the principle of equality of arms fall within the procedural aspect. In accordance with the principles laid down in the case law of the ECHR, when examining complaints by individuals alleging breaches of Article 6 of the Convention in conjunction with respect for the principle of equality of arms, it is not for the court to assess the procedural regulation which, for example, restricts a person's right to become acquainted with a part of the case file. Instead, it should assess whether the judicial proceedings as a whole have ensured the right to a fair court. In particular, the right to a fair court must not be restricted to the extent that a State action or regulation deprives a person of the substance of that right.

In the present case, a distinction must be made between the materials of the operational activities and the information on facts obtained as a result of the operational activities. In particular, when assessing the constitutionality of the contested provision, it is important whether the materials to which the person is denied access contain new information or evidence which is not contained in the materials available to the defence party and is directly related to the object of evidence. A systematic analysis of the criminal procedural regulation shows that evidence and information on facts related to the subject-matter of the accusation are provided to the accused upon transferring the case for examination. In particular, all the information relevant to the object of evidence is available in the criminal case file. However, the operational materials contain only additional information on the circumstances in which the information was obtained, the methods used to obtain it, the specific information obtained, and information which is only subordinate to the information indicating that the person in question may have committed a criminal offence and which is available in the criminal case file. This means that the operational materials do not contain new information which would affect the rights of the defence in substance, and the prohibition of a person entitled to defence to become acquainted with such materials does not deprive them of their right to a fair court.

As to whether the procedural guarantees provided for in the contested provision ensure the right to a fair court in general, it should be noted that the contested provision was adopted to comply with the judgment of the ECHR in the case *Baltiņš v Latvia*, where the ECHR found a violation of Article 6(1) of the Convention. The opinion of the Committee of Ministers of the Council of Europe concluded that Latvia had taken all necessary measures to comply with the Court's judgment, including improving its legal framework to prevent similar violations in the future. The current framework,

according to which the courts become acquainted with the materials of the operational activity, assess them and include in their rulings notes on what allowed them to conclude that the right to a fair court had not been disproportionately restricted, has also been recognised as sufficient by the decision of the United Nations Human Rights Committee. Moreover, the principles set out in the case law of the national courts, which guide the courts in examining individual complaints under Section 500, Paragraph six of the Criminal Procedure Law and in deciding whether there has been instigating to commit a criminal offence, are fully consistent with the criteria set out in the case law of the ECHR, which must be taken into account to ensure the right of individuals to a fair court by preventing unlawfully obtained evidence from being used in criminal proceedings.

**7. Other party to the proceedings – the Ombudsman** – considers that the contested provision ensures a proportionate balance between the interests of national security and the right of the accused to a fair court.

It does not clearly follow from the content of the contested provision whether this provision denies the right to become acquainted with the materials of operational activity, which are not appended to the criminal case and are related to the object of evidence, only to the Applicant or also to the prosecutor. However, notwithstanding the above, the contested provision restricts the procedural right of the Applicant to be heard within the scope of the right to a fair court.

In the opinion of the Ombudsman, the contested provision does not deprive the right to a fair court in essence, but rather restricts it to the extent that the possibilities of exercising certain procedural rights are affected. That restriction is justified by the need to ensure the protection of national security, as well as the protection of the lives and health of the bodies performing operational activities and covert assistants. Such protection of classified information cannot be ensured by way of a written warning to the person involved in the criminal proceedings who has the right to inspect the materials of the criminal case of the duty to keep an official secret and regarding the liability which is intended for disclosure of the official secret in accordance with the provisions of Section 375, Paragraph four of the Criminal Procedure Law.

Operational materials which are not appended to the criminal case and are related to the object of evidence have a specific content which, by its very nature, cannot contain information relevant to evidence. The court can only use this material as a basis

for assessing the admissibility of evidence. Moreover, obtaining evidence cannot be the purpose of carrying out operational activity measures at all, as it does not fall within the scope of the tasks of operational activities set out in Section 2 of the Operational Activities Law.

Any restriction on the right enshrined in the first sentence of Article 92 of the Constitution and Article 6(1) of the Convention must provide certain safeguards and be absolutely necessary. Moreover, any difficulties caused to the defence by the restriction of the accused's rights must be sufficiently balanced with the procedures carried out by the judicial authorities. The ECHR has held that, where evidence withheld in the interests of national security is used in a case, national courts must carefully verify the decision-making procedure. However, in assessing the procedural safeguards, the significance of the undisclosed material and the possibilities of using it in the proceedings must be taken into account, that is to say, whether the undisclosed information can assist the defence at all. The Court of Justice of the European Union has also recognised that, for reasons of vital importance relating to national security, certain information or evidence may be withheld from the person concerned, but that, even in such a case, the responsible authority must use procedural means that ensure both the protection of national security and the person's right to be heard. According to the Ombudsman, the materials of operational activities which are not appended to the criminal case and are related to the object of evidence, in essence, could not contain essential factual information exonerating the accused. In addition, the person directing the proceedings ensures verification of the information obtained as a result of the operational activity measures. In addition, according to the case law of the Senate, after examining such material, the court must give an opinion in which the parties' objections and complaints concerning the admissibility of the evidence are duly considered and reasoned. Thus, the contested provision ensures a proportionate balance between the interests of national security and the right of the accused to a fair court.

However, problems could arise in cases where operational activity measures are taken after the initiation of criminal proceedings, without applying the special investigative actions contained in Chapter 11 of the Criminal Procedure Law, which, unlike operational activity measures, can only be taken in the context of an existing criminal proceeding. Taking into account the similar nature of these categories of actions, the comparatively broader application of operational activity measures in criminal proceedings should be criticised. If special investigative actions are carried out

in the framework of criminal proceedings, the person involved in the criminal proceedings, which has the right to become acquainted with the materials of the criminal case, including the accused, has the right to submit an application to the investigating judge with a request to allow the person to become acquainted with the materials not appended to the criminal case. Thus, in cases where operational activity measures are taken instead of special investigative actions in the framework of criminal proceedings, the persons involved in the criminal proceedings, including the accused, are placed at a procedural disadvantage. Moreover, under the current legal framework, it is difficult to distinguish between cases in which information obtained as a result of operational activity measures is to be classified as restricted information and cases in which it is to be classified as official secret. In the opinion of the Ombudsman, the Operational Activities Law should specify the criteria for the above classification to clearly distinguish between information containing official secret and information obtained in the course of operational activity measures, which should be classified as restricted information and to which a court could grant access to by its decision in accordance with the Freedom of Information Law.

**8. Other party to the proceedings – the Latvian Council of Sworn Advocates** – holds that the contested provision complies with Article 92 of the Constitution.

Section 24, Paragraph four of the Operational Activities Law provides for the right of the prosecutor to become acquainted with the materials of operational activities already at the stage of criminal prosecution and to verify whether these materials contain information which substantiates or refutes the existence of facts which are the object of evidence, whereas the accused has no such right either in pre-trial criminal proceedings or in the trial of a criminal case. Thus, the accused is placed in a comparatively less favourable position than the prosecutor, and the contested provision restricts the Applicant's right to procedural equality arising from the right to a fair court and the right to the means necessary to prepare the defence.

Allowing the accused or their defence counsel to become acquainted with the materials of the operational case, which are not appended to the materials of the criminal case but which relate to the object of evidence, would allow them not only to ascertain whether these materials contain such information which substantiates or refutes the arguments already raised on the admissibility of evidence but also to raise

new arguments in support of their position. Moreover, if the court's decision contains only a laconic statement that the materials of the operational activity have been assessed, but not a more detailed reasoning as to why the arguments on the inadmissibility of the evidence obtained as a result of the operational activity are unfounded, the defence may be limited in its ability to fully appeal against the court's decision in this part.

There are means less restrictive on a person's rights which could achieve the legitimate aim of the contested provision in the same quality. For example, both in criminal cases and in other cases involving official secrets, there is a procedure for persons participating in the proceedings to have access to evidence containing official secrets after having been warned in writing of the obligation to keep the official secret and of the liability for unlawful disclosure of official secret. However, in proceedings regarding criminally acquired property, where the fundamental rights of other persons, the interests of society and the interests of achieving the purpose of the criminal proceedings are set against the right of the person related to the property to become acquainted with the materials of the proceedings, the procedural arrangement provides that the person related to the property may become acquainted with the materials of the case with the permission of the person directing the proceedings and to the extent specified by them. The decision of the person directing the proceedings by which a request to become acquainted with the case materials is rejected may be appealed to the district (city) court which examines proceedings regarding criminally acquired property. In criminal cases where operational materials are used as evidence, it would also be possible to provide for a more proportionate mechanism to ensure the accused's right to a fair court. In particular, the court could be granted the right to decide whether and to what extent the accused or their defence counsel may become acquainted with the operational materials which are not appended to the criminal case and are related to the object of evidence. The accused person or their defence counsel, on the other hand, could become acquainted with the above-mentioned materials to the extent determined by the court after being warned in writing that disclosure of classified information is subject to criminal liability and after having confirmed by signing that they have been so warned. This would strike a reasonable balance between the interests of national security and the preservation of official secret, as well as the fundamental rights of others, on the one hand, and the right of the accused to a fair court, on the other.

Moreover, it is irrelevant whether the operational material not appended to the criminal case contains new direct evidence or only evidence which relates to the admissibility, reliability or sufficiency of existing evidence. I.e., the case law of the ECHR has held that the question of access to evidence under Article 6 of the Convention arises where the evidence in question was used or relied upon by the court in determining the guilt of the accused, or the material contains information which would have enabled the accused to obtain acquittal or a reduction in sentence. Relevant evidence in this context is not only that which is directly related to the facts of the case but also other evidence which might bear on the admissibility, reliability and sufficiency of that evidence.

Moreover, the right of the Applicant to defend their fundamental rights enshrined in the Constitution by means of general legal remedies should be assessed more broadly than only the possibility to appeal against an imperative prohibition to become acquainted with the materials of operational activity. In particular, the infringement of the Applicant's fundamental rights could have been prevented if the court had not used, in the Applicant's opinion, inadmissible evidence in support of their guilt or if it rendered an acquittal judgment. Consequently, the Applicant had the possibility to defend their rights by means of general legal remedies and the time-limit for filing a constitutional complaint should be counted from the date of entry into force of the decision of the last institution.

**9. Other party to the proceedings – *Dr. iur. Aldis Lieljuksis* –** holds that the contested provision complies with Article 92 of the Constitution.

He points out that an operational activity is a State institution legal activity, and the bodies performing operational activities do so to protect society from criminal threats, as well as ensure the protection of official secret and the rule of law by taking action against individuals who threaten it. Informing a person about operational activity measures during the implementation thereof would be contrary to the tasks of operational activities as set out in Section 2 of the Operational Activities Law. After the completion of the operational activity proceeding, persons may be informed that they have been subjected to a special method operational activities measure only if one of the conditions laid down in Section 24.<sup>1</sup>, Paragraph two of the Operational Activities Law is fulfilled, and according to the Paragraph one of the same Article, only the body performing the operational activities measure, and not the court, is entitled to provide

such information, even in a general manner. Even a closed operational case may contain information obtained with the special method which relates to the object of evidence, but which cannot be used in criminal proceedings because its disclosure would endanger other protected interests specified in the Operational Activities Law. Therefore, a person should not be informed of the measures or actions taken within an operational activity and, in particular, of the content of the information obtained as a result thereof. On the contrary, other information obtained as a result of the measures provided for in the Operational Activities Law and relating to the object of evidence may be used in criminal proceedings, if they are obtained without violating the principles and requirements of the Operational Activities Law.

The range of tasks of operational activity specified in the Operational Activities Law is wide, but according to Section 4, Paragraph three of the Law, they must be carried out in compliance with the principles set out in the said Section and with the least possible restriction of the fundamental rights of persons. One of the principles of operational activity, which is derived from several provisions of the Operational Activities Law, is the conspiracy principle, which provides, inter alia, that the organisation, methodology and tactics of operational activity measures constitute an official secret, but the information obtained may be used in criminal proceedings in accordance with the procedure established for criminal proceedings and ensuring confidentiality and security of the operational activity measures and persons involved therein. This principle is binding on the officials of the body performing the operational activity, and no other official is entitled to decide whether the conspiracy principle would be respected by using the data contained in the operational case. The institution of covert assistants is specially protected, as covert assistants are under the protection of the State and information on their identity and secret cooperation with the bodies performing operational activities is an official secret. Taking into account that the obligation to comply with the requirements of conspiracy rests entirely on the body performing the operational activity, only that body is entitled to decide on the use of the information provided by the covert assistant and contained in the operational case in criminal proceedings. On the contrary, the Court is not and cannot be aware of the circumstances relating to the involvement of the covert assistant, which is itself a protected official secret and can only be disclosed to officials in accordance with the procedure laid down in the Operational Activities Law.

The investigatory experiment referred to in the applicant's constitutional complaint is a legal operational activity measure regulated by Section 15 of the Operational Activities Law. According to Paragraph three of this Section, the performance of an investigatory experiment in a situation eliciting a criminal act requires the approval of a prosecutor. Moreover, Section 22 of the Operational Activities Law provides for the consent of the direct manager of the body performing operational activities or his or her deputy also to the initiation of operational case of the relevant category and for the implementation of a measure, thus ensuring control of the body performing the operational activity over the actions of the official. In addition, according to Section 23.<sup>2</sup> of the Operational Activities Law, in cases of special method operational activities measures, a post-inspection is carried out, which includes the obligation of the body performing the operational activity to report to the prosecutor on such a measure and the progress of its performance. This post-inspection also includes the obligation of the prosecutor, upon establishing the circumstances referred to in Paragraph three of this Section, to order the destruction of the data obtained and, in the event of the judge's approval, to forward the information to the President of the Senate. This provides for a kind of first-step post-inspection, whereas the second-step post-inspection is to be carried out by the court which examines the application under the contested provision. Thereby a high multilevel judicial control of special method operational activities measures is ensured on a high level.

The contested provision is necessary to ensure the right of a person to a fair court, as it provides the court with an opportunity to verify the admissibility of evidence obtained in the course of operational activities in accordance with international legal standards and case law. Breach of confidentiality requirements may cause significant damage not only to the covert assistant but also to third parties and to the interests of the State by revealing methods of covert activity protected by law; therefore, it is unacceptable that the accused, by becoming acquainted with the operational case file, could find out the identity of the covert assistant or learn about the fact of the covert assistant's cooperation as such. According to the Operational Activities Law, certain officials are obliged to verify whether an official or a covert assistant of the body performing an operational activity has carried out provocative acts prohibited by law. It follows that the court, when reviewing a request made in accordance with the procedure laid down in the contested provision, may also instruct the persons concerned to carry out such a review in respect of the conduct of the person whose conclusion is

appended to the ruling. Moreover, it is not enough that the court's ruling contains only a laconic reference to the fact that the court has examined the materials of the operational case file. The court should describe in detail the compliance of the operational activity with the legal framework as well as the planned and approved activities, which could be achieved by supplementing Section 320 of the Criminal Procedure Law and specifying in a general way what the court must state in its ruling with regard to the examination of the operational activity materials in the case. Giving the accused access to such a comprehensive ruling would ensure their right to a fair court to the extent possible, while guaranteeing the protection of official secret and the interests of others.

**10. Other party to the proceedings – *Mg. iur. Armands Smans*** – holds that the contested provision complies with Article 92 of the Constitution.

Section 24, Paragraph four of the Operational Activities Law implies the right of the prosecutor, as the person directing the proceedings, to become acquainted with the information obtained in the process of operational activity, which relates to the object of evidence. It also follows from the aforementioned provision that when assessing the materials included in the criminal case to be submitted to the court, it is the prosecutor, as the person directing the proceedings, who assesses whether and to what extent the information on facts obtained during operational activity measures, which is intended to be used as evidence, should be included in the case file, as well as the conditions for using such information as evidence. Thus, it is the exclusive prerogative of the prosecutor to influence the scope of the factual information to be added to the criminal case, i.e. to determine to what extent this material will be available to the accused and their defence counsel. However, the contested provision does not provide for the possibility for the court to allow the accused or their defence counsel to become acquainted with the information on facts obtained during the operational activity measures to a greater extent than the prosecutor decided when handing over the case file to the court.

Situations cannot be excluded where the participants to the proceedings have different opinions on the meaning of the information contained in the operational activity materials not appended to the criminal case. That is, the prosecutor might consider that some of the unappended material does not relate to the prosecution, that it is not necessary for the defence or for full examination of the appended material, or

that it is not possible to attach the material to the case because of the need to ensure the confidentiality and security of the operational activity measures and the persons involved therein. The defence, on the other hand, might take the opposite view. According to the principle of a fair court, it is not permissible to rely solely on the opinion of one party to the proceedings regarding the possibility for another party to have access to information relating to the object of evidence. This situation raises reasonable doubts as to the impartiality and independence of the decision in question, since such a decision is not subject to judicial review. Thus, in cases where, on the basis of the contested provision, a decision is taken on the issue of access to the operational materials which are not appended to the criminal case and are related to the object of evidence, it should be possible for the court to reconsider the prosecutor's opinion on the extent to which the accused or their defence counsel should be allowed to become acquainted with the materials of the criminal case.

The fact that the operational materials may contain restricted information or official secrets cannot be the basis for an absolute prohibition of the defence to have access to these materials. This is evidenced, for example, by Section 375, Paragraph four of the Criminal Procedure Law, which stipulates that persons involved in the criminal proceedings and which have the right to familiarise themselves with the materials of a criminal case shall be notified in writing regarding the duty to keep an official secret and regarding the liability which is intended for disclosure of the official secret. According to Section 231 of the Criminal Procedure Law, in the case when special investigative actions were carried out against a person, the results of which have not been attached to a criminal case, the person entitled to defence has the right to request to familiarise with these materials, and judicial control over the observance of the person's rights is ensured as well. Thus the legitimate aim of the contested provision can be achieved by other means less restrictive of the rights and legitimate interests of a person.

### **Concluding Part**

**11.** In its reply, the *Saeima* indicated grounds which, in accordance with Section 29, Paragraph one, Clause 3 of the Constitutional Court Law, could constitute as basis for termination of legal proceedings in the case. In particular, the Applicant has missed the term for submitting a constitutional complaint, since they had no general

remedies at their disposal. The contested provision is imperative and is worded unambiguously, and the Applicant is in a situation typical for its scope. The term is therefore to be calculated not from the date when the decision of the last institution entered into force, but rather from the moment when the infringement of their fundamental right occurred – 25 June 2014 – when the contested provision entered into force.

According to the case law of the Constitutional Court, issues of a procedural nature, including issues on termination of legal proceedings, are to be examined before the substantive assessment of the constitutionality of a legal provision (*see Judgment of the Constitutional Court of 10 December 2021 on termination of legal proceedings in Case No 2021-11-01, paragraph 9*).

In the given case, the Applicant had the possibility to defend their fundamental rights enshrined in the Constitution by means of general legal remedies. In particular, the infringement of the Applicant's fundamental rights could have been prevented if the court of general jurisdiction had not used the information obtained as a result of the operational activity to prove their guilt or had rendered an acquittal judgment. The Applicant used the above-mentioned general remedies by appealing against the judgment of the court of first instance in appeal proceedings, and against the judgment of the court of appeal in cassation proceedings. Consequently, in accordance with Section 19.<sup>2</sup>, Paragraph four of the Constitutional Court Law, the six-month term for submitting a constitutional complaint is to be counted from the date of entry into force of the decision by the last institution. The decision of the court of cassation was adopted and entered into force on 31 August 2021, and the application to the Constitutional Court was received on 24 September 2021. The six-month term is thus met.

**Accordingly, the proceedings in the present case can be continued.**

**12.** The Applicant requests the Constitutional Court to examine the compliance of the contested provision with Article 92 of the Constitution, indicating that the contested provision infringes the principle of equality of arms, which is included in the scope of the right to a fair court. The Applicant substantiates this statement by the fact that they, as an accused, have no right to become acquainted with the materials of operational activity, which are not appended to the criminal case and are related to the object of evidence, whereas the prosecutor is not denied such right in the criminal

prosecution proceedings. It follows from the application that, in essence, the compliance of this provision with the first sentence of Article 92 of the Constitution is contested.

First sentence of Article 92 of the Constitution states: “Everyone has the right to defend his or her rights and lawful interests in a fair court.”

The Constitutional Court has recognised that the principle of equality of arms is also among the requirements which the right to a fair court imposes on the procedure of examining a criminal case (*see Concluding Part of the Judgment of the Constitutional Court of 5 March 2002 in Case No 2001-10-01, paragraph 6, and Judgment of 10 February 2017 in Case No 2016-06-01, paragraph 33*).

**12.1.** The principle of equality of arms requires that the rights of the parties to the proceedings must be fairly balanced, i.e. each party to the proceedings must be afforded adequate opportunities to use procedural means and no party to the proceedings may be unreasonably placed at a disadvantage compared to other parties to the proceedings (*see, e.g., Judgment of the Constitutional Court of 16 April 2015 in Case No 2014-13-01, paragraph 20.1*). The principle of equality of arms to criminal proceedings provides that all parties involved in the proceedings have an equal opportunity to present the circumstances of the case, and prohibits any party from being granted a significant advantage over its opponent (*cf. Concluding Part of the Judgment of the Constitutional Court of 27 June 2003 in Case No 2003-03-01, paragraph 6*).

Moreover, the right to be heard is essential to the full protection of rights and to balancing the interests of the parties involved. It is exercised in a number of ways, such as the right to receive full information on the opinion expressed by the opposing party, the evidence and facts gathered, and the right to express an opinion on matters of fact and law (*see Concluding Part of the Judgment of the Constitutional Court of 27 June 2003 in Case No 2003-03-01, paragraph 6.1, and Judgment of 25 September 2020 in Case No 2019-35-01, paragraph 15*).

However, the case law of the Constitutional Court has recognised that the right to become acquainted with all evidence is not absolute. The limits for applying the rights enshrined in the first sentence of Article 92 of the Constitution may be narrowed in cases relating to state security, however, in such cases also certain guarantees of protecting rights must be ensured (*see Judgment of the Constitutional Court of 25 September 2020 in Case No 2019-35-01, paragraph 15*).

**12.2.** The Constitutional Court has repeatedly indicated that, taking into account the principle of harmony between the provisions enshrined in the Constitution and of international human rights, the first sentence of Article 92 of the Constitution must be specified in conjunction with Article 6 of the Convention (*see, e.g., Judgment of the Constitutional Court of 26 March 2020 in Case No 2019-15-01, paragraph 10*).

The ECHR has recognised that the principle of equality of arms, enshrined in Article 6 of the Convention, is an integral element of a fair court. In particular, Article 6(1) of the Convention requires the prosecution to disclose to the defence all evidence in its possession for or against the accused (*see Judgment of the Grand Chamber of the European Court of Human Rights of 16 February 2000 in Rowe and Davis v. the United Kingdom, Application No 28901/95, paragraph 60*). Meanwhile Article 6(3)(b) of the Convention guarantees the accused the right to the time and means necessary for the preparation of their defence (*see Judgment of the European Court of Human Rights of 6 March 2012 in Leas v. Estonia, application No 59577/08, paragraph 80*). Article 6(3)(b) of the Convention thus aims to ensure equality of arms between the prosecution and the defence by giving both sides the same or comparable rights (*cf. Judgment of the Constitutional Court of 26 March 2020 in Case No 2019-15-01, paragraph 14*).

The right to equality of arms is closely linked to the adversarial principle. The ECHR has recognised that the principle of equality of arms and the adversarial principle may be violated if the accused is denied access to the case file (*see Judgment of the European Court of Human Rights in Ternovskis v. Latvia, application No 33637/02, paragraph 72*). The adversarial principle in criminal cases means that each party must have the opportunity to examine and comment on the other party's observations and evidence. Whatever the method chosen by the national legal system to guarantee compliance with this requirement, it must ensure that the other party becomes aware of the explanations given and that they are given a real opportunity to provide their explanations on them (*see Judgment of the European Court of Human Rights of 28 August 1991 in Brandstetter v Austria, Application No 11170/84 et seq., paragraph 67*).

It is also recognised in the case law of the ECHR that the right of access to evidence is not absolute (*see Judgment of the European Court of Human Rights of 23 April 1997 in Van Mechelen and Others v. the Netherlands, Application No 21363/93 and Others, paragraph 58*). The ECHR has stated that the right of access

to certain evidence may be restricted where necessary to protect national security, the rights of others, secret police investigation actions, measures or officials, or witnesses. However, in such cases, procedural means must be used which ensure both that protection and the right to be heard (*see Judgment of the Grand Chamber of the European Court of Human Rights of 19 September 2017 in Regner v. Czech Republic, application No 35289/11, paragraph 99 et. seq.; cf. Judgment of the Court of Justice of the European Union of 18 July 2013 in Case C-584/10 Kadi, paragraph 125*). In cases of this kind, too, there must be certain safeguards of rights, and any restrictions on the rights of the accused must be strictly necessary (*see Judgment of the European Court of Human Rights of 23 April 1997 in Van Mechelen and Others v. the Netherlands, Application No 21363/93 and Others, paragraph 58*). In circumstances where national security is affected and confidential information may be used, the State must provide the individual with a remedy that is as effective as possible (*see Judgment of the Constitutional Court of 6 December 2004 in Case No 2004-14-01, paragraph 10*). In cases where evidence which has never been disclosed due to interests of national security is used, it is for the national courts to scrutinise the decision-making procedure, i.e. to ensure that the requirements of the adversarial principle and the principle of equality of arms are respected as far as possible, thereby protecting the interests of the accused (*see Judgment of the European Court of Human Rights of 6 March 2012 in Leas v. Estonia, application No 59577/08 paragraph 78*).

Moreover, these safeguards of the accused's right to defence apply not only to evidence, but also to other information that is relevant to proof. The relevant factor is the extent to which the information relates to the case and, in particular, whether the information has a material bearing on the charge against the person, i.e. whether the evidence is used to support the guilt of the accused or whether it contains information that would allow the accused to be acquitted or their sentence reduced. In this context, 'evidence' means not only evidence which is directly related to the facts of the case but also other information which might bear on the admissibility, reliability and sufficiency of such evidence (*see Judgment of the Grand Chamber of the European Court of Human Rights of 16 February 2000 in Rowe and Davis v. the United Kingdom, Application No 28901/95, paragraph 66; Judgment of the European Court of Human Rights in Mirilashvili v. Russia, Application No 6293/04, paragraph 200; Decision of 6 March 2012 in Leas v. Estonia, Application No 59577/08, paragraph 81; and*

*Judgment of 4 April 2017 in Matanović v. Croatia, Application No 2742/12, paragraph 161).*

**The principle of equality of arms thus provides that the parties have an equal right to inspect the material which is relevant to the evidence, however, in cases involving national security, derogations from this principle are permissible in so far as such derogations are necessary and the safeguards protecting the accused person's right to a fair court are respected.**

13. The Applicant, the *Saeima*, and the other parties acknowledge that the prohibition included in the contested provision to familiarise with the materials of operational activity, which are not appended to the criminal case and are related to the object of evidence, is aimed at the protection of national security and official secret. However, the Applicant holds that such a prohibition is not proportionate and the protection of national security and official secret could also be ensured by such a legal regulation according to which the accused could be granted the right to become acquainted with the relevant materials of operational activity.

13.1. The contested provision should be interpreted in conjunction with the Operational Activities Law, which, inter alia, determines the purpose, tasks, content, conduct and secrecy of operational activity. According to Section 1 of this Law, operational activities are both overt and covert legal activities of officials of State authorities, specifically authorised by law and in accordance with the procedure established by this Law. The purpose of these activities is to protect the life and health, rights and freedoms, honour, dignity and property of persons, to safeguard the Constitution, the State system, national independence and territorial integrity, national defence, economic, scientific and technical potential and official secret against external and internal threats. According to Section 8, Paragraph three of the Operational Activities Law, the organisation, methodology and tactics of operational activities are an official secret, while Section 24, Paragraph one of the same Law provides that information obtained in the course of operational activities measures shall be classified as restricted access information or an official secrets object, which may be used as evidence in a criminal proceeding only in accordance with the procedures laid down in the Criminal Procedure Law, ensuring the implementation of the investigatory measures and the confidentiality and safety of the persons involved therein. This is based on the fact that the vast majority of criminal offences are committed in secret,

which is why the measures taken by the bodies performing operational activities are mainly concealed from the persons against whom they are directed (*see: Lieljuksis A. Operatīvās darbības tiesiskās un praktiskās problēmas [Legal and Practical problems of Operational Activity]. Riga: Rīgas Stradiņa universitāte, 2021, p. 20.* The secrecy of the operational activity measures is commensurate with the criminal procedural aim set out in Section 1 of the Criminal Procedure Law – to establish a criminal procedure that ensures the effective application of the provisions of the Criminal Law and the fair settlement of criminal law relations without unjustified interference in a person's life. The Operational Activities Law protects, inter alia, the State system, the independence and territorial integrity of the State, the State's defence potential and official secret, i.e. values closely related to the defence of the State itself (*ibid., p. 23*).

The meaning of the secrecy of operational activities and material of operational activities is closely linked to the concept of official secret. Section 2, Paragraph one of the Law On Official Secret provides that an official secret is such military, political, economic, scientific, technical or other type of information which is included in the list approved by the Cabinet and the loss or illegal disclosure of which may cause harm to the security and economic or political interests of the State. Official secret is protected by organisational or technical measures taken by the bodies performing operational activities to ensure the protection of official secret and to prevent the unlawful acquisition and use thereof (*see: Lieljuksis A. Operatīvās darbības tiesiskās un praktiskās problēmas [Legal and Practical problems of Operational Activity]. Riga: Rīgas Stradiņa universitāte, 2021, p. 24.* In certain cases, the legal framework provides for the possibility for a person to get acquainted with information containing official secret – e.g., Section 375 of the Criminal Procedure Law provides that persons involved in the criminal proceedings and which have the right to familiarise with the materials of a criminal case shall be notified in writing regarding the duty to keep an official secret and regarding the liability which is intended for disclosure of the official secret.

**13.2.** Operational activity is distinguishable from special investigative actions, the legal regulation of which is laid down in Chapter 11 of the Criminal Procedure Law. Pursuant to Section 231 of this Law, a person involved in criminal proceedings, who has the right to familiarise with the materials of a criminal case after the completion of pre-trial proceedings, has the right to request to be acquainted with the materials obtained as a result of special investigative actions and unattached to the criminal case, as well as to request that these materials be added to the criminal case.

Such requests are examined by the court in accordance with the procedure laid down in the same Section. Pursuant to Section 234, Paragraph one of the Criminal Procedure Law, the methods, techniques, and means for the performance of a special investigative action, as well as the information acquired as a result thereof that does not have the significance of evidence in the criminal proceedings in which such operation was performed, or the use of which in another criminal proceedings is not permitted, or which is not necessary for the prevention of an immediate and significant threat to public security, are also a State or investigative secret. Moreover, it follows from Section 210, Paragraph two of the Criminal Procedure Law that means and methods of operational activity may be used within the framework of special investigative actions.

However, the concept of operational activity is broader than that of special investigative actions and the objectives of these activities are different. In particular, the objectives of operational activities as defined in the Operational Activities Law do not include criminal procedural objectives to which special investigative actions are subordinate. According to Section 2, Paragraph one of the Operational Activities Law, the tasks of operational activity include, inter alia, protecting of persons against criminal threats and preventing, deterring and detecting of criminal offences, and the determining of persons committing criminal offences and the sources of evidence. Therefore, obtaining evidence is not in itself a part of the tasks of an operational activity. Furthermore, according to Section 4, Paragraph four of the Operational Activities Law, operational activities measures shall be initiated and performed only if fulfilment of the tasks referred to in Section 2 and achievement of the objectives laid down in Section 1 of this Law are not possible by means and methods provided for in the Criminal Procedure Law or other procedural laws, or by other means, or are significantly more difficult. If necessity for the performance of an operational activities measure does not exist any more or the basis has been lost, the performance thereof is discontinued. This means that the performance of an operational activity is to be regarded as a last resort supplementing the functions of investigative activities, including special investigative actions, in criminal proceedings.

In addition, the Operational Activities Law provides for a broader scope of confidential information compared to special investigative actions. In particular, the criminal procedural regulation provides that special investigative actions are recorded, their materials appended to the criminal case, and according to Section 229 of the Criminal Procedure Law, they are used in evidence in the same way as other

investigative actions. While, according to the Operational Activities Law, operational activities and their results are recorded in a special procedure established by this Law and other laws and regulations, their materials are appended to investigatory records cases and, in accordance with Section 127, Paragraph three of the Criminal Procedure Law, are used in evidence in exceptional cases, if the information obtained in the course of an operational activity can be verified in accordance with the procedure established by the Criminal Procedure Law. Furthermore, according to Section 229, Paragraph two of the Criminal Procedure Law, if secretly recorded expressions or activities of a person are used in proving, such person shall compulsorily be interrogated, and in the event that a person is acquainted with facts that have been acquired without his or her knowledge, such person shall be informed regarding the performed secret operation insofar as such operation directly affects the relevant person. In contrast, Section 24.<sup>1</sup> of the Operational Activities Law sets out the cases in which a person is not informed about a special method operational activity performed against that person, including the cases where informing a person may reveal the identity of third parties or the fact of covert cooperation, the organisation, methodology and tactics of operational activities measures, as well as harm the interests of national security, the performance of operational activities, or criminal proceedings.

**13.3.** It is important that, in addition to information on the methods of operational activity and other information containing official secret, the operational material may contain information on covert assistants, including on the fact of the covert cooperation as such, as well as on the identity, nature and extent of the involvement of the covert assistant. According to Section 31, Paragraph one of the Operational Activities Law, covert assistants are under the protection of the State and information with respect to their identity and covert cooperation with the body performing the operational activities is an official secret. However, pursuant to Paragraph three of this Section, a covert assistant may be involved in criminal proceedings without disclosing the fact of the covert cooperation. The fact of a person's covert cooperation or the information provided by them may be disclosed in criminal proceedings only if it is necessary to achieve the objectives of the investigation, to guarantee public safety and only if it does not endanger the life, health or liberty of the covert assistant or another person, or the possibility of further use of the covert assistant. Moreover, according to Section 35 of the Operational Activities Law, the identity of the information sources may be revealed only to the Prosecutor General, but to the

prosecutors specially authorised by the Prosecutor General – only with the permission of the head of the body performing operational activities. Thus, the identity of the covert assistants and the fact of their cooperation can only be revealed to a very narrow circle of officials of the body performing the operational activity. The protection of the secret assistant and the cooperation fact is related to Section 24.<sup>1</sup>, Paragraph two, Clause 2 of the Operational Activities Law, according to which a person against whom a special method operational activity has been carried out is prohibited from becoming acquainted with the information that may reveal the identity of the covert assistant or the person who provided covert assistance to an official of the body performing the operational activity or the fact of covert cooperation. It follows that the legislator's aim was to ensure the protection of the fundamental rights of third parties involved in operational activities, thus also ensuring that neither the life, health and safety of such persons nor the performance of further operational activities would be endangered.

**13.4.** In line with the contested provision, the accused and their defence counsel do not have the right to become acquainted with the materials of operational activities which are not appended to the criminal case and are related to the object of evidence. The applicant submits that, as a result, he has not been ensured the right to fully prepare for the hearing of the case, nor has he been able to fully verify whether the arguments based on the materials of the operational activity are justified and correspond to the truth, nor has he been able to refute them and comment on them.

The case law of the Constitutional Court has recognised that the principle of procedural equivalence included in Section 18 of the Criminal Procedure Law is one of the fundamental principles of criminal procedure which operates throughout the criminal proceedings, i.e. both during the pre-trial proceedings and in trial (*see Judgment of the Constitutional Court of 23 May 2017 in Case No 2016-13-01, paragraph 14.1*). Thus, it also applies to criminal proceedings in the framework of which, including prior to the initiation of the proceedings, operational activity has been carried out, and in accordance with the contested provision, only the court may have access to the materials of the operational activity which are not appended to the criminal case and are related to the object of evidence. It follows from Section 24, Paragraph four of the Operational Activities Law that the prosecutor, as the person directing the criminal proceedings, has the right to inspect information obtained in the course of operational activity, which relates to the object of evidence or the preparation and performance of investigative actions. According to Section 412, Paragraphs one and

two of the Criminal Procedure Law, a prosecutor, having recognised evidence as sufficient to sustain the prosecution in court, draws up a list of the materials of a criminal case and archive file to be transferred to the court. A prosecutor includes materials that are applicable to a specific criminal offence, and that will be used in court as evidence, in a criminal case to be transferred to the court, and includes materials that will not be used as evidence in an archive file. Thus, the prosecutor, as the person directing the proceedings, decides whether and to what extent information obtained during operational activities measures on facts to be used as evidence should be included in the case file, as well as the conditions for using such information as evidence. It follows that the accused is denied access to the materials of the operational activity to which the prosecutor had the opportunity to access, and the accused is placed in a disadvantageous situation compared to the prosecutor.

Thus, the right to become acquainted with such materials of operational activities, which are not appended to the criminal case and are related to the object of evidence, is subject to the guarantees of equality of arms enshrined in the first sentence of Article 92 of the Constitution. Moreover, the prohibition for the defence to become acquainted with the materials of operational activities, which are not appended to the criminal case and are related to the object of evidence, is related to the necessity to protect the official secret, the life and health of the officials and third parties to the operational activity, as well as the organisation, methodology, tactics and further performance of operational activities. When adopting the contested provision, the legislator envisaged that by restricting access to operational materials, the principle of conspiracy would be respected and thus the confidentiality necessary for the protection of those interests would be ensured.

**Thus, to establish whether the contested provision complies with the first sentence of Article 92 of the Constitution, the Constitutional Court must review whether it ensures a fair balance between the principle of equality of arms and the interests of national security.**

**14.** Criminal proceedings in which operational activity has been carried out must ensure such a balancing of the rights and interests of the parties thereto that would achieve the objectives of both the criminal proceedings and the operational activity. Balance between the interests of the parties to equality of arms and the interests of national security can be achieved by providing procedural safeguards that sufficiently

ensure the rights of the defence to a fair court in cases where it is denied access to certain materials.

The ECHR has held that it must also take into account the significance of the undisclosed material and its use in the proceedings when assessing the relevant procedural safeguards (*see Judgment of the Grand Chamber of the European Court of Human Rights of 16 February 2000 in Jasper v. the United Kingdom, Application No 27052/95, paragraph 58, and Judgment of the European Court of Human Rights of 25 July 2017 in M. v. the Netherlands, Application No 2156/10, paragraph 69*). In particular, the court must make sure whether it was possible in the State proceedings, taking into account the defence's comprehensive arguments based on the information available to it, to assess the impact of the withheld material on the validity of the convicting judgment (*see Judgment of the Grand Chamber of the European Court of Human Rights of 16 February 2000 in Rowe and Davis v. the United Kingdom, application No 28901/95, paragraph 66*).

Operational materials which are not appended to the criminal case and are related to the object of evidence have a special status separate from factual information obtained as a result of operational activity and used in evidence. According to Kristīne Līce, Latvia's representative to international human rights institutions, it follows from the criminal procedural framework that the accused is given the opportunity to get acquainted with the evidence when the case is referred to trial. In particular, according to Section 127, Paragraph three of the Criminal Procedure Law, information regarding facts acquired in operational activities measures, information that has been recorded with the assistance of technical means, may be used as evidence only if it is possible to examine such information in accordance with the procedures laid down in this Law. The fourth paragraph of the same Section provides that if information on facts obtained in operational activities measures and information recorded with the assistance of technical means is used as evidence in a criminal case, a reference shall be attached thereto regarding which institution, when and for what time period has accepted the performance of operational activities measures. A reference shall be issued to the person directing the proceedings by the head of the institution which has accepted the performance of the operational activities measure or an official authorised by him or her. It can therefore be concluded that the materials of the operational activity which are not appended to the criminal case and are related to the object of evidence contain additional information on the circumstances under which the information was obtained,

on the methods used, as well as the specific information obtained in the course of the operational activity, and information which is subordinate to the information indicating that the accused may have committed the criminal offence and which is contained in the materials of the criminal case (*see vol. 4 of the case file, p. 160*). Thus, the information contained in such operational materials serves only to substantiate the admissibility of the evidence included in the criminal case. The same follows also from Section 124, Paragraphs one and four of the Criminal Procedure Law, which stipulate that the objects of evidence are the totality of circumstances to be proven, and the facts and auxiliary facts connected thereto, in the course of criminal proceedings, while the certainty or non-certainty of other evidence, as well as the possibility or impossibility to use such evidence in proving, is justified with auxiliary facts. At the same time, the operational activity materials may contain both information on the bodies performing operational activities, the organisation, methodology and tactics of its activities, which constitutes official secret, as well as information on the identity of other persons who have cooperated with the bodies performing operational activities and the fact of their cooperation. The disclosure of such details could irreversibly jeopardise the conduct of further operational activities, as well as the life, health and safety of the officials and third parties involved in the operational activities.

The contested provision establishes a mechanism of judicial review according to which the court is obliged to assess the merits of the particular information contained in the materials of operational activities with regard to the admissibility of evidence in criminal proceedings. The case law of the ECHR recognises that, in many cases where materials are not disclosed, the court can only balance the public interest against the interests of the accused if it has become acquainted with the material. It must therefore carefully examine the decision-making procedure to ensure, as far as possible, that the principle of adversarial proceedings and the principle of equality of arms are respected and that the interests of the accused are protected (*see judgment of the European Court of Human Rights in Dowsett v. the United Kingdom of 24 June 2003, Application No 39482/98, paragraphs 42-43, and judgment in Leas v. Estonia of 6 March 2012, Application No 59577/08, paragraphs 78-79*).

The case law of the Senate has recognised: where information obtained in accordance with the special method in an investigatory process matter on another person is used in a criminal case to prove the guilt of the accused, it is essential for the court to assess whether this violates the principle of guaranteeing human rights laid

down in Section 12 of the Criminal Procedure Law. As regards the admissibility of information obtained as a result of an operational activity in criminal proceedings, the court must, *inter alia*, assess whether this infringes the constitutional rights of a person and allows disproportionate interference in that person's life, i.e. whether it violates the fundamental principles of criminal procedure (*see decision of the Senate of 11 November 2013 in Case No SKK-289/2013 (11819002111)*). Section 130, Paragraph two, Clause 4 of the Criminal Procedure Law provides that information regarding facts that has been acquired violating the fundamental principles of criminal proceedings is recognised as inadmissible and unusable in proving. Thus, in accordance with the contested provision, when assessing the materials of the operational activity which are not appended to the criminal case and are related to the object of evidence, the court must ascertain that the information obtained as a result of the operational activity on the facts, on which the arguments regarding the guilt of the accused person are based, has been obtained in a lawful manner. For example, in cases where objections have been raised in relation to instigating to commit a criminal offence, the ECHR has indicated that the court's assessment includes the obligation to establish the reasons for which the measure was taken, the extent of police involvement in the offence and the nature of the actions taken against the applicant (*see Judgment of the European Court of Human Rights of 5 February 2008 in Ramanauskas v. Lithuania, application No 74420/01, paragraph 71*). However, it also follows from the above that the court must ensure that the information contained in the operational materials which are not appended to the criminal case and are related to the object of evidence does not unduly prejudice the accused's right to a fair court in any other way. As the Senate has pointed out, the right of the accused to a fair court may be ensured by the court examining the materials of the operational activity and assessing whether the restriction of the fundamental rights of the accused, i.e. the denial of access to these materials, was particularly necessary to protect both the fundamental rights of third parties and the public interest (*see Decision of the Senate of 20 February 2015 in Case No SKK-27/2015 (11810025304)*). Moreover, when examining the relevant operational materials, the court is obliged under Section 19, Paragraph three of the Criminal Procedure Law to evaluate all reasonable doubts regarding guilt which cannot be eliminated as beneficial for the person who has the right to defence. This means that the court also must assess whether the information contained in these materials does not otherwise violate the accused person's right to a fair court.

Moreover, the case law of the Senate has recognised that the court must not only formally state that it has familiarised itself with and assessed the case file of the investigatory process matter in accordance with the procedure laid down in the contested provision but also give its opinion. However, it does not have to state in its decision the specific information and facts obtained during the examination of the investigatory process matter case file. Moreover, according to the Senate, the contested provision should be interpreted more broadly, as the indication in the court decision that the materials of the operational activity have been assessed without a specific opinion cannot be considered sufficient (*see Decision of the Senate of 4 February 2016 in case SKK-53/2016 (11815005612)*). Thus, the case law has already established the principle that the court must provide an opinion on becoming acquainted with the operational materials which are not appended to the criminal case and are related to the object of evidence, which must duly assess the objections of the parties to the admissibility of the evidence and contain reasoned conclusions of the court.

In addition, the Constitutional Court notes that the legal regulation established by the contested provision has already been assessed by international institutions. In particular, the contested provision was adopted following the judgment of the ECHR in the case *Baltiņš v. Latvia*, in which the Court held that it was not possible to conclude from the materials of the criminal case that the domestic courts had attempted to become acquainted with the secret materials of the operational activity and had properly examined the defendant's complaints about alleged provocation on the part of law enforcement authorities (*see Judgment of the European Court of Human Rights of 8 January 2013 in the case Baltiņš v. Latvia, application No 25282/07, paragraphs 63-65*). As Kristīne Līce points out, the Committee of Ministers of the Council of Europe has assessed the information provided to it on the adoption of the contested provision and concluded that Latvia has taken all necessary measures to comply with the judgment of the Court in the above-mentioned case, including by improving its regulatory framework to prevent the possibility of similar violations in the future (*see Case file, vol. 4, p. 160-161, and Resolution No CM/ResDH(2016)191 of the Committee of Ministers of the Council of Europe of 6 September 2016 in the case Baltiņš v. Latvia, concluding the supervision of the execution of the judgment in this case. Available at: hudoc.exec.coe.int*). The application of the contested provision was also assessed in the case examined by the United Nations Human Rights Committee (hereinafter – the Committee) *G. B. v. Latvia*. In its opinion, the Committee rejected the applicant's claim

that their right to a fair court had been violated, since the legal framework provided for in the contested provision, according to which the prohibition for the defence party to become acquainted with the materials of the operational activity must be balanced with the need to ensure a fair court, was considered sufficient. Namely, the Committee found that the domestic courts, in accordance with the mechanism contained in the contested provision, had thoroughly examined and evaluated the materials relating to the operational activities and had included in their decisions a note to that effect, which led to the conclusion that the accused's right to a fair court had not been disproportionately impeded. Moreover, the Committee stressed that the prohibition of the defence from becoming acquainted with the file was particularly necessary to protect the fundamental rights of third parties, namely those cooperating with law enforcement authorities, as well as the public interest. This strikes a reasonable balance between the interests of the public and those of the defence (*see the opinion of the United Nations Human Rights Committee of 5 November 2021 in G. B. v. Latvia, application No 3124/2018. Available at: ohchr.org*).

Therefore the Constitutional Court concludes that the prohibition established in the contested provision for the defence party to become acquainted with the materials of the operational activity which are not appended to the criminal case and are related to the object of evidence was necessary to protect the interests of State security and society. The Constitutional Court recognises that the legal regulation established by the contested provision, according to which the court assesses the relevant materials of operational activity and includes in its ruling an opinion that they have been assessed, is sufficient to ensure the right of a person to a fair court.

**Thus, the contested provision ensures a fair balance between the principle of equality of arms and the interests of the State and public security. Therefore it complies with the first sentence of Article 92 of the Constitution.**

### **Substantive Part**

On the basis of Sections 30-32 of the Constitutional Court Law, the Constitutional Court

**decided:**

**to declare Section 500, Paragraph six of the Criminal Procedure Law compatible with Article 92 of the Constitution of the Republic of Latvia.**

The judgment is final and not subject to appeal.

The Judgement shall enter into force as of the date of its publication.

Chairperson of the Court Hearing

Aldis Laviņš