THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

JUDGEMENT
on Behalf of the Republic of Latvia
in Riga, on 23 May 2022
in Case No. 2021-18-01

The Constitutional Court of the Republic of Latvia in the following composition: the Chairperson of the Court hearing Aldis Laviņš, Justices Irēna Kucina, Gunārs Kusiņš, Jānis Neimanis, Artūrs Kučs and Anita Rodiņa,

based on the application submitted by the Joint-Stock Company under liquidation "TRASTA KOMERCBANKA" and *ERGO TEC LLP* , a merchant registered in the United Kingdom,

in the presence of the authorised representatives of Joint-Stock Company under liquidation "TRASTA KOMERCBANKA", Armands Rasa and Matīss Šķiņķis

and the authorised representatives of the institution that issued the contested act – the *Saeima* – Andrejs Stupins and Jānis Priekulis,

and Līva Miksone as the secretary of the court hearing,

on the basis of Article 85 of the *Satversme* of the Republic of Latvia and Section 16, Paragraph 1, Section 17, Part one, Paragraph 11, as well as Section 19.^{2} and Section 28 of the Constitutional Court Law,

examined at a court hearing with the participants of the case participating in Riga on 31 March, as well as 6 April, 7 April, 13 April and 21 April 2022, the case

"On the Compliance of Section 70.^{11} Paragraph Four of the Criminal Law and Section 358, Paragraph One of the Criminal Procedure Law with the first sentence of Article 91 and Article 105 of the *Satversme* of the Republic of Latvia".

The Establishing Part

1. On 22 June 2017 the *Saeima* adopted the Law "Amendments to the Criminal Law", which entered into force on 1 August 2017, supplementing the Criminal Code with Article 70.[11] regulating the confiscation of criminally acquired property and stipulating:

"(1) Criminally acquired property is a property which has come into the ownership or possession of a person as a direct or indirect result of a criminal offence.

(2) If the value of the property is not proportionate to the legitimate income of the person and the person does not prove that the property is acquired in a legitimate way, as a criminally acquired property can also be recognised the property that belongs to a person:

1) who has committed a crime which, in its nature, is focused on the gaining of property or other kind of benefit;

2) who is a member of an organised group or supports it;

3) who has committed a crime related to terrorism.

(3) A property which is at the disposal of such person who maintains permanent family, economic or other kind of property relationships with the person referred to in Paragraph two of this Section can also be recognised as a criminally acquired property, if the value of the property is not proportionate to the legitimate income of the person and the person does not prove that the property is acquired in a legitimate way.

(4) The criminally acquired property, proceeds of crime which the person has obtained from the disposal of such property, and also the yield received as a result of the use of the criminally acquired property shall be confiscated, unless it must be returned to the owner or legal possessor."

Section 70.[11] Paragraph Four of the Criminal Law (hereinafter – the contested norm of the Criminal Law) remains in force in its original wording until the moment of adjudication of the case on the merits was concluded.

On 22 June 2017 the *Saeima* adopted the Law "Amendments to the Criminal Procedure Law", which entered into force on 1 August 2017, by amending Article 358 of the Criminal Procedure Law as follows:

"(1) Criminally acquired property shall be confiscated with a court ruling for the benefit of the State, if the further storage of such property is not necessary for achieving the objective of criminal proceedings and if such property does not need to be returned to the owner of lawful possessor, and acquired financial resources shall be included in the State budget.

(2) In the case referred to in Paragraph one of this Section a criminally acquired property may be confiscated for the benefit of the State also by a decision of a prosecutor to terminate criminal proceedings, except when a property the right to which are to be registered in the public register has been recognised as criminally acquired."

Section 358, Paragraph One of the Criminal Procedure Law (hereinafter – the contested norm of the Criminal Procedure Law) has not been amended and remains in force in its original wording.

2. Two cases were initiated before the Constitutional Court on the constitutionality of the contested norms of the Criminal Law and the contested norms of the Criminal Procedure Law (hereinafter jointly referred to as − the contested norms):

1) On 7 may 2021 on the basis of an application filed by the Joint-Stock Company under liquidation "TRASTA KOMERCBANKA" (hereinafter − the Bank) the case No. 2021-18-01 "On the Compliance of Section 70.[11] Paragraph Four of the Criminal Law and Section 358, Paragraph One of the Criminal Procedure Law with the first sentence of Article 91 and Article 105 of the *Satversme* of the Republic of Latvia" has been initiated;

2) On 8 may 2021 on the basis of an application filed by *ERGO TEC LLP*, a merchant

registered in the United Kingdom, (hereinafter − the Bank's creditor) the case No. 2021-19-01 "On the Compliance of Section 70.[11] Paragraph Four of the Criminal Law and Section 358, Paragraph One of the Criminal Procedure Law with the first sentence of Article 91 and the first three sentences of Article 105 of the *Satversme* of the Republic of Latvia" has been initiated;

To facilitate a more comprehensive and speedy trial, these cases were merged into a single case in accordance with Section 22, Paragraph 6 of the Constitutional Court Law.

The merged case No. 2021-18-01 has been given the name "On the Compliance of Section 70.[11] Paragraph Four of the Criminal Law and Section 358, Paragraph One of the Criminal Procedure Law with the first sentence of Article 91 and Article 105 of the *Satversme* of the Republic of Latvia".

3. The applicant − the Bank − holds that the contested norms are incompatible with Article 91 and Article 105 of the *Satversme* of the Republic of Latvia (hereinafter − *Satversme*).

After the Bank has been declared insolvent, by court decisions in criminal proceedings the funds deposited in its accounts have been recognized as the criminally acquired property. The insolvency administrator has taken decisions to replace the Bank's creditors whose deposited funds have been recognised as criminally acquired property with the State of Latvia under the same round of creditors. However, by the court's decision the complaint of the State Revenue Service has been satisfied and such action of the administrator of insolvency proceedings has been recognised as non-conforming to the law. Namely, by the court's decision it has been recognised that above-mentioned financial resources deposited in the Bank declared to have been criminally acquired should be transferred to the State of Latvia. The contested norms have been applied in such a way that the Bank is obliged to return its funds that from the moment of deposit become its property to the State, thereby reducing the amount of property owned by the Bank. On the basis of the contested norms, a *bona fide* third party has had its financial resources confiscated in an amount corresponding to the amount of criminally acquired property of other persons around the time when those other persons made deposits with the Bank.

With the court rulings by which the financial resources deposited with the Bank declared to have been criminally acquired, the issue of whether the State of Latvia, like any other creditor, is included in the common Bank's list of creditors or such financial resources were automatically transferred to the State budget, regardless of the round of creditors, has not been decided. This issue has been

finally resolved by the Riga City Vidzeme District Court decision of 9 October 2020 in the civil case by which it is clearly acknowledges that the Bank is obliged to transfer these financial resources to the State of Latvia immediately, "bypassing" all other creditors of the Bank. Thus, only with this decision the Bank has definitively lost its property, and the six-month time limit for submitting an application to the Constitutional Court account is taken from the date of this decision.

In accordance with the norms of the Credit Institutions Law, the norms of the European Union legislation, as well as the legal doctrine and case-law, the financial resources became the Bank's property within the meaning of Article 105 of the *Satversme* from the moment of deposit, whereas the depositors had only the right of claim against the Bank. The aforementioned is not affected by the fact that the Bank is currently declared insolvent.

According to the case-law of the European Court of Human Rights, confiscation of property in criminal proceedings is generally considered to be a property control measure within the meaning of the third sentence of Article 1 of the First Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention). However, the European Court of Human Rights considers the confiscation of the property of a *bona fide* third party to be a deprivation of property within the meaning of the second sentence of that Article. Thus, confiscation of the property of a *bona fide* third party in favour of the State is considered to be an expropriation of property also within the meaning of the fourth sentence of Article 105 of the *Satversme*.

The expropriation of the Bank's property did not take place on the basis of a separate law. Likewise, adopting the contested norms, all the owners whose property could be confiscated on the basis of the contested norms have not been heard and could not be heard at all. The requirement that expropriation of property may be carried out only in exceptional cases has also not been complied with, since the contested norms apply to an abstract range of cases. Payment of fair compensation for the expropriated property was neither offered to the Bank nor even considered at all. Thus, the contested norms are incompatible with the fourth sentence of Article 105 of the *Satversme*.

Even if the Constitutional Court were to conclude that the restriction created by the contested norms did not fall within the scope of the fourth sentence of

Article 105 of the *Satversme*, the contested norms are also inconsistent with the first, second and third sentences of this Article of the *Satversme*.

The restriction on fundamental rights contained in the contested norms is not established by law because it is not sufficiently clear, foreseeable and does not protect private persons against the arbitrariness of the authorities.

It is not clear from the contested norms that by criminally acquired property should be understood the Bank's property and not the creditor's right of claim against the Bank. Also, the contested norms allowed the confiscation of financial resources owned by the Bank at the value corresponding to the property owned by the depositors at the time of making the deposits, instead of providing for the confiscation of criminally acquired property of depositors according to its current value. The legislator deliberately did not include procedural guarantees in the national regulation for *bona fide* third parties such as the Bank.

In addition, the contested norms are also inconsistent with the principle of good law-making.

First, the contested norms are not harmonised with the requirements of Directive 2014/42/EU of the European Parliament and of the Council of 2 April 2014 on freezing and confiscation of instrumentalities and the proceeds from crime in the European Union (hereinafter − Directive 2014/42/EU) and Council Framework Decision 2005/212/JHA of 24 February 2005 Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (hereinafter − the Framework Decision). In particular, Directive 2014/42/EU and the Framework Decision explicitly provide that confiscation of the property of a *bona fide* third party is prohibited. Moreover, contrary to Directive 2014/42/EU and the Framework Decision, the contested norms do not provide for effective means of legal protection for entities such as the Bank.

Secondly, the contested norms are not harmonised with other legal norms in accordance with the principle of rational legislator. They are not consistent with the legal rules governing the insolvency of credit institutions, as they do not take into account the fact that the deposited financial resources become the property of the credit institution from the moment of deposit. Thus, the application of the contested norms in all cases results in the expropriation not of the depositors' financial resources, but of the property of the credit institution − a *bona fide* third

party. By harmonising the contested norms with the norms regulating the insolvency proceedings of credit institutions it should have been provided that the credit institution's client's right of claim against the credit institution should be recognised as the criminally acquired property and confiscated. The contested norms are also inconsistent with the norms of law regulating the insolvency proceedings of credit institutions which prohibit the use of the property of the insolvent credit institution to satisfy claims outside the insolvency proceedings.

Thirdly, in the process of drafting the contested norms their impact on the protection of the rights of others has not been analysed and proved. Namely, the considerations expressed by industry specialists regarding the protection of the rights of a *bona fide* third parties have not been analysed and taken into account.

In the opinion of the Bank, the legitimate aim of the contested norms is the protection of the rights of others, as they are aimed at removing criminally acquired property from civil legal circulation, thus protecting people from criminal activities.

The contested norms, in so far as they apply to property which is not the property of a *bona fide* third party, are appropriate for the achievement of the legitimate aim, but in so far as they apply to property belonging to a *bona fide* third party, they are not appropriate for the achievement of that aim. Namely, the confiscation of the property of a *bona fide* third party in favour of the State does not deter persons from engaging in criminal offences, since such confiscation does not affect the person who committed the criminal offence. In addition, even after confiscation, the criminally acquired property can and will be put into civil legal circulation only if the State does so.

The legislator, when adopting the contested norms, failed to assess whether the legitimate goal could not be achieved by less restrictive means of a *bona fide* third party. First, a less restrictive measure would have been the following − to provide for the confiscation of the property of the person involved in the criminal proceedings − the right of claim against the credit institution. It would also have been possible for the contested norms not to provide for a mandatory obligation to confiscate criminally acquired property in all cases, but to establish criteria by which the good faith of third parties should be evaluated. Finally, it would have been possible, as in Section 360, Paragraph 2.[1] of the Criminal Procedure Law, to provide that the property of a *bona fide* third party is left in its possession, while the Latvian State acquires the rights of claim against the person who committed

the criminal offence or was unable or unwilling to prove the legality of the origin of the property.

When assessing the compatibility of the restriction on fundamental rights with the principle of proportionality, it is important to take into account that as a result of confiscation, ownership rights to property are lost, moreover, this is happening in circumstances where none of the State authorities has raised no doubts regarding the Bank's status as a *bona fide* owner. Contrary to the case-law of the European Court of Human Rights, by adopting the contested norms, the legislator deliberately decided on the automatic and mandatory confiscation of criminally acquired property, regardless of whether such property has come into the possession of a *bona fide* third party. Moreover, the Bank's property has been taken away and the State property is being acquired at much higher amounts that would otherwise be due to the depositors if the funds deposited by them not have been declared to have been criminally acquired. The Bank does not even have the theoretical possibility to take civil action against the depositors.

When assessing compliance of the contested norms with Article 91 of the Satversme, first of all, it should be concluded that *bona fide* third persons whose property is confiscated are in completely different circumstances than other persons whose property is confiscated on the basis of the contested norms. The contested norms provide for equal treatment of groups of persons in different circumstances, as they do not foresee that the good faith of a person would prevent him from confiscation of property. For the above reasons, it cannot be held that the equal treatment of persons in different circumstances provided for in the contested norms is established by law and has a legitimate aim. Also, the legislator's considerations as to why it is necessary the same treatment of *bona fide* third parties and other persons whose criminally acquired property is confiscated do not derived from the legislative materials.

After reading the materials of the case the Bank submitted additional considerations.

The Bank, while stating that it has challenged the relevant legal norms, emphasises that the essence of the dispute in the present case is the confiscation of the property of a third party for the benefit of the State. The twelfth part of Article $634^{.1}$ of the Criminal Procedure Law and the Law on Execution of Confiscation of Criminally Acquired Property referred to in the reply of the *Saeima* do not contain

any provisions on the execution of confiscation in the case when several persons claim the property.

The Bank does not agree with the statement that the funds deposited with it are not property within the meaning of Article 105 of the *Satversme*. Namely, in the Bank's opinion, Article 105 of the Satversme does not confer the right to property acquired as a result of a criminal offence only on the unlawful acquirer of such property, but the Bank is not to be regarded as an unlawful acquirer.

It does not follow from the case-law of the Constitutional Court that the legitimate aim of any restriction on fundamental rights defined in every legal norm, by which the legislation of the European Union is introduced, is automatically also the protection of a democratic state order. Thus, in the present case, the protection of the democratic state order cannot be recognised as a legitimate aim of the restriction of fundamental rights. Similarly, contrary to what has been stated by some of the invited persons, the purpose of the restriction of fundamental rights contained in the contested norms is not to promote the well-being of society by increasing the revenue of the State budget.

It is necessary to take into account the recent case-law of the Court of Justice of the European Union, which indicates that Directive 2014/42/EU precludes national legislation which allows the confiscation for the benefit of the State of property allegedly belonging to a person other than the perpetrator of the offence, where that person has no possibility of participating in the confiscation procedure.

Not being able to agree with the invited persons who have questioned whether the Bank could be regarded as a *bona fide* third party in relation to the funds deposited in it. In no judicial or administrative proceedings it has been proved or even alleged, in accordance with the law, that the Bank failed to carry out a proper investigation of the customers or their funds or to comply with any other requirements of the law in respect of depositors whose funds declared to have been criminally acquired. Even if the *Saeima* considers that the Bank is not a *bona fide* owner of the funds in dispute, it is reasonable that there should be a legal process in which the Bank has a realistic chance of proving its *bona fide*. However, neither the contested norms, nor any other legal norms provide a *bona fide* acquirer of criminally acquired property with an effective remedy that would ensure the assessment of his/her *bona fide* and protection of his/her rights.

At a court hearing the authorised representatives of the Bank Matīss Šķiņķis and Armands Rasa repeated the arguments mentioned in the application and

additionally pointed out that none of the international treaties/agreements or recommendations referred to by the *Saeima* establishes an obligation to confiscate criminally acquired property always and in all cases. On the contrary, all these documents explicitly state that confiscation must not affect *bona fide* third parties.

In the event of the insolvency of a credit institution, the funds held by or belonging to the credit institution are to be used first and foremost to finance the insolvency proceedings. Consequently, if it were to be assumed that a credit institution in liquidation has no possibility to protect its rights, mentioned in Article 105 of the *Satversme*, before the Constitutional Court, a credit institution in liquidation would be prevented from achieving the objective of the insolvency proceedings - to satisfy the claims of creditors as fully as possible.

4. The applicant − the Bank's creditor − also holds that the contested norms are incompatible with Article 91 and the first three sentences of Article 105 of the *Satversme*.

The Bank's creditor has deposited financial resources in the Bank and, following the liquidation of the Bank and subsequent commencement of the insolvency proceedings filed a creditor's claim within the Bank's insolvency proceedings. According to the information provided by the Bank's administrator, the value of the claim submitted by the Bank's creditor and the possibility of satisfying it are affected by the confiscation of the property owned by the Bank. Namely, on the basis of the contested norms, the state's failure to comply with the round of creditors' claims allegedly significantly reduces the Bank's property, which prevents it from meeting its obligations to the Bank's creditors in full. Consequently, the fundamental rights of the Bank's creditor have been infringed. This issue has been finally resolved by the Riga City Vidzeme District Court decision of 9 October 2020 in the civil case by which it is clearly acknowledges that the Bank is obliged to transfer these financial resources to the State of Latvia immediately, "bypassing" all other creditors of the Bank. The six-month time limit for submitting an application to the Constitutional Court account is taken from the date of this decision.

When assessing compliance of the contested norms with Article 105 of the *Satversme*, first of all, it should be concluded that the Bank's creditor's claim against the Bank as a binding legal claim is property within the meaning of Article 105 of the *Satversme*. Thus, the contested norms restrict the right to property of the Bank's creditor included in the first three sentences of Article 105 of the *Satversme* by depriving the Bank's creditor of the value of its claim against the Bank in the insolvency proceedings. The decrease in the value of the Bank's creditor's claim resulting from the disputed norms is not a business risk that the creditor could have foreseen when making deposits in the Bank. Namely, the contested norms were applied on the basis of the alleged criminal origin of the property of other Bank's creditors and not on the basis of the insolvency of the Bank and the risk associated with it.

The Bank's creditor, in support of its claim that the restriction of fundamental rights contained in the contested norms is not established by law, has put forward arguments identical to those presented by the Bank.

The legitimate aim of the contested norms is the protection of the rights of other persons, since they are aimed at the removal of criminally acquired property from civil legal circulation.

The contested norms, in so far as they relate to confiscation of property for the benefit of the State and restrict the right to property of a *bona fide* third party, in this case − a creditor of a credit institution, are not suitable for achieving the legitimate aim.

When adopting the contested norms, the legislator failed to assess whether the legitimate aim could not be achieved by means that would be less restrictive on the rights of a *bona fide* third party.

When assessing the compliance of the limitation of fundamental rights with the principle of proportionality, it is important that, as a result of the confiscation of the financial resources of the Bank, the creditor of the Bank completely lost the value of its property − the creditor's claim − and thus the fundamental rights included in Article 105 of the *Satversme* have been infringed in the most serious possible manner.

When assessing the impact of the contested norms on any person whose interests they affect, it should be taken into account that the same or similar factual consequences will also affect other creditors of the Bank. The contested norms

may create a situation where the entire property of the insolvent company, without waiting for the insolvency proceedings to be concluded and bypassing the other creditors, are transferred to the State budget simply because one of the creditors of the insolvent company has committed criminal activities. This undermines public confidence in in the regulation of the insolvency proceedings and, in addition, is detrimental to the business environment and the national economy.

The incompatibility of the contested norms with Article 91 of the *Satversme* manifests itself in two aspects.

First, the incompatibility of the contested norms with Article 91 of the *Satversme* is related to unjustified differential treatment of persons who have their right of action against the insolvent credit institution. Persons in the same and comparable circumstances are the State and the other Bank's creditors in the insolvency proceedings. It follows from the Credit Institutions Law that the State, if it has its right of action against a credit institution, is also considered as a creditor of the credit institution. The aforementioned is not affected by the legal basis on which the claim of the state as a creditor is based, but is linked to the principle of equality of creditors. If any claims were not subject to the insolvency procedure but were nevertheless satisfied out of the debtor's property, the point of the insolvency procedure would be lost.

The difference in treatment is manifested in the fact that the State can have its claim against the Bank satisfied before the Bank's insolvency proceedings are concluded. Moreover, the State is able to obtain full satisfaction of its claims and therefore the State is in a privileged position vis-à-vis all other Bank's creditors.

For the same reasons as those given when assessing the restriction of fundamental rights in the context of Article 105 of the *Satversme*, it cannot be considered that such differential treatment was established by law. Moreover, no reasonable and objective reason for the difference in treatment created by the contested norms can be established. The only result of confiscating criminally acquired property outside insolvency proceedings in such a case is that the State receives financial resources faster and to a greater amounts. However, additional benefits for the State budget are not a legitimate aim of the contested norms, but also cannot serve as a basis for the differential treatment created by the contested norms.

Even if it were established that the difference in treatment had a legitimate aim, the contested norms do not comply with the principle of proportionality.

Secondly, the incompatibility of the contested norms with Article 91 of the *Satversme* is related to unjustified equal treatment of creditors of a credit institution who are in substantially different circumstances. Comparable persons who are in different circumstances, are a creditor of a credit institution in the insolvency proceedings and a creditor of a credit institution that is not in the insolvency proceedings. When a credit institution is declared insolvent, its creditors find themselves in substantially different situation. In particular, if a credit institution is not declared insolvent, the rights and possibilities of a creditor to obtain satisfaction of his claim are not affected by the credit institution's relations with other creditors, including the fact that a deposit made by another creditor with the credit institution is declared to have been criminally acquired and confiscated for the benefit of the State. In the insolvency proceedings, on the other hand, the ability of a creditor of a credit institution to obtain satisfaction of its claims depends directly on the amount of the credit institution's property and the claims of other creditors. If financial resources belonging to a credit institution are declared to have been criminally acquired property and confiscated for the benefit of the State while the credit institution is in the insolvency proceedings, the confiscation of the property of the insolvent credit institution will directly affect all creditors of the credit institution.

Such equal treatment of persons in different circumstances cannot be recognised as being established by law for the reasons already mentioned above. Moreover, it is also unjustifiable, since there is no objective and rational reason why the creditors of an insolvent credit institution should be the only ones to bear the negative consequences resulting from the application of the contested norms to such a credit institution. Taking into account the progress of the development of the contested norms, it can be concluded that the legislator has not taken into account the interests of the creditors of the insolvent credit institution and has not considered the consequences that the contested norms would have in such a situation. However, the legislator was obliged to develop such legal norms which would differentiate the consequences of the contested norms depending on whether the property of the credit institution is confiscated and whether the credit institution is in insolvency proceedings.

Even if it were established that the equal treatment had a legitimate aim, the contested norms would not comply with the principle of proportionality.

5. The institution that issued the contested acts, − the *Saeima* − points out that the proceedings in the case should be terminated both in respect of the Bank and the Bank's creditors (hereinafter also - the Applicants).

5.1. Based on Section 29, Paragraph One, Clause 6 of the Constitutional Court Law, the proceedings in respect of the Bank should be dismissed.

First, the contested norms do not infringe the fundamental rights of the Bank, and the Bank's application is aimed at protecting the fundamental rights of other persons − the Bank's creditors. The contested norms, which have been applied by court rulings declaring the financial resources of the Bank's depositors to have been criminally acquired property and ordering their confiscation for the benefit of the State, have had adverse consequences for those depositors and not for the Bank, in whose accounts those financial resources were deposited. In the rulings of the Riga City Vidzeme District Court by which the criminally acquired property was confiscated, it is clearly stated that they are the funds held in depositors' accounts that are declared to have been criminally acquired, not that financial resources owned by the Bank would be confiscated.

In addition, no legal significance can be attributed to the legal relationship arising between the credit institution and the depositor, to the assessment of who is considered the owner of the financial resources deposited with the Bank, and whether the depositor retains the right of action against the credit institution. Even if it were to be considered that the Bank is the owner of the financial resources deposited with a credit institution, while the depositors have only the rights of action against the Bank, it is also to be concluded that the contested norms do not have adverse consequences for the Bank. Namely, in such a case, with the court rulings regarding the recognition of financial resources deposited in the Bank as criminally acquired property, the depositors would lose their right of action against the Bank.

The Bank's application is contradictory. If it were to be accepted that the court rulings in question expropriate the Bank's property, this would create a situation where the court rulings leave depositors with a right of action against the creditor or expropriate both the Bank's property and the depositors' right of action against the Bank. This would mean that the amount of funds are expropriated twice, and this would not be correct.

According to the court rulings, the Bank is solely obliged to comply with these rulings in accordance with the procedures laid down in the regulatory

enactments, and that obligation does not arise from the contested norms. The Bank's situation would not change even if the Constitutional Court recognised the contested norms as null and void and the financial resources declared to have been criminally acquired property would not be confiscated for the benefit of the State. In other words, the Bank is a credit institution in liquidation and the creditors of the Bank, not the Bank, would receive these funds anyway.

The criminal origin of the property had been proved by the court rulings that had entered into force, thus Article 105 of the *Satversme* is not applicable to such property.

Second, the Bank failed to comply with the time limit for submitting the application. This period is to be calculated from the date of entry into force of the court rulings declaring the funds of the depositors concerned to have been criminally acquired property and ordering their confiscation for the benefit of the State. Contrary to the Bank's statement, precisely with the date of entry into force of this court ruling the issue of recognition of the financial assets deposited in the Bank's open accounts as criminally acquired property and confiscation for the benefit of the State has finally been decided. It is precisely the circumstance to which the Bank attributes the infringement of its fundamental rights. The writs of execution have been issued in respect of the rulings in question. The fact that these rulings did not specify the procedure for their execution is of no significance, since the procedure is laid down in Section 634.[1], Part 12 of the Criminal Procedure Law. This provision *expressis verbis* provided not that the Credit Institution Law was applicable to the enforcement of such decisions, but ruling on the confiscation of criminally acquired property shall be executed in accordance with the procedures laid down in the laws and regulations governing actions with the property under the State jurisdiction. It is not justified to link the commencement of the time limit for lodging the application to the decision in the civil proceedings, since in no other proceedings it can be concluded that the funds deposited in the accounts opened by the Bank are not to be recognised as criminally acquired property and are not to be confiscated for the benefit of the State.

Since the court rulings from which the time limit for submitting an application to the Constitutional Court is to be calculated entered into force on 31 July 2018 and 16 April 2019, respectively, and the application to the Constitutional Court was submitted on 7 April 2021, the time limit has not been complied with.

The Bank has challenged the provisions of law which provide for the confiscation of criminally acquired property for the benefit of the State or its return

to the owner or lawful possessor, and not the provisions of law which regulate the enforcement of court decisions declaring property to have been criminally acquired and ordering its confiscation for the benefit of the State, and therefore the limits of the claim cannot be extended in that respect.

At the court hearing the authorised representatives of the *Saeima*, Jānis Priekulis and Andrejs Stupins, repeated the arguments mentioned in the *Saeima's* reply and additionally pointed out that the subject of a legal transaction can be only that which has not been withdrawn from private legal circulation. Consequently, property rights cannot be a consequence of a person's attempt to launder the proceeds of crime. It does not follow from the *Satversme* that the proceeds of crime held in a credit institution will ever continue to participate in the civil legal circulation and cover claims of persons against the credit institution.

The Bank is a subject of the Law on the Prevention of Money Laundering and Terrorism and Proliferation Financing (hereinafter − the Law on the Prevention of Money Laundering), which is subject to special due diligence requirements to prevent the possibility that funds of illicit origin may be deposited with the Bank. It would be absurd to admit that it could be entitled to *bona fide* third party guarantees regarding the services it offers. This cannot be the case that the credit institution itself is the main beneficiary of the fact that persons who has committed a criminal offence have been able to bypass its internal control system.

5.2. In respect of the Bank's creditor the proceedings in the case should be terminated on the basis of Article 29, Paragraph One, Clause 6 of the Constitutional Court Law.

First, the fundamental rights of the Bank's creditor as laid down in the *Satversme*, are not infringed at all. Property that has been declared criminally acquired by court rulings is not the property of the Bank's creditor. The Bank's creditor has challenged the norms which establish the basic principle that the criminally acquired property is confiscated for the benefit of the State, but do not regulate how court decisions declaring property to have been criminally acquired and ordering its confiscation for the benefit of the State are to be enforced. This issue is regulated by other legal provisions, including Section 634.[1], Part 12 of the Criminal Procedure Law. Thus, the choice of the contested norms in the application is incorrect, and the entire argumentation of the Bank's creditor in the application essentially concerns a completely different person − the Bank. Namely, the

reasoning is based on the fact that the alienation of property belonging to a *bona fide* third party is not permissible and that the *bona fide* third party in this case is the Bank. Moreover, Article 105 of the *Satversme* gives a person the right only to lawfully acquired property.

It is not possible to ascertain from the application of the Bank's creditor that the contested norms are the ones that could have the adverse effects indicated in the application. The application is accompanied by a document which shows that the insolvency administrator is carrying out a number of actions aimed at ensuring that in the proceedings the creditor's claim is satisfied to the maximum extent possible. Thus, the Bank's creditor has not substantiated the fact that it is not possible to recover the funds necessary to satisfy the claim of the Bank's creditor within the insolvency proceedings.

Second, the Bank's creditor failed to comply with the time limit for submitting the application. Such *Saeima's* view is based on the same considerations as those raised in relation to the Bank's application. Namely, this period is to be calculated from the date of entry into force of the court rulings declaring the funds of the depositors concerned to have been criminally acquired property and ordering their confiscation for the benefit of the State.

If the legal proceedings in the case were not terminated, then, in the opinion of the *Saeima*, the contested norms should be recognised as being compatible with the first sentence of Article 91 and Article 105 of the *Satversme*.

Latvia is bound by several international agreements, from which the State's obligation to ensure the confiscation of criminally acquired property follows, - the United Nations Convention against Transnational Organized Crime of December 13, 2000 (hereinafter − the Palermo Convention), Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 16 May 2005 (hereinafter − the Warsaw Convention), the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1998 (hereinafter − the Vienna Convention). Latvia is also bound by Directive 2014/42/EU, which also imposes an obligation on the State to ensure the confiscation of criminally acquired property.

In assessing whether the restriction of the fundamental right is established by law, the *Saeima* disagrees with the Bank's creditor that it is not clear that the

financial resources of the Bank should be considered as criminally acquired property, and not the rights of action of the Bank's creditor against the Bank. The contested norms do not determine what constitutes the criminally acquired property, as this is clearly determined by the first part of Article 70.[11] of the Criminal Law. The circumstances of the adoption of the contested norms also indicate that they were adopted and promulgated in accordance with the procedure established by the *Satversme* and the Rules of Procedure of the *Saeima*. Although studies, social impact assessments, risk assessment measures and other analytical tools may improve the quality of legislation and contribute to the stability of the legal framework, it does not follow from the *Satversme* that the implementation of such measures in respect of any norm adopted by the *Saeima* would be a mandatory precondition for establishing that the norm is to be regarded as a law duly adopted. Moreover, it follows from the circumstances of the adoption of the contested norms that not only several international legal instruments, but also various studies have been taken into account in their adoption. Whether the contested norms comply with the requirements of Directive 2014/42/EU is not to be assessed as part of the methodology for assessing a particular restriction of a fundamental right.

It follows from the case-law of the European Court of Human Rights that the confiscation of the criminally acquired property within the framework of the criminal proceedings is in the public interest and is a means of deterring persons from engaging in criminal offences, *inter alia*, to ensure compliance with the principle that criminal offence does not bear fruit. Thus, the restriction of fundamental rights created by the contested norms, in so far as it provides for confiscation of criminally acquired property for the benefit of the State and transfer of criminally acquired funds to the State budget, is aimed at compliance with Latvia's international obligations. This is to ensure the protection of the democratic state order and public security.

The argument of the Bank's creditor that the limitation of fundamental rights created by the disputed norms is not suitable for achieving a legitimate goal should be left without legal consideration. In other words, it cannot be held that in the present case property belonging to a *bona fide* third party is being confiscated, since it is not the Bank's property that is being confiscated, but that of the Bank's depositors. The limitation of fundamental rights, contrary to the claims of the Applicants, is an appropriate means to achieve the legitimate aims, since the contested norms ensure that it is impossible to gain material benefit from committing a criminal offence and deter persons from committing criminal

offences, while it is precisely the gaining of material benefit that is one of the greatest incentives to commit crime.

According to the court rulings, the property of the depositors, not the Bank, was confiscated, and the property of the depositors was confiscated for the benefit of the State directly in connection with the large-scale money laundering carried out through the depositors' accounts opened with the Bank. Thus, any outcome other than confiscation of such criminally acquired property for the benefit of the State would not achieve the legitimate aims to the same extent.

The benefit that the society obtains from the limitation of fundamental rights established in the contested norms is undoubtedly greater than the damage caused to the Bank creditor's right to the property. If such criminally acquired property is not confiscated, the *Saeima* believes that this would mean that persons are not deterred from engaging in criminal offences and that there would be a greater opportunity to launder the proceeds of crime through credit institutions.

In assessing compliance of the contested norms with the first sentence of Article 91 of the *Satversme*, the *Saeima* points out that the claim for confiscation of criminally acquired property for the benefit of the State and transfer of the obtained financial resources to the State budget arises because the particular property has been directly or indirectly acquired as a result of a criminal offence, therefore it is a special claim. This can arise regardless of whether the credit institution has been declared insolvent. It is not possible to compare a claim for confiscation of criminally acquired property and transfer of the proceeds to the State budget with other claims that persons have against a credit institution. Thus, in the context of the contested norms, the State, if it has a claim against a credit institution for confiscation of criminally acquired property and transfer of the proceeds to the State budget, is not in the same and comparable conditions with other creditors of the credit institution in the context of the disputed norms.

The *Saeima* also disagrees that creditors of a credit institution under liquidation and creditors of a credit institution which is not in liquidation are in different circumstances, as well as that the contested norms provide for equal treatment in such circumstances. The consequences indicated by the Bank's creditor do not arise from the contested norms. Moreover, even if the funds deposited with a credit institution declared to have been criminally acquired at a time when the credit institution has not been declared insolvent, the situation may arise in which the credit institution cannot fully satisfy the claims of its creditors. Namely, the ability to satisfy creditors' claims depends on the property at the credit

institution's disposal − the factual situation − and not on the contested norms. Thus, the mere fact that a credit institution has been declared insolvent does not mean that the creditors of that credit institution are in a different position from the creditors of a credit institution that has not been declared insolvent.

6. The invited person − the Ministry of Justice − states that neither for the Bank, nor for the Bank's creditor violation of fundamental rights cannot be established.

The contested norms did not result in any infringement of the fundamental rights of the Bank, since property belonging to other persons, and not to the Bank, was recognised as criminally acquired property in criminal proceedings. Consequently, it cannot be established that the Bank would be on an equal situation with the persons who own the property that is being confiscated. However, if the property were to be recognised as the Bank's property, this would not exclude the possibility that it could be considered to be the proceeds of crime and be confiscated for the benefit of the State. Namely, there can be no system whereby funds obtained by criminal means are rendered non-confiscable or are legalised after being deposited in a credit institution.

Furthermore, property must not be used contrary to the public interest and the State has a duty, *inter alia*, to protect people from criminal activities, including removing criminally acquired property from circulation. According to the opinion of the Ministry of Justice, if someone could unhindered use of criminally obtained benefits, there would be a contradiction with the understanding of the rule of law.

Directive 2014/42/EU allows the confiscation of proceeds of crime or other property the value of which corresponds to the value of the proceeds of crime, at least where third parties knew or should have known that the purpose of the transfer or acquisition was to avoid confiscation. Under the Law on the Prevention of Money Laundering, credit institutions are obliged to identify their customers and, on the basis of a risk assessment, to carry out customer due diligence in order to combat money laundering and terrorist financing.

Also, the contested norms cannot cause infringement of the fundamental rights of the Bank's creditor, since on the basis of the contested norms the property of the Bank's creditor is not confiscated. Moreover, creditors cannot rely on the fact that criminally obtained funds in the possession of a credit institution will continue to participate in civil legal circulation and possibly cover their claims

against the credit institution, as this is a risk that both the credit institution and its creditor must take for the sake of the public interest. It is also relevant that the insolvency proceedings in the present case have not been concluded, and it is therefore not possible to establish that any negative consequences have already occurred for the Bank's creditor.

The applicants have failed to comply with the time limit for submitting applications to the Constitutional Court, since the court decision from which the time limit is to be counted is related to issues concerning the execution of decisions in criminal proceedings which have entered into force and such issues in their essence are not based on the contested norms.

At the court hearing, Indra Gratkovska, authorised representative of the Ministry of Justice, pointed out that the confiscation would not have any adverse consequences for the credit institution, as all the credit institution's funds anyway would be used to cover creditors' claims in the liquidation process. If it were considered that depositing funds obtained through crime in a credit institution makes them non-confiscable, this would not lead to the solution to combat money laundering.

7. The invited person - the Prosecutor General's Office - states that the contested norms comply with the first sentence of Article 91 and Article 105 of the *Satversm*e.

The contested norms do not infringe the applicants' fundamental rights. The applicants essentially object to the procedure for confiscation measures, but do not contest the constitutionality of confiscation itself as a fight against crime. In such circumstances, it would have been the norms regulating the confiscation procedure itself, but not the substantive norms, which would have been contestable, and not the distinction between the persons affected by the confiscation.

The State's obligation to confiscate the proceeds of crime is not only provided for by national laws and regulations, but also arises from international obligations, such as the Warsaw Convention, the Palermo Convention, the Vienna Convention, the Council of Europe Convention of 8 November 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (hereinafter − the Strasbourg Convention), Directive 2014/42/EU and Directive 2018/1673 on combating money laundering by criminal law of the European Parliament and of the Council of 23 October 2018.

It is irrelevant exactly what criminal proceeds are confiscated and in whose hands they are held, since even proceeds of crime that have been transformed through laundering are subject to unconditional confiscation. These measures are taken with the aim of eradicating crime, which is undoubtedly in the public interest, while any dispute over property rights or losses (if any) is a matter for national law.

The existence of crime and, consequently, the presence of criminally acquired property in the civil legal circulation should be evaluated as circumstances that are contrary to the interests of society. The illegal acquirer does not have ownership rights to the property declared to have been criminally acquired in accordance with the procedures specified in the Criminal Procedure Law, and therefore such property does not fall within the scope of Article 105 of the *Satversme*. In such circumstances, no one else is entitled to the criminally acquired property. Only the victim can be mentioned as an exception, as he/she has the right to the separation of his property (or appropriate compensation).

When assessing compliance of the contested norms with the first sentence of Article 91 of the *Satversme*, the Prosecutor General's Office points out that differences can be established both in the possibilities of a credit institution under liquidation to settle with creditors as compared to other credit institutions and in the possibilities of creditors to recover deposits, however, the insolvency proceedings cannot be given a decisive significance. The confiscation of criminally acquired property cannot be made dependent on the status of the credit institution, which can also be achieved artificially, for example by self-liquidation. Namely, the removal of criminally acquired property from civil legal circulation is a priority.

The other solutions proposed by the applicants − to provide that the financial resources, declared to have been criminally acquired property, deposited with a credit institution, are left in the credit institution's possession to cover creditors' claims in the insolvency proceedings or that the right of action against the credit institution is confiscated instead of the financial resources deposited with the credit institution − are not acceptable. This would be inconsistent with the notion that proceeds of crime cannot remain in civil legal circulation. If a creditor whose property have been declared to have been criminally acquired were replaced by the State, the property of the insolvent credit institution would probably not be sufficient to meet the full confiscation of the criminally acquired property, as

creditors are ranked in order of priority. This is further substantiated by the fact that in the present situation, the funds deposited in the subordinated deposit accounts were declared to have been criminally acquired.

There is no legal basis or reasonable grounds for confiscating funds in an amount less than that previously deposited with a credit institution. The fact that a credit institution has been declared insolvent cannot affect the amount of funds to be confiscated.

In general, the credit institution's good faith in its insolvency process is questionable, but furthermore even so the Bank's good faith. Both the provisions of the Credit Institutions Law and the provisions of the Law on the Prevention of Money Laundering provide for various risk analysis, monitoring and prevention obligations, including, for example, the obligation to conduct customer due diligence.

The Bank's creditor has the right to take civil action against the former management of the Bank. Similarly, the Bank's creditor should itself be aware of the risks of keeping all its current financial resources in one credit institution.

At the court hearing the authorised representative of the Prosecutor General's Office, Uvis Kozlovskis, upheld the written opinion of the Prosecutor General's Office, additionally pointing out that the credit institution operates, handles and makes a profit from the deposits. If these funds are found to be proceeds of crime and the credit institution must return them to the victim or they are confiscated in order to break the chain of laundering, there is no infringement of the credit institution's fundamental rights, since it is only returning what it has received for the purpose of making a profit.

8. The invited person − the Ombudsman − indicates that the proceedings in the case should be terminated, but if this is not done, then it should be recognised that the contested norms are compatible with the *Satversme*.

The Ombudsman agrees with the Saeima's reply that the contested norms do not limit the Applicants' fundamental rights. Property which has been declared by court rulings to have been criminally acquired and in respect of which confiscation has been determined for the benefit of the State, is not the property of either the Bank or the Bank's creditor. Moreover, if the deposited funds were considered to be the property of the Bank, it is not clear how the depositor could acquire the right to interest on the deposited funds.

As regards the Bank's creditor, it should be pointed out that the infringement of its fundamental rights is not real, since the contested norms did not cause any infringement of its rights at the time when the application was submitted and the occurrence of such infringement is not guaranteed in the future, especially taking into account the fact that work with the Bank's debtors is still ongoing and the amount of financial resources available to satisfy the claims of creditors is not known at present.

The argument that the contested norms do not determine the scope and limits of the restriction of fundamental rights and allow arbitrary restriction of fundamental rights is unfounded. First, the funds have been declared to be the proceeds of crime, subject to confiscation for the benefit of the State by court rulings in criminal proceedings which have determined the nature, jurisdiction and amount of the funds. According to the court rulings, financial resources belonging to certain persons – the Bank's creditors – in a certain amount to be the proceeds of crime. It was not necessary for the contested norms to resolve all possible situations by enumerating different types of criminally acquired property, as this would be determined by the court in its decision in each individual case.

When assessing compliance of the contested norms with the first sentence of Article 91 of the *Satversme*, it should be noted that confiscation of criminally acquired property and satisfaction of creditors' claims in the liquidation proceedings of a credit institution are two different proceedings with substantially different legal grounds and the rights and obligations of legal subjects within their framework are not comparable. Thus, there is no merit in the claim that the State should join the queue of creditors.

Money laundering is defined as activities carried out with criminally acquired property with the intention of creating a false impression on the part of third parties as to the origin of the property. The Law on the Prevention of Money Laundering lists a whole range of money laundering activities. At all stages of money laundering, persons involved in money laundering seek to use credit institutions to make deposits, investments, transfers, etc. of the proceeds of crime. The claim that, when funds are deposited with a credit institution, they become the property of the credit institution, merging with the other funds in the credit institution's accounts, and the credit institution becomes a *bona fide* beneficiary is absurd. This would place the financial scheme, one of the most vulnerable links in the money laundering chain, outside the requirements of the law, thereby *a priori* legalising the funds held in the accounts of credit institutions.

The Bank is subject to the Law on the Prevention of Money Laundering and it is subject to a series of strict and detailed requirements in the field of money laundering prevention. Consequently, the argument that the Bank is a *bona fide* beneficiary who did not know and should not have known of the criminal origin of the funds is absurd in substance, since the credit institution is under a direct obligation to ascertain the origin of the customer's funds. In any case where there is doubt as to the origin of funds, the credit institution must not allow them to enter the financial system. Moreover, the payment of funds that have been declared to be the proceeds of crime to the creditors of a credit institution in liquidation is not permissible, as it is contrary to the purpose of the Law on the Prevention of Money Laundering and confiscation.

The Ombudsman agrees with the *Saeima's* reply that the Applicants have missed the time limit for submitting an application to the Constitutional Court.

At the court hearing the authorised representative of the Ombudsman, Ilona Lošaka, additionally pointed out that the assumption that by depositing funds in a credit institution these funds become legal because they are mixed with other funds owned by the credit institution and are no longer separable from the whole of the funds is incorrect from the point of view of the Law on the Prevention of Money Laundering and does not correspond to the purpose and essence of the Prevention of Money Laundering system. A *bona fide* third party is characterised by the fact that it did not, could not and should not have known of the existence of a criminal offence and, consequently, of the criminal origin of the funds. However, this is inconsistent with the credit institution's obligation to prevent the movement of proceeds of crime in the financial system under the Law on the Prevention of Money Laundering and international obligations.

9. The invited person – the Financial and Capital Market Commission – points out that the coverage of the State's claims outside the round of creditors restricts the Applicants' right to property.

In the case of a deposit, the funds that are deposited into the depositor's account on the basis of an account service agreement are not individualised. They flow into the credit institution's total resources and are reflected on the bank's balance sheet. They can be used at the discretion of the credit institution. In this legal relationship, the depositor has a right of action against the credit institution if it loses ownership of the deposited funds.

Insolvency is the state of a credit institution such that it is unable to meet its debt obligations. Namely, a credit institution becomes insolvent when the amount of funds available to it is too small to cover all claims against it. Thus, it was clear from the outset of the insolvency proceedings that the property of the credit institution would not be sufficient to cover the claims of all creditors in full. In order to ensure that such a situation is resolved as fairly and proportionately as possible, the legislator has laid down a specific procedure for the settlement of costs and debts in the Credit Institutions Law. In the course of insolvency proceedings the distribution of large amounts of funds from the property of a credit institution for other purposes not specified in the Credit Institutions Law, as is the case, for example, in the present case, disturbs the hierarchy and proportionality, thereby prejudicing the interests of other creditors and causing losses to them. It should be taken into account that the legislator has also provided for a certain place in the hierarchy of creditors for the State to cover its claims. According to Article 192, Paragraph 3 of the Credit Institutions Law the state with its claims is ranked in the fourth round of creditors. This shows the conscious intention of the legislator not to place the financial interests of the state above the interests of less protected creditors.

The insolvency of a credit institution is not comparable to the liquidation of a credit institution or a going concern, because in both cases the financial resources are sufficient to cover all claims against the credit institution in full.

After the Bank was declared insolvent, all funds in depositors' accounts became the Bank's property, out of which the expenses of the insolvency proceedings are paid and creditors' claims are satisfied in accordance with the procedure laid down in the Credit Institutions Law.

Although the Bank's insolvency proceedings have not yet ended and it is theoretically possible that other funds may be recovered in the course of the proceedings and used to cover the Bank's insolvency expenses and creditors' claims, the insolvency proceedings of other credit institutions and the Bank's own insolvency proceedings do not allow optimistic conclusions to be drawn as to the extent of future recoveries and creditors' claims. Accordingly, it is highly probable that the confiscation of the Bank's financial resources for the benefit of the State will limit the rights of a creditor of the Bank over its property.

Moreover, such a large disbursement of funds outside the Bank's insolvency plan could directly jeopardise the efficient conduct and completion of the Bank's

insolvency proceedings, as the Bank may not have sufficient funds to cover the costs of the insolvency proceedings.

At the court hearing Inga Pētersone, Līga Medne and Sarmīte Glāzere, authorised representatives of the Financial and Capital Market Commission, pointed out that it is never possible to fully guarantee that criminally acquired funds will not flow into a credit institution. This does not depend solely on the effectiveness of the credit institution's internal control system or on how well and correctly the credit institution complies with the requirements in the field of money laundering prevention laid down in the regulatory enactments, as the diversity of clients and markets must also be taken into account.

If the State were to step in as a statutory creditor and replace the creditor from whose deposit the proceeds of crime are confiscated, the objective of removing proceeds of crime from civil legal circulation would also be achieved. The segregation of these funds outside the ranks of creditors in insolvency proceedings may prejudice the rights of other creditors.

10. The invited person – the Head of the Financial Intelligence Unit – Ilze Znotiņa at the court hearing indicated that neither the Bank, nor the Bank's creditor had infringed the fundamental rights included in Article 105 of the *Satversme*.

The Financial Intelligence Unit has pointed out that Article 105 of the *Satversme* protects only legally acquired property. So, the criminally acquired property cannot legally belong to anyone at all. For this reason, it is irrelevant whether the funds in the credit institution's account are to be regarded as the Bank's property, since once the funds are declared to be the proceeds of crime, they must be removed from civil legal circulation by confiscation. If someone could freely use the proceeds of crime, there would be an obvious contradiction with the understanding of the rule of law. In addition, the State has, among other things, an obligation arising from international obligations, *inter alia*, to remove the proceeds of crime from civil legal circulation, thereby protecting the public from criminal activities. It is internationally recognised that confiscation is the only way to prevent the proceeds of crime from continuing to circulate in the economy. In addition, credit institutions are also aware of their obligation to report suspicious transactions in order to prevent the possibility of criminally acquired funds entering the financial sector and the wider economy.

The confiscation of the proceeds of crime has no impact on the Bank's financial position, as it also extinguishes the Bank's liabilities to its depositors. In particular, a court decision on confiscation of the proceeds of crime confiscates both the property obtained through crime and the depositors' rights of action.

The interests of the State and of society in removing criminally acquired property from civil legal circulation must always be placed above the interests of any individual creditor, since such removal would prevent the commission of a criminal offence – the further laundering of the proceeds of crime. In general, the confiscation of proceeds of crime takes precedence over the interests of insolvency proceedings, since insolvency is a matter for specific creditors and a specific debtor, while the confiscation of proceeds of crime is a matter for the public interest.

Moreover, the Applicants' contention that international law prohibits the confiscation of proceeds of crime held by a *bona fide* acquirer cannot be accepted. International law requires that persons affected by confiscation measures have access to effective remedies, but in no case providing for exceptions according to which such remedies should be left in the person's possession. In addition, the compatibility of the Latvian legal framework with international obligations has been assessed several times. For example, in 2020 the European Commission acknowledged that Latvia had fully and correctly adopted international standards to prevent money laundering, terrorism and proliferation financing. Those third parties who have in good faith acquired criminally acquired funds in their possession are provided with civil remedies, that is, they can claim compensation in accordance with the provisions of Article 360 of the Criminal Procedure Law.

As regards the Bank's creditor, it should be noted that the creditor itself must be aware of the risks arising from keeping all its current assets with one credit institution. Depositors are not protected from the risk of a credit institution's insolvency. Moreover, it is relevant whether the reduction of creditors' property in insolvency proceedings could be attributed to the decision to declare to have been criminally acquired or to, for example, the conduct of the previous liquidator or the costs of the insolvency proceedings, including the administrator's remuneration.

Theoretically, it is possible that a credit institution could be considered as a *bona fide* third party, for example in the case where the credit institution itself is the victim of fraud. However, the present case is not such a case.

11. The invited person – the Latvian Financial Industry Association – holds that the contested norms are incompatible with Article 105 of the *Satversme* because all alternative means of achieving the legitimate aim have not been considered.

The Latvian Financial Industry Association states that two to five percent of the world's gross domestic product is related to money laundering and only approximately one percent of the relevant funds are frozen. In the European Union, 70 percent of cases of illegal money circulation have a cross-border nature. It is possible to develop such solutions so that coordinated actions of the private and public sectors give the maximum possible result. It is also important to maintain zero tolerance towards financial crimes in Latvia.

In the last three years, the number of criminal proceedings initiated for money laundering has tripled, but the number of convictions has increased six times, thus raising the question of whether the regulation established by Latvian laws is proportionate.

The thesis that criminally acquired property can be withdrawn from civil legal circulation cannot be absolute, it is necessary to make sure whether the rights of other persons are not disproportionately restricted and whether this withdrawal is practically feasible.

In order to ensure that the process of depositing funds with a credit institution is safe, the regulatory framework imposes a number of requirements on credit institutions to balance economic and legal risks. However, credit institutions can never test all financial resources, so they take a risk-based approach – assessing risks correctly, focusing on the most important and highest risks.

Not being able to agree with the *Saeima's* opinion that in the present case there is no limitation of the fundamental rights of a person. Namely, if one of the depositors' deposits is seized, then in the event of confiscation, all financial funds are confiscated for the benefit of the State, rather than the amount to which the depositor would actually be entitled in the absence of the seizure or confiscation. It is therefore important to assess whether the confiscation justifies the limitation of another person's fundamental right – the right to receive the deposit or a part thereof in the course of satisfying creditors' claims.

The Criminal Procedure Law does provide for one case in which property is not confiscated even if there is no victim. Namely, at least in the case of real estate *bona fide* persons are said to be more protected, without providing that real

estate is always confiscated for the benefit of the State. A similar measures should also be considered in cases of confiscation of financial resources in the event of the insolvency of a credit institution. If confiscation were based solely on the fact that the customer may have obtained the funds illegally and attempted to pass them off as legal by means of a transfer or a series of other acts, and the confiscated funds were therefore transferred to the State, even though the predicate offence had not been proved, the interests of other persons (depositors acting in good faith) would be more highly valued. No person allegedly involved in the laundering can directly benefit from such confiscation, as the money is distributed to different and *bona fide* depositors of the insolvent credit institution. Therefore, the test of compliance with the principle of proportionality would not be passed in such cases.

The custody of seized financial resources is an additional burden for credit institutions. Situations such as those in the present case could be avoided if the seized funds were kept in the investigating authority's account with the Treasury. This would clearly emphasise that the funds of a credit institution that is still in operation are immediately withdrawn and deposited with the State. Then no other person would be able to rely on these being the total funds available to meet creditors' claims in the event of the credit institution's insolvency.

If the contested norms are declared unconstitutional, the legislator will have to be given time to put the legal framework in order.

Edgars Pastars, authorised representative of the Financial Industry Association, further stated at the court hearing: there is no doubt that criminally acquired property should not remain in the possession of the person who committed the criminal offence, therefore it should be confiscated. However, the question is how to do it better, without harming the rights and interests of other persons. It is also questionable whether the fundamental rights of the Bank have been infringed in the present case.

12. The invited person – the Latvian Association of Insolvency Proceedings Administrators – points out that the contested norms are not aligned with the norms of law regulating insolvency proceedings.

According to the recommendations of the Moneyval report of the Council of Europe Committee of Experts on Money Laundering and the Prevention of the Financing of Terrorism, Latvia should continue investigating money laundering cases as a matter of priority.

In accordance with the principle of rational legislator, it is essential to reconcile the different regulations in order to achieve the fairest and most effective solution. Insolvency proceedings are a specific area of law in which money laundering issues are treated differently from other areas of law.

A different understanding is also applicable to the application of the contested norms in the context of insolvency proceedings. The insolvency procedure legislation prohibits the use of the insolvent's property to satisfy claims outside the insolvency proceedings. The State, if it has the right of claim against the insolvent subject, is also recognized as a creditor.

The specific nature of the insolvency proceedings makes it possible to argue that the contested norms have been adopted without being aligned with the norms of the law regulating the insolvency proceedings, and thus significantly prejudice the interests of the Bank's creditor.

In particular, the principles of law contained in the Insolvency Law that are directly applicable to the specific nature of insolvency proceedings, must be taken into account, such as the principle of creditor equality, the principle of honouring of obligations, the principle of effectiveness of proceedings, and the principle of quick turnover.

13. The invited person – ***Dr. iur.* Jānis Rozenbergs** - points out that the right of action of the client (depositor) against the credit institution, and not the financial resources of the credit institution, should be recognised as criminally acquired property.

In order to decide the case correctly, it is necessary to establish the legal relationship existing between the depositors and the Bank, as well as the ownership of the funds. According to the Credit Institution Law, the deposit of financial resources in a credit institution account is a deposit and the depositors are the Bank's customers. When depositing funds in a credit institution's account, the customer loses the deposited funds, which become the credit institution's property, but acquires a binding legal claim against the credit institution. Such a transaction corresponds to a loan by its nature. This can be inferred from the Credit Institutions Law, *inter alia*, Article 71, Paragraph one thereof. As a credit institution is essentially accumulating the free financial resources of individuals and putting them into circulation, the deposited financial resources "mix" with the other financial resources belonging to the credit institution.

Depositors have no interest in receiving the same funds back when they deposit them, as money is not an individual or individualisable thing that can be proven to belong to a particular property. If the funds received are also a loan, the giver, upon losing property rights, only has the right to demand the return of the loaned amount. The situation remains unchanged even if the credit institution's licence is revoked and the credit institution is liquidated or declared insolvent.

In the context of the present case, it is important to clarify what exactly should be recognised as criminally acquired property – financial resources or a right of action in the amount of the financial resources deposited. In fact, it is not possible that a decision relating to a customer (depositors' property) would relate to the credit institution's own property, i.e., the funds received. A court ruling declaring property to have been criminally acquired can and in fact does relate only to the customer's right of action against the credit institution. Therefore, legally (according to the law) the assignment of claim rights takes place, the depositor loses, but the victim or the state gains the right of action.

Although the right of action is declared to have been criminally acquired property in the amount of the deposited financial resources, the Bank's financial resources or property belonging to a third party are declared as criminally acquired property based on the contested norms. Moreover, the procedure for the satisfaction of the claims of the Bank's creditors is not followed. The fact that it is not possible to individualise the funds deposited in a credit institution account is not taken into account. Therefore, it is not possible to withdraw any specific funds of a creditor of a credit institution that have been declared as criminally acquired property.

At the court hearing *Dr. iur.* Jānis Rozenbergs also pointed out that credit institutions, upon receiving a decision to seize financial resources registered in a client's account, ceasing expenditure operations, but these seized funds remain in the assets of the credit institution.

The term “to remove from civil legal circulation” is understood as the transfer of funds declared to have been criminally acquired property to the State Treasury. The property is said to be criminal, because as a result of a criminal offence it has been unlawfully transferred to a person who has no legal basis to receive it. Property or non-cash funds are not bad in themselves, i.e., they do not have to be passed through the State Treasury as a certain amount in order to be allowed to return to circulation. In any case, the aim is only to prevent a person

who has acquired a claim against a credit institution not by legal means but as a result of a criminal offence, from dealing with this property and benefiting from it.

If a credit institution makes a sincere effort to comply with the requirements of the Law on the Prevention of Money Laundering, there is no basis for accusing it of having criminal funds at its disposal.

14. The invited person – ***Dr. iur.*** **Lauris Rasnačs -** believes that as a result of deposits, the credit institution becomes the owner of the relevant financial resources, while the depositors acquire a right of action against the credit institution.

The scope of Article 105 of the *Satversme* includes the right acquired by a person to carry out a certain type of commercial activity, for example, the right of creditors to carry out commercial activity on the basis of a licence. It follows from the case-law of the European Court of Human Rights that deposits also fall within the scope of the right to property. In general, it may be concluded that Article 105 of the *Satversme* protects various rights, including the right of action with material significance.

When a depositor makes a deposit, the credit institution becomes the owner of the relevant funds. By its nature, a court order directed at a credit institution, in terms of civil legal consequences, does not differ from the person's own order to the credit institution to pay out financial funds in the amount that corresponds to the person's right of action.

Article 1992 of the Civil Law recognises the conversion of a deposit into a loan, as long as the deposited money is used as a fungible thing at the discretion of the depositary. It is irrelevant whether the repayment of such a loan is made using, for example, the same banknotes or currency notes, since what is important is the value of the amount to which the depositor or lender has a right of action against the bank.

Confiscation of funds deposited with the Bank and declared to have been proceeds of crime infringes the rights of both the Bank and the Bank's creditors. It is irrelevant to establish how the Bank acquired ownership of the deposited funds, including an assessment of its good faith. Thus, in the case under consideration, Article 91 of the *Satversme* is of subordinate importance to Article 105 of the Satversme.

The purpose of confiscation of criminally acquired property is undoubtedly to protect the legitimate use and stability of the financial system by preventing and

stopping further money laundering through it. Accordingly, the property declared to have been criminally acquired must be removed from civil legal circulation. Accordingly, the property rights of the applicants in respect of that property must also be viewed in the light of the rules governing the confiscation of that property.

At the court hearing *Dr. iur.* Lauris Rasnačs also pointed out that deposits in a credit institution are reflected in two positions – they are both the assets and the liabilities. If any legally significant action is taken in relation to the funds deposited, the link between the right of ownership and the right of action must always be borne in mind.

The confiscation cannot be carried out in such a way that it would disproportionately and unreasonably prejudice the rights of other creditors of the credit institution.

15. The invited person - *Dr. oec.* Marina Kudinska - stated at the court hearing that the confiscation of the criminally acquired property should not be a priority in insolvency proceedings.

When closing the deposit account, the client has the right of action on financial resources and the credit institution has the obligation to repay the funds requested by the client in accordance with the procedure provided for in the contract. Thus, the funds raised from customers are the credit institution's property that it can invest to gain profit.

Credit institutions are obliged to establish an internal control system, which includes, *inter alia*, customer due diligence. The credit institution must continuously monitor the activities of its customers and ensure that the transactions carried out by the customers are economically justified, do not significantly exceed the declared amount, that the customer payments are in line with the declared economic activity, and that the credit institution has the necessary documents evidencing the transactions. Control should be continuous.

However, even if the internal control system is very effective, it is not always possible to detect that funds have been illegally obtained. In any event, once a court decision on the illegal origin of the funds has been received, the funds should be sequestered, as they should be removed from civil legal circulation.

An operating credit institution needs to be aware of the risk that funds may be confiscated, and it needs to be clear how to refinance its operations if some funds are withdrawn. However, the status of an insolvent credit institution is peculiar, since all its property must be used to satisfy the claims of creditors acting

in good faith, and such an institution has no means of refinancing these missing funds. In such a situation, *bona fide* creditors should not have to pay for the fact that the credit institution did not pay sufficient attention to the origin of the funds. This does not mean that the funds should remain in the credit institution, as they are confiscable, but in the event of insolvency they should be distributed proportionally. It is important that the very people who have tried to legalise these funds do not receive them.

16. The invited persons – ***Dr. iur.* Jānis Kārkliņš and *Mg. iur.* Pauls Zeņķis -** points out that the decision on confiscation of property concerns the depositor's rights of action and the realisation of these rights of action in the liquidation and insolvency proceedings of a credit institution does not take precedence over the realisation of other creditors' claims.

In order to examine the case correctly, it is necessary to ascertain the object of the confiscated property, i.e., to ascertain exactly what is to be confiscated for the benefit of the State in the circumstances referred to in the contested norms.

A deposit is a non-cash deposit in a credit institution's account, and deposits are the financial resources that are reflected in a credit institution's balance sheet. In the credit institution's balance sheet assets, the deposit is shown as the credit institution's current assets, i.e., as the credit institution's property. As part of the relationship between the depositor and the credit institution, the depositor does not retain ownership rights of the funds. The depositor has a subjective binding legal rights of action, i.e., the rights to demand payment of the debt from the credit institution. This is also indicated in Article 71, Paragraph one of the Credit Institutions Law and the Senate case-law. Even if the deposit is considered to be the contract of bailment under the second sentence of Article 1978 and Article 1992 of the Civil Law, the contract of bailment would be converted into a loan contract. Money is not considered a thing, but an abstract, calculable claim of value, which is not included in the property. Its legal nature and meaning are said to be similar to the essence of a fungible property.

The legally correct interpretation is that the right of action that the depositor has against the credit institution is recognized as the criminally acquired property. Thus, “to be returned, on the basis of ownership, to the owner” is also limited to the right of action against the credit institution. In a situation where the funds are deposited with a credit institution, it becomes impossible to “find” them, as they are mixed with the other funds of the credit institution. Since it is not possible to

“trace” the funds that have come into the possession of a credit institution, one can only trace the value of the funds deposited, which can be found in the “replacement property” of the financial resources. Such an interpretation is also consistent with Article 70.[11] Paragraph one of the Criminal Law. Namely, in the case where funds are deposited in a credit institution's account, the property acquired “directly” as a result of the criminal offence is lost, since it cannot be individualized, but is replaced by “replacement property” acquired “indirectly” as a result of the criminal offence – the right of action against the credit institution.

It is logical that a decision to confiscate criminally acquired property (i.e. a right of action) for the benefit of the State has no effect on the composition of the credit institution's property, since the decision does not relate to the credit institution's property at all. In such a case, there is a legal assignment of the claim. Consequently, the enforcement of the decision results in the satisfaction of the State's claim against the credit institution.

A decision on confiscation of criminally acquired property is immediately enforceable. The term “immediately” should be interpreted in such a way that it is compatible with and does not conflict with other provisions. If there are obstacles to the immediate execution of such a decision, it should be executed as soon as all the obstacles to its execution have been removed. One of the legal obstacles is the insolvency of the credit institution and the special procedure for the satisfaction of creditors' claims established within the framework of this procedure. The legislator has not provided that in such a case the State, as a creditor of a credit institution which has acquired a right of action against the credit institution in criminal proceedings, should be granted priority over other creditors of the credit institution under liquidation. There is no basis in law for accepting a legal construction according to which the State should be given priority – over other creditors – in the liquidation or insolvency of a credit institution. Such a situation is inconsistent with the system of law and infringes the fundamental rights guaranteed to the credit institution and other creditors by the *Satversme*.

During the court hearing the invited persons *Dr. iur.* Jānis Kārkliņš and *Mg. iur.* Pauls Zeņķis stated: There is no legal provision in Latvia that would justify the State's rights of action, which it acquired when the deposited funds declared to have been criminally acquired property, taking priority over the claims of other creditors in insolvency proceedings. It is not always valid to argue that criminally acquired property should be removed from civil legal circulation. The principle of protection of a *bona fide* person also applies in civil law.

In the case of an insolvent credit institution and an operating credit institution, there is no difference in what is confiscated. In particular, in both cases, the right of action is confiscated, but in the case of operating credit institution, the right of action is instantly converted into cash, giving the false impression that it is not a right of action but cash. In any case the State in the result of confiscation acquires the right of action and nothing more.

If, on the basis of a court ruling on the confiscation of the proceeds of crime, the State acquires the rights of action of a creditor who had obtained those proceeds through criminal means, the aim of removing the proceeds of crime from civil legal circulation is achieved, since the State removes from circulation the rights of action that belonged to that person. Consequently, the person cannot exercise the right of action to receive money and continue to legalise it in some way or use it for his own purposes.

17. The invited person – ***Mg. iur.* Gunārs Kūtris** – holds that the contested norms are incompatible with Article 105 of the *Satversme*.

By the application of the contested norms, the Applicants' right to property has been infringed. Although in reality these provisions were applied to three of the Bank's depositors, the confiscation of these funds in fact significantly reduced the Bank's property and deprived the Bank's creditors of the possibility of recovering their deposits from the Bank. From a civil law point of view, the depositor's funds become the property of the credit institution when they are credited to the credit institution's account, and the depositor has the claim rights against the credit institution. If the credit institution's property are reduced by a decision, the credit institution's rights and the rights of its creditors whose claims are subject to a sequence established by the Credit Institutions Law are substantially prejudiced.

In determining the time when the infringement occurred, it must be observed that the credit institution and its creditors are not involved at all in the proceedings concerning the proceeds of crime. At best, the credit institution is made aware that such a process is taking place. Thus, a credit institution becomes aware of the application of the contested norms when it receives a court decision from a sworn bailiff or the State Revenue Service for execution. Whereas the creditor finds out about it later.

The law does not provide a procedure for a credit institution or creditors to defend their rights to property, as the proceedings are for property of another person, possibly criminally acquired.

One may partially agree with the *Saeima's* pointing out that the alleged infringement is caused not by the contested norms, but by some other legal norms, since the legal norms which determine what and how may be recognised as criminally acquired property must be distinguished from the legal norms which regulate how a confiscation decision is executed. However, this would mean that the Applicants would have to challenge the "loophole". Also, there is no known any law that establishes the priority of confiscation of criminally acquired property over other creditors in insolvency proceedings.

A criminal must be deprived of the proceeds of crime, because the incentive to commit crime must be removed. Although the interpretation "criminally acquired property cannot be left in civil legal circulation" was used during the adoption of the contested norms, Directive 2014/42/EU does not contain such a requirement, since the action required therein is confiscation, meaning "final deprivation of property". Confiscation is the deprivation from the criminal.

Although the contested norms, in so far as they relate to property belonging to a person who has committed a criminal offence or to persons related to him who are not *bona fide*, are appropriate for the achievement of a legitimate aim, a different situation arises in cases where criminally acquired property has become the property of another or a third person. Directive 2014/42/EU states that confiscation "shall be without prejudice to the rights of *bona fide* third parties". The protection of the rights of a third party acting in good faith has always been emphasised, for example in the Warsaw Convention. The case-law of the Court of Justice of the European Union has also held that a restriction on the property rights of a third party acting in good faith is incompatible with European Union law. The European Court of Human Rights has taken a similar approach. In order for confiscation to comply with the principle of proportionality, a number of factors must be taken into account, including the degree of culpability and due diligence of the person whose property rights are affected and the link between the person concerned and the alleged offence.

Thus, the Latvian legislator has not taken into account the requirements laid down in international documents and the need to protect the rights of third parties recognised in the case-law of international courts. Thus, the contested norms, in so

far as they also apply to the alienation of property belonging to a third party acting in good faith, are not suitable for achieving the legitimate aim.

Moreover, the contested norms are not harmonised with the legal norms regulating credit institutions and their insolvency. It could be concluded that there is no conflict of laws, since the confiscation of property in the insolvency proceedings of a credit institution has not been established as a priority payment. However, case law does not support this assertion.

At the court hearing *Mg. iur.* Gunārs Kūtris further emplasized that the clarity of the contested norms is only of primary importance, as a problem had arisen in their application when the applicants of the contested norms do not understand the purpose of these norms. Namely, the aim is to take away the criminally acquired property from the guilty person who has committed a criminal offence. Consequently, the fight against the criminally acquired property does not have to be directed against property belonging to another person. In the present case, a situation has arisen where a person who is in no way connected with the criminal offence has his legally acquired property confiscated, and this is in no way the purpose of the contested norms.

18. The invited person – ***Mg. iur.* Māris Vainovskis -** explained at the court hearing that the confiscation of criminally acquired property does not cause any infringement of the fundamental rights of the Bank and the Bank's creditor as contained in the *Satversme*.

The very nature of a deposit implies that it remains with the credit institution until the depositor reclaims it from the credit institution. When a depositor withdraws funds from a credit institution, both the asset and the liability of the credit institution are lost. Therefore, this situation to be neutral for the credit institution. If the deposit is declared to have been criminally acquired property, the consequences are similar. When the credit institution returns or pays these funds to the State, both the asset and the financial liability of the credit institution are lost. Therefore, the situation is still neutral.

Any capital instrument held in the Tier 1 or Tier 2 capital of a credit institution must comply with the requirements of the Law on the Prevention of Money Laundering. It is the responsibility of the credit institution to ensure that the capital instrument meets these requirements. If a credit institution loses part of its capital, it is obliged to replace it and ensure capital adequacy. It is a business risk for a credit institution to check and be sure of what constitutes its capital. This

is a matter of banking supervision and of the quality of the credit institution's own performance in meeting its regulatory requirements, a very large part of which are precisely those relating to the internal control system and ensuring that it operates adequately to keep its capital clean. However, the above risk does not constitute an infringement of fundamental rights that should be examined by the Constitutional Court. There is no protected interest in enriching oneself on a directly or indirectly criminal basis.

Funds of illegitimate origin have no place in the capital of a credit institution and are excluded from it. Consequently, these funds cannot also be distributed to creditors in insolvency proceedings, as insolvency proceedings do not make funds that have been declared to be criminally acquired property to be legally acquired funds. There is a competition between the principle of equality of creditors and the principle of legality. However, the principle of legality requires that the criminally acquired property should not be subject to civil legal circulation. Accordingly, the funds declared to have been criminally acquire must, where the court so orders, be disposed of in full. This is both a business risk for the credit institution and a risk for other depositors.

19. The invited person – ***Mg. iur.* Paulis Iļjenkovs -** pointed out at the court hearing that criminally acquired funds cannot remain in civil legal circulation and their confiscation does not infringe the fundamental rights of the Bank and the Bank's creditor as mentioned in the *Satversme*.

For a criminal to benefit from the proceeds of crime, they need to be placed in the legal financial circulation, and very often through banks and financial institutions. Credit institutions are therefore in a position to prevent the flow of proceeds of crime into the civil legal circulation, thus already preventing money laundering. They are subject to obligations under the Law on the Prevention of Money Laundering such as a number of obligations regarding the checking of their clients. Customer due diligence is a regular process. The higher the risk, the more frequent the customer due diligence should be done. If the credit institution has suspicions, it reports it to the Financial Intelligence Unit, which, if it finds that the suspicion is justified, passes the information on to the investigating authority.

There is no dispute that the funds deposited belong to the credit institution from the moment of deposit. However, in any event, both the criminally acquired property that has come into the possession of the credit institution as a result of the deposit and the right of action are subject to confiscation. This is because the funds

were already criminally acquired when they were deposited with the credit institution. Consequently, the right of action against the credit institution was also criminally acquired. When the court confiscates the criminally acquired property, both the depositor's right of action and the credit institution's property rights are extinguished. The credit institution has nothing to lose in this case. In addition, the credit institution is fulfilling its obligations in the field of prevention of money laundering.

The confiscation of the depositor's right of claim and of the financial resources held by the credit institution to the value of that claim restores balance. There is no reason to believe that the situation would be different in the case of an insolvent credit institution. In other words, no other design would ensure that no proceeds of crime remain in civil circulation.

The contested norms do not infringe the fundamental rights of the insolvent credit institution, since Article 105 of the *Satversme* protects only lawfully acquired property. For that reason, the confiscation also has no consequences for other creditors of the insolvent credit institution who are waiting in the queue, since, firstly, they do not and cannot have any right to the criminally acquired property of others and, secondly, because the creditor's claim in the insolvency process will be satisfied in a smaller amount, having no connection with the confiscation of the criminally acquired property. They are two completely different processes with no conflict between them. The claims of creditors of an insolvent credit institution will not be satisfied in full solely because the credit institution has become insolvent.

Moreover, neither the Latvian legal framework, nor international legal norms provide for such a possibility that criminally obtained funds remain in civil legal circulation. If such funds were paid out in an insolvency proceeding, their payment would be qualified as money laundering. That is to say, if criminally acquired funds are not removed from the bankruptcy estate of a credit institution, they remain there, and if they are disbursed to cover the claims of other creditors, it can be predicted with a reasonable degree of certainty that some of those criminally acquired funds will go to other creditors.

Moreover, the State is not a creditor when confiscating proceeds of crime. The confiscation obligation does not arise, for example, from the obligations of a credit institution to pay taxes or duties to the State or to pay for other services provided by the State. Such an obligation is the result of an entirely different process.

20. The invited person – ***LL. M.*** **Ēriks Kristiāns Selga** – pointed out at the court hearing that confiscation of criminally acquired property takes precedence over insolvency proceedings.

Confiscation of criminally acquired property is required by Latvia's international obligations. It has three main public interest justifications. First of all, the confiscation has a punitive function – it deprives the offender of the benefit or advantage of the unlawful act. Secondly, it is preventive, aimed at preventing the commission of further criminal offences. Thirdly, the confiscation is said to be corrective. One of the main purposes of confiscation is to prevent the consequences of a criminal act.

The relationship between credit institutions and depositors is unique. One aspect is that the withdrawal of the deposit is expected to be instantaneous, effectively merging the depositor's right of claim with the money. This confiscates the proceeds of crime, which include both the right of claim and financial resources. However, this is a minor issue in international practice on the prevention and broader confiscation of proceeds of crime. The Anglo-Saxon courts have held since the 1990s that debiting and crediting processes can be regarded as an exchange of funds without any distinction between the depositors' rights of claim and the credit institution's rights of ownership. Thus, if the funds are the proceeds of crime, they should be confiscated until neither the funds, nor the right of claim to them exists in civil legal circulation.

In assessing the impact of confiscation on insolvency proceedings, *LL. M.* Ēriks Kristiāns Selga at the court hearing pointed out that confiscation should be given higher priority than insolvency proceedings. Firstly, the confiscation process is separated from the insolvency process. The purpose of confiscation is to take preventive, corrective and punitive measures, while the purpose of insolvency proceedings is to satisfy creditors fairly. Insolvency cannot in itself be considered as a reason not to proceed with confiscation proceedings or to subordinate State claims to them. Secondly, the higher priority is also doctrinally justified. In the United States of America, it is a well-established principle that the State automatically acquires ownership of the proceeds of crime at the time of the commission of the offence. Thus, third parties cannot become the owner, as only the State has ownership rights. Where a credit institution has access to criminally acquired funds, international practice supports that such confiscation should take

place regardless of other proceedings involving those funds, including the credit institution's insolvency.

Internationally, confiscation in its legal sense follows the doctrine of contamination, i.e., if fungible proceeds of crime are placed as illusory money in an individual account that already contains legally acquired funds, then the entirety of the money is considered to be proceeds of crime. This doctrine, particularly in the case of credit institutions, is almost absolute, which is a consequence of the fungibility of credit institutions' funds.

21. The invited person – ***LL. M.* Jūlija Jerņeva** – points out that the priority of the contested norms over the norms of the Credit Institutions Law is disproportionate.

Directive 2014/42/EU precisely defines the criminal offences to which it applies, and these are exhaustively set out in Article 3 of the Directive.

Contrary to what the Applicants claim, the Framework Decision does not contain a mechanism for the protection of third parties acting in good faith. However, according to the Advocate General of the Court of Justice of the European Union, Campos Sanchez-Bordana, the Framework Decision can be interpreted as authorising the confiscation of property belonging to third parties other than property belonging to *bona fide* third parties. In this respect, the Court of Justice of the European Union has also held that the rights of third parties acting in good faith must be taken into account.

Directive 2014/42/EU prohibits the confiscation of proceeds of crime which would affect the rights of *bona fide* third parties, as the objective of protecting *bona fide* third parties is clearly and unambiguously underlined in the Directive.

In the light of the judgement of the Court of Justice of the European Union in Case C-393/19, as well as the content of the applicable legislation, it follows that European Union law, including Directive 2014/42/EU and the Framework Decision, does not impose an absolute obligation to ensure that criminal property is not left in civil legal circulation at all times.

However, Directive 2014/42/EU does not clarify exactly which *bona fide* third parties are protected and exactly which rights of *bona fide* third parties are protected by the provisions of the Directive, nor does the afore-mentioned case-law of the Court of Justice of the European Union answer these questions. In the present case, it is not a question of whether Directive 2014/42/EU protects the rights of a third party acting in good faith at all, but whether Directive 2014/42/EU

must be interpreted as protecting the right of insolvent credit institutions and their creditors to seek enforcement of confiscation orders which do not result in funds being paid to the State by circumventing the procedure for the recovery of creditors' claims. If the answer to this question is in the affirmative, there would be no doubt that effective remedies should also be available to entities such as the Applicants.

Although the ownership of the funds has passed to the Bank, even assuming that the Bank is *bona fide*, it cannot be automatically concluded that the Bank is a *bona fide* third party and therefore protected. In particular, an interpretation that always staunchly protects the *bona fide* beneficiary can lead to systemic problems, which is why there should be exceptions. It is doubtful whether, as a result of the confiscation, the credit institution would be regarded as a *bona fide* third party whose confiscation (in the form of the exercise of a right of recourse) would be regarded as impermissible. Moreover, the confiscation, in so far as it consists in the exercise of a right of action, is also questioned by the Applicants. A contrary interpretation could also allow credit institutions to enrich themselves unfairly, regardless of the circumstances.

For the purpose of clarifying the meaning of*bona fide* third party, the provisions of Regulation 2018/1805 of the European Parliament and of the Council of 14 November 2018 on mutual recognition of freezing orders and confiscation orders (hereinafter – the Confiscation Regulation), which introduces a similar but not identical concept of "affected person" should be applied. The Confiscation Regulation provides for a number of characteristics to identify the "affected person", but the most appropriate for the present case is that the "affected person" is the person whose right to property is "directly limited" by the confiscation order. In the context of the present case, there are grounds for finding a direct infringement of the rights of a third party acting in good faith.

If the confiscation order is considered to directly restrict the Applicants' right to property, it is necessary to examine whether the protection of the right in question is "readable" in the provisions of Directive 2014/42/EU. Article 6, Paragraph 2 of the Directive is laconic and merely states that confiscation "shall be without prejudice to the rights of *bona fide* third parties". It follows that there are no property rights of *bona fide* third parties which should be excluded from the scope of that provision. Accordingly, that provision must be interpreted as meaning that it includes the protection of the rights of an insolvent credit institution and its creditors.

Finally, no applicable law, including European Union law, provides that the administrator of an insolvent credit institution may derogate from the procedure for the satisfaction of creditors' claims set out in the Credit Institutions Law. The State's right to ignore a possibly deficient regulatory framework in order to obtain satisfaction of its claims out of turn cannot be regarded as proportionate.

In addition at the court hearing, *LL. M.* Jūlija Jerņeva pointed out that if Directive 2014/42/EU provides that the rights of third parties acting in good faith must be protected, then an exception to these rights must be justified by a legal provision. If the funds to be confiscated are paid into the state treasury, bypassing creditors, this must be justified by legal provisions.

22. The invited person – ***LL. M.* Uģis Zeltiņš** – considers that the contested norms are incompatible with the Framework Decision and Directive 2014/42/EU.

In the present case, there are no grounds for suspecting that the contested norms are too narrowly formulated and do not provide for confiscation in a situation where it is required by the Framework Decision and Directive 2014/42/EU. However, EU law requires not only that confiscation is possible, but also that a *bona fide* third party is protected against confiscation. While the Framework Decision and Directive 2014/42/EU are instruments of minimum harmonisation, i.e., Member States may introduce stricter confiscation rules, the severity of confiscation rules cannot be increased by Member States without limit. The limitation of this discretion is contained in the text of the Framework Decision and Directive 2014/42/EU. The provisions of the Framework Decision indicate that effective judicial protection must be ensured for the persons concerned, and the Framework Decision does not derogate from the obligation to respect fundamental rights. The approximation of national rules must take into account the rights of third parties acting in good faith. Directive 2014/42/EU further specifies that the rights of a *bona fide* third party are not affected.

As the Court of Justice of the European Union explained in Case C-393/19: The Framework Decision must be interpreted as precluding a Member State from confiscating the property of a third party acting in good faith. The reasoning of the Court of Justice of the European Union does not contain any considerations specific to the Framework Decision and is therefore fully applicable to the confiscation provisions of Directive 2014/42/EU. Accordingly, a Member State is under an obligation under European Union law to design its national confiscation

legislation in such a way as to avoid undue prejudice to the rights of a third party acting in good faith.

It is possible to interpret the confiscation legislation in Latvia in a way that is compatible with the protection of the third party required by European Union law. However, this does not mean that the country has fulfilled its transposition obligation. In the present case, the Latvian legal system in the area of confiscation does not meet the standard of "specificity, precision and clarity" set by the Court of Justice of the European Union. First of all, there are no provisions in which the law enforcer or the addressee of the confiscation decision can read, rather than "read in", that a confiscation which affects the rights of a *bona fid*e third party is prohibited. Moreover, the court's ruling that according to the Applicants, has infringed their fundamental rights, shows that the current legislation does not even encourage the court to consider the impact of confiscation on the rights of a *bona fide* third party.

Thus, the Latvian legislation as a whole is incompatible with the Framework Decision and Directive 2014/42/EU in so far as it does not provide for an exception in order to protect the rights of a third party acting in good faith.

Finally, it should be noted that the funds deposited with the Bank are the property of the Bank. However, the discussion on the ownership of the financial resources is of no particular relevance since Article 6(2) of Directive 2014/42/EU protects the rights of a *bona fide* third party in general, including the right of claim, and not specifically the right of ownership. Not being able to agree that confiscation would allow the proceeds of crime to enter into civil legal circulation otherwise than before the claims of other creditors have been satisfied. If proceeds of crime are withdrawn from the assets of an insolvent company as a priority over other creditors, it should be concluded that, in the period leading up to the insolvency, the failed business has been carried on at the expense of one creditor and not others.

At the court hearing, *LL. M.* Uģis Zeltiņš stressed that the position of the *Saeima* is incompatible with the obligation to consider whether the confiscation does not infringe the rights of a *bona fide* third party. A decision confiscating funds deposited with an insolvent credit institution, affecting both the credit institution itself and the rights of its *bona fide* creditors.

The Concluding Part

23. The *Saeima* is of the opinion that the proceedings in the case should be terminated on the basis of Article 29, Paragraph One, Clause 6 of the Constitutional Court Law, because the contested norms do not cause infringement of the fundamental rights of the Applicants contained in the first sentence of Article 91 as well as in Article 105 of the *Satversme*. Moreover, the Applicants have not complied with the time limit for submitting applications to the Constitutional Court established in Section $19^{.2}$ Paragraph four of the Constitutional Court Law.

If arguments have been raised in the case which could be grounds for termination of legal proceedings, they should be assessed first of all *(see, for example, Paragraph 12 of the 27 June 2016 Constitutional Court Judgement in Case No. 2015-22-01*).

Pursuant to Section $19^{.2}$ Paragraph one of the Constitutional Court Law, a constitutional complaint (application) may be submitted to the Constitutional Court by any person who considers that their fundamental rights as defined in the *Satversme* (Constitution) are infringed by legal norms that do not conform to the norms of a higher legal force. Namely, the infringement of fundamental rights is an obligatory precondition for submitting a constitutional complaint to the Constitutional Court*(see Para 7 of the Decision of the Constitutional Court of 23 November 2016 on termination of proceedings in Case No. 2016-02-01*). According to the regulation of the Constitutional Court Law, an infringement of fundamental rights of a person shall be established if: first, the person has the specific fundamental rights included in the *Satversme*; second, the contested norm directly infringes the fundamental rights included in the *Satversme(see, for example, Para 11 of the Decision of 30 December 2020 of the Constitutional Court on termination of legal proceedings in Case No. 2020-08-01*).

Consequently, the Constitutional Court will first of all assess whether in the given case the Applicants' fundamental rights have been infringed, which fall within the scope of the first sentence of Article 91 as well as Article 105 of the *Satversme*, and then it will examine whether the infringement of these fundamental rights has been caused by the contested norms. The Court will then assess whether the time limit for submitting applications to the Constitutional Court established in the Constitutional Court Law has been complied with.

24. The present case brings together two cases brought on constitutional complaints. When examining a case following a person's constitutional complaint, significant weight is to be given to the facts of the case in which the contested

norm has infringed the applicant's fundamental rights*(see Paragraph 12 of the Constitutional Court's judgement of 25 October 2011 in Case No 2011-01-01*). In order to decide on the continuation or termination of the proceedings, it was necessary to distinguish the factual circumstances relating to the Bank from the factual circumstances relating to the creditor of the Bank. At the same time, it should be noted that the arguments of the Applicants regarding their fundamental rights arising from Article 105 of the *Satversme* are similar and interrelated. Consequently, the Constitutional Court will first assess the arguments on the termination of the proceedings in respect of the Bank. The aspects of the assessment related to the scope of Article 105 of the *Satversme* will also be extended to the assessment of the infringement of the fundamental rights of the creditor of the Bank.

The legal substantiation provided in the Bank's constitutional complaint is based on the fact that the contested norms disproportionately restrict the Bank's right to property enshrined in the *Satversme*. In the context of the first sentence of Article 91(1) of the *Satversme*, the Bank points out that, in its view, the comparable groups are united by the fact that the persons belonging to them own property which has been recognised as criminally acquired property and is subject to confiscation*(see the Bank's application in the case file, vol. 1 p. 39)*. Finally, when assessing the considerations related to the termination of proceedings in respect of the Bank, the first sentence of Article 91 and Article 105 of the Satversme must be viewed in their context.

25. Article 105 of the Constitution determines the following: "Everyone has the right to own property. Property shall not be used contrary to the interests of the public. Property rights may be restricted only in accordance with law. Expropriation of property for public purposes shall be allowed only in exceptional cases on the basis of a specific law and in return for fair compensation."

25.1. The first three sentences of Article 105 of the *Satversme* provide for both the unimpeded exercise of the right to property and the right of the State to restrict the exercise of that right in the public interest. The fourth sentence of the same Article, in turn, establishes the right of the State to deprive a person of the right to property *de jure* in certain cases*(see Para 14 of the Constitutional Court's Decision of 15 October 2021 on termination of proceedings in Case No 2020-63-01*).

In the bank's application, it is stated that the contested norms did not provide for compulsory expropriation of property within the meaning of the fourth sentence of Article 105 of the *Satversme*. The creditor of the Bank, on the other hand, submits that the restriction of its right to property must be examined within the framework of the first three sentences of Article 105 of the *Satversme*. The representative of the *Saeima* pointed out at the hearing that the references to the case law of the European Court of Human Rights in the Bank's application related to a different issue. In particular, the cases cited by the Bank, in which the European Court of Human Rights has held that confiscation is to be regarded as deprivation of property within the meaning of Article 1 of Protocol No. 1 to the Convention, concern the confiscation of the instrument of commission of a criminal offence and not of property obtained by crime*(see transcript of the hearing of 31 March 2022 in Case File, vol. 9 p. 13).*

When specifying the content of fundamental rights included in the *Satversme*, Latvia's international obligations in the field of human rights should also be taken into account, as it follows from Article 89 of the *Satversme*, the aim of which is to achieve harmony of human rights norms included in the *Satversme* with norms of international law. Thus, the content of Article 105 of the *Satversme* must be ascertained in conjunction with Article 1 of Protocol No. 1 to the Convention and the case-law of the European Court of Human Rights in its application.

The Constitutional Court states: The European Court of Human Rights has held that the confiscation of criminally acquired property, although linked to the alienation of property, generally constitutes a control over the use of property within the meaning of Article 1, Part 2 of Protocol No. 1 to the Convention. In particular, such confiscation is carried out in order, *inter alia*, to prevent the person himself from profiting from the criminal property and to prevent it from harming society as a whole, and thus constitutes property control*(see the decision of the European Court of Human Rights of 5 July 2001 in "Arcuri and Others v. Italy", application No. 52024/99*).

It follows from the foregoing that in the case under review, confiscation of criminally acquired property is to be assessed as a restriction of the right to property and is to be examined within the framework of the first three sentences of Article 105 of the *Satversme*.

25.2. For the purposes of Article 105 of the *Satversme*, the "right to property" shall be understood to mean all rights of a pecuniary nature which a

person may use for his own benefit and which he may dispose of at his own will. The Constitutional Court has recognised that, among other things, personal funds are the object of property rights *(see Paragraph 15.2 of the Judgement of the Constitutional Court of 28 September 2020 in Case No. 2019-37-0103*). Similarly, the right to enforce an obligation is part of the concept of "property". The decisive factor is whether the claim is lawful*(see Paragraph 17.1 of the Judgement of the Constitutional Court of 30 March 2011 in Case No. 2010-60-01*).

Funds deposited in a credit institution account are considered non-cash. As stated in legal doctrine, money is considered to be a fungible and, moreover, consumable thing which can be transferred as an individually determined thing only in specific cases*(see*: *Rozenfelds J. Lietu tiesības. Riga: Zvaigzne ABC, 2004, pp. 28 and 198.*). This means that money deposited with a credit institution is not individualised, it is mixed with other financial assets held by the credit institution*(see*: *Torgāns K. Saistību tiesības. Riga: Court House Agency, 2014, p. 466.*).

The Senate has also assessed the legal relations arising from the deposit of funds with a credit institution, stating that the money deposited into the depositor's account based on the account service agreement is not individualized, it flows into the bank's common resources and is reflected in the bank's balance sheet, it can be used at the discretion of the bank and in this legal relationship the depositor has a right of claim against the bank (*see paragraph 9 of the judgement of the Senate Department of Civil Cases of 22 February 2019 in Case No SKC-1/201*9). In particular, the depositor, as a customer of the credit institution, has the right to request repayment of the funds under certain conditions*(see*: *Pearson G. Financial Service Law and Compliance in Australia. New York: Cambridge University Press, 2009, p. 275; Kassow J. Die Beihilfe im Sinne des Art. 87 I EG als staatliche oder aus staatlichen Mitteln gewährte Begünstigung. Göttingen: Cuvillier, 2004, S. 155*).

The European Court of Human Rights has recognised that deposits are undoubtedly property within the meaning of Article 1 of Protocol No. 1 to the Convention*(see the decision of the European Court of Human Rights of 2 July 2002 in "Gayduk and Others v. Ukraine", Application No. 45526/99, et al*.). A creditor's claim in insolvency proceedings is also to be regarded as "property" within the meaning of Article 1 of Protocol No. 1 to the Convention*(see paragraph 57 of the judgement of the European Court of Human Rights of 20 July 2004 in "Bäck v. Finland", application No. 37598/97*).

However, it does not follow from the above that such findings should automatically also apply to financial resources deposited with a credit institution but recognised as proceeds of crime. This is related to the fact that the Constitutional Court has repeatedly recognised that the unlawful acquirer of property recognised as criminally acquired in accordance with the procedure established by the Criminal Procedure Law has no property rights*(see Para 7.1 of the Decision of the Constitutional Court of 6 January 2011 on termination of proceedings in Case No 2010-31-01*). Thus, a person's right to property is protected by the first three sentences of Article 105 of the *Satversm*e insofar as that person is not the unlawful acquirer of property acquired unlawfully.

Consequently, in general, financial resources deposited with a credit institution and the right to claim them were "property" protected by the first three sentences of Article 105 of the *Satversme*.

26. When assessing whether the contested norms directly infringe the fundamental rights included in the *Satversme*, the Constitutional Court must establish the content of the contested norms. Both the contested norm of the Criminal Law and the contested norm of the Criminal Procedure Law stipulate that criminally acquired property shall be confiscated for the benefit of the State if it is not to be returned to the owner or lawful possessor.

26.1. It follows from Article $70^{.10}$ of the Criminal Law that the essence of confiscation of criminally acquired property, an object of commission of a criminal offence or property related to a criminal offence is the compulsory forfeiture of the property to the State for no consideration. The case in question concerns the confiscation of the criminally acquired property as a form of special confiscation.

A decision on the recognition of property as criminally acquired and its confiscation may be taken by the public prosecutor at the conclusion of criminal proceedings, or by the court together with the final decision in the criminal case, when considering the merits of the case, as well as in accordance with the procedure set out in Chapter 59 of the Criminal Procedure Law. From the application and the documents attached to it, it can be concluded that, in the context of the case under review, the property has been recognised as criminally acquired and confiscated by court rulings adopted in accordance with the procedure laid down in Chapter 59 of the Criminal Procedure Law, i.e., in a separate proceeding for criminally acquired property*(see Volume 1 of the case file). page 56 and 80*). The Constitutional Court has recognised that the proceedings for criminally

acquired property are characterised by the fact that the guilt of a person is not established in these proceedings, but rather the the criminal origin of the property or its connection with a criminal offence *(see paragraph 10 of the Judgement of the Constitutional Court of 23 May 2017 in Case No 2016-13-01*). This means that the proceedings for proceeds of crime provided for in Chapter 59 of the Criminal Procedure Law correspond to the doctrine-recognised designation of such special proceedings as "proceedings *in rem*" or "proceedings on the case"*(see*: *Kūtris G. Noziedzīgi iegūtā konfiskācijas iespējas un pamats. Book: Starptautisko un Eiropas Savienības tiesību piemērošana nacionālajās tiesībās. (Application of international and European Union law in national law.) Latvijas Universitātes 78. starptautiskās zinātniskās konferences rakstu krājums. (Proceedings of the 78th International Scientific Conference of the University of Latvia.) Riga: Academic Publishing House of the University of Latvia, 2020, p. 205.*). Namely, the contested norm of the Criminal Law provides for confiscation as a criminal law coercive measure, while the contested norm of the Criminal Procedure Law establishes the procedural procedure of confiscation or the sequence of actions*(see Mg. iur. Gunāra Kūtra viedokli lietas materiālu 7. Sēj. (The views of Gunārs Kūtra, in Volume 7 of the case-file) p. 120).*

The Constitutional Court concluded that, by the contested norms, the Latvian legislator had stipulated special confiscation of property aimed at alienation of criminally acquired property without compensation within the state ownership, regulating the relevant legal relations within the framework of criminal law.

26.2. The development of an effective confiscation system as a means of combating profiteering from crime has over time become a priority issue not only at national but also at international level*(see*: *Boucht. J. The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds. Oxford, Portland, Oregon: Hart, 2017, p. 2*).

The European Court of Human Rights has recognised that there are common European and international legal standards on this issue which encourage the confiscation of property related to serious criminal offences such as corruption, money laundering, drug trafficking offences*(see, for example, paragraph 76 of the judgement of the European Court of Human Rights of 26 June 2018 in "Telbis and Viziteu v. Romania", Application No. 47911/15*).

Article 3, Paragraph 1 of the Warsaw Convention obliges Council of Europe Member States to adopt such laws, regulations and other measures as may be

necessary to enable them to confiscate the instrumentalities of crime and the proceeds of crime or property the value of which corresponds to the value of the proceeds of crime and the laundered property. Similarly, Article 12, Paragraph 1, Sub-paragraph a of the Palermo Convention obliges its Contracting Parties to take the necessary measures, to the greatest extent possible under their domestic legal systems, to confiscate the proceeds of crime, that is to say, the proceeds of the offences covered by the Convention, or property the value of which corresponds to the value of those proceeds. Article 5, Paragraph 1of the Vienna Convention obliges States to take the necessary measures to confiscate the proceeds of the offences referred to in Article 3, Paragraph 1 of the Convention.

Recommendation 4 of the Financial Action Task Force, which develops and contributes to policy frameworks, including those for the protection of the global financial system against money laundering, on confiscation and provisional measures, also states that countries should consider establishing measures whereby the proceeds or instrumentalities of crime can be confiscated without criminal conviction.

International obligations in this area have also been referred to in the initial impact assessment reports of the draft law "Amendments to the Criminal Law" and the draft law "Amendments to the Criminal Procedure Law", which adopted the contested provision of the Criminal Law and the contested provision of the Criminal Procedure Law, citing, for example, the Palermo Convention, the Warsaw Convention and the Vienna Convention as justifications for the need for the new regulation*(see,e.g. the draftlaw No 629/Lp12 "Amendments to the Criminal Law", the initial impact assessment report (annotation) and the draft law No 630/Lp12 "Amendments to the Criminal Procedure Law", the initial impact assessment report (annotation)*). The international obligations were also repeatedly referred to in the committee meetings where the two draft laws were discussed*(see, for example, the minutes of the meeting of the Legal Affairs Committee of 14 September 2016, File, vol. 3 p. 5).*

Latvia's international obligations obliged it to establish a legal framework ensuring that criminally acquired property to be confiscated.

26.3. Confiscation of criminally acquired property is carried out to protect important public interests. Moreover, it is generally aimed at ensuring the rule of law (*see: Golobinek R. Financial Investigations and Confiscation of Proceeds from Crime. Training Manual for Law Enforcement and Judiciary. CARDS Regional programme 2002/2003. Available at: https://rm.coe.int*). At the court

hearing, Ilze Znotiņa, Head of the Financial Intelligence Unit, pointed out that if a person could benefit from the proceeds of crime without hindrance, this would be contrary to the understanding of a state governed by the rule of law*(see transcript of the court hearing of 13 April 2022, in volume 10 of the case files p. 149).*

Confiscation of criminally acquired propety means that a person is deprived of the proceeds or benefit of an unlawful act. The European Court of Human Rights has recognised that the purpose of confiscation is to prevent people from being unjustly enriched as a result of criminal offences. Even if a person has managed to avoid being found guilty in criminal proceedings, criminal acts cannot result in financial benefits for the person or his or her family*(see paragraphs 102 and 103 of the judgement of the European Court of Human Rights of 12 May 2015 in "Gogitidze and Others v. Georgia", application No. 36862/05*). Confiscation of criminal assets also has a preventive role, as it deters persons from engaging in criminal offences (*see paragraph 186 of the judgement of the European Court of Human Rights of 13 July 2021 in "Todorov and Others v. Bulgaria", application No. 50705/11 et seq.*). Similarly, confiscation of criminal property is remedial in nature, as it serves to eliminate the consequences of the criminal act and restore the situation to what it was before the criminal act was committed.

In order to fulfil these tasks, criminally acquired property must be removed from civil legal circulation, which is the purpose of confiscation of criminally acquired property *(see Paragraph 12.1*of *the decision of the Senate, Department of Civil Cases, of 17 September 2020 in case SPC-27/2020*). The European Court of Human Rights has also recognised that confiscation aims to prevent the further circulation of criminal proceeds in the economy and is in line with international standards in this area. Moreover, States have a wide margin of discretion in this regard to decide on the most appropriate action in the framework of property control, including with regard to the confiscation of criminal property*(see, for example, paragraph 93 of the judgement of the European Court of Human Rights of 8 October 2019 in "Balsamo v. San Marino", Applications No. 20319/17 and No 21414/17*). Thus, the contested norms are, in their essence, aimed at removing criminally acquired property from civil legal circulation by alienating it for the benefit of the state and thus changing the ownership of such property.

Consequently, the contested norms fall within the scope of the fundamental rights contained in the first three sentences of Article 105 of the *Satvers*me.

27. The Bank considers that the contested norms, by providing for the confiscation of criminally acquired property, infringe its right to property enshrined in the *Satversme*, since on the basis of the contested norms the Bank's property is confiscated. Moreover , the contested norms establish equal treatment of *bona fid*e owners of property and other owners of property, thus violating the principle of legal equality. The *Saei*ma, in its turn, points out that the contested norms do not infringe the fundamental rights of the Bank, since the contested norms create unfavourable consequences for depositors, whose funds deposited in the accounts opened by the Bank are confiscated.

The Constitutional Court has repeatedly indicated that the infringement of a person's fundamental rights must be direct, concrete and the contested norms must affect the applicant himself*(see Paragraph 10 of the Constitutional Court's judgement of 22 June 2010 in Case No 2009-111-01*). Infringement of a person's fundamental rights within the meaning of the Constitutional Court Law is to be understood in the sense that the contested norm creates unfavourable consequences directly for the applicant*(see Paragraph 3 of the Decision of the Constitutional Court of 11 November 2002 on termination of proceedings in Case No. 2002-07-01*).

Article 1, Paragraph 2, Point 1 of the Credit Institutions Law provides that the term "credit institution" used in the Credit Institutions Law shall be understood within the meaning of Article 4(1)(1) of Regulation No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment brokerage firms and amending Regulation (EU) No 648/2012. A credit institution is an undertaking that accepts deposits and other repayable funds from customers and grants loans on its own behalf. The credit institution's activities are thus based on raising funds by providing various types of services to its customers.

The present case concerns a specific type of financial service provided by the Bank, namely deposit-taking. It follows from the legal nature of the deposits that upon disbursement of deposit to a depositor, the credit institution's liability towards the customer ceases and, therefore, the impact on the credit institution is neutral. A similar result arises in the case of confiscation of the criminally acquired property. In the present case, the effects of the confiscation on the Bank arealso neutral. This can be explained by the fact that the Bank was obliged to transfer the funds declared to have been criminally acquired to the state budget, however, at the same time, within the framework of the insolvency proceedings, it was no

longer obliged to disburse the funds to the person who had deposited them with the Bank. Consequently, the confiscation of financial resources that would otherwise be due to a depositor or other creditor of the Bank within the framework of the insolvency proceedings do not cause any adverse consequences specifically for the Bank.

The representative of the Financial and Capital Market Commission emphasised at the court hearing that the deposited funds are recognised as an asset of the credit institution, which in turn is recognised as an obligation towards the client in the amount of the deposit*(see the transcript of the hearing of 6 April 2022 in volume 9 of the case files). p. 73).* The invited person *Dr. iur.* Lauris Rasnačs emphasised that the positions of assets and liabilities are inextricably linked. Requiring a credit institution to make a withdrawal reduces both assets and liabilities*(see transcript of the hearing on 7 April 2022, Volume 9 of the Court file). p. 155).* The invited person *Mg. iur.* Māris Vainovskis pointed out at the court hearing that if a depositor withdraws the deposited funds from a credit institution, it creates a neutral situation for the credit institution, because both the asset side and the liabilities of the credit institution are lost. The same neutral situation would also arise if, as a result of the confiscation of criminally acquired property, the State becomes the beneficiary of the funds deposited*(see transcript of the hearing of 7 April 2022, Case Files, vol. 10, p. p. 10).* The representative of the Financial Industry Association, also as the invited person, stated at the court hearing that the deposit should be considered as a debt owed by the credit institution to the depositor. If the customer is no longer entitled to recover anything from the credit institution and the credit institution is not obliged to repay anything, there is no infringement of the credit institution's fundamental rights. In other words, the credit institution would not suffer negative consequences. The representative of the Financial Industry Association additionally pointed out that even in the event of the insolvency of a credit institution, there is no reason to speak of any infringement of its right to property*(see the transcript of the hearing of 6 April 2022 in Volume 9 of the case file Pages 104, 106, 107 and 115*).

In support of the infringement of its fundamental rights, the Bank argued at the court hearing that it needed funds to satisfy its creditors to the fullest extent possible (*see transcript of the hearing of 31 March 2022, volume 8 Page 123*). However, the possibility of satisfying the claims of the Bank's other creditors is not linked to the infringement of the fundamental rights of the Bank included in the first three sentences of Article 105 of the *Satversme*.

Taking into account all of the above, it can be concluded that the confiscation of criminally acquired property does not directly infringe the Bank's right to own property contained in the first three sentences of Article 105 of the *Satversme*, nor does it infringe the Bank's right contained in the first sentence of Article 91 of the *Satversme*.

Consequently, based on Section 29, Paragraph One, Clause 6 of the Constitutional Court Law, the proceedings in respect of the Bank's claim on compliance of the contested norms with the first sentence of Article 91 and Article 105 of the *Satversme* should be dismissed.

28. As regards the creditor of the Bank, the Constitutional Court must ascertain whether the contested norms infringe the fundamental rights included in the first sentence of Article 91 and the first three sentences of Article 105 of the *Satversme*.

If compliance of a legal norm with several norms of the Constitution is contested, then the Constitutional Court, taking into account the essence of the case under examination, must determine the most effective approach to assessing that compliance *(see Judgement of the Constitutional Court of 8 April 2021 in Case No 2020-34-03, Paragraph 9*). The same applies when it is necessary to determine the most effective approach to assessing the arguments for terminating proceedings.

Since the main issue in the case under review in relation to the Bank's creditor is the impact of confiscation of criminally acquired property on the Bank's creditor's ability to obtain satisfaction of its claim in the insolvency proceedings, the Constitutional Court will first examine the issues related to the infringement of the Bank's creditor's right to property contained in the first three sentences of Article 105 of the *Satversme*, and then the issues related to the possible infringement of the principle of legal equality contained in the first sentence of Article 91 of the *Satversme*.

29. The Bank's creditor and several of the parties to the proceedings pointed out that the confiscation of the Bank's property essentially reduced or even completely deprived the Bank's creditor of the right to recover its own deposits from the Bank in the context of its insolvency proceedings. The *Saeima*, in its turn, points out that the contested norms cannot cause infringement of the fundamental rights of the Bank's creditor, since the property confiscated on the basis of the

contested norms is neither the property of the Bank nor the property of the Bank's creditor.

As is clear from the facts of the case, the creditor of the Bank had deposited funds with the Bank. As the activities of credit institutions in general involve many risks of a financial and non-financial nature, these risks also affect depositors and their relationship with the credit institution. As pointed out by several invited persons, such as *Dr. oec*. Marina Kudinska and *Mg. iur.* Māris Vainovskis, depositors must also take these risks into account*(see the transcript of the hearing of 7 April 2022, File volume 10 page 3 and 13*). The European Court of Human Rights has also recognised that legal relations with a credit institution are by their very nature fraught with risk and that a person must therefore take into account the fact that, *inter alia*, he may be prevented from recovering his funds deposited with the credit institution as a result of the credit institution's actions*(see Paragraph 33 of the decision of the European Court of Human Rights of 14 September 2010 in "Ilić v. Serbia", Application No. 21811/09*).

In the present case, the Bank's licence was revoked by decision of the European Central Bank of 3 March 2016. From the information available in the Court Information System, it follows that the Bank's licence was revoked, *inter alia*, because the Bank's business model was not viable, it operated with increasing losses for a long period of time, it was unable to develop an operational strategy that corresponded to its real situation, and it did not ensure the existence of an internal control system that would meet the requirements of the Anti-Legalisation Law*(see the judgement of the Riga City Vidzeme District Court of 14 March 2016 in case No. C30489916*). Following the cancellation of the Bank's licence, the Bank was declared to be wound up on 14 March 2016 and insolvent on 10 March 2017 and, as part of these insolvency proceedings a creditor of the Bank submitted its creditor's claim.

In order to ensure protection of the rights of creditors and debtors, smooth progress of the insolvency proceedings, as well as public confidence in the effectiveness of the regulation of insolvency proceedings, the legislator had established the regulation of insolvency proceedings which was aimed at ensuring that the claims of creditors were satisfied as far as possible during the insolvency proceedings. Namely, a creditor of an insolvent credit institutionhave, *inter alia*, the right to submit a creditor's claim within a specified period of time, which, as already concluded above, is protected by the first three sentences of Article 105 of

the *Satversme*, and to exercise other rights of a creditor arising from regulatory enactments.

However, the rights of a creditor in insolvency proceedings could not be examined in isolation from the factual circumstances in the case in question, which are related to the recognition of financial resources deposited in a credit institution as criminally acquired property, its confiscation and transfer to the state budget. Creditor's right arising from the legislative instruments to recover the deposited financial resources within the insolvency proceedings according to the rounds of satisfaction of creditors' claims does not entitle it to claim for the property which has been recognised as criminally acquired and participate in the distribution of such a property. This is due to the fact that, as it has already been established above, criminally acquired property is subject to confiscation and removal from civil circulation, *inter alia*, in accordance with Latvia's international obligations.

Thus, the contested norms, which provide for the confiscation of the criminally acquired property, do not cause direct negative consequences for the creditor of an insolvent credit institution, since the property, to the confiscation of which the creditor attributes the infringement of their fundamental rights, is criminally acquired and, therefore, must be removed from civil legal circulation.

Consequently, based on Section 29, Paragraph One, Clause 6 of the Constitutional Court Law, the proceedings in respect of the claim of the Bank's creditor on compliance of the contested norms with the first three sentences of Article 105 of the *Satversme* should be dismissed.

30. The Bank's creditor points out that the contested norms also infringe its fundamental rights included in the first sentence of Article 91 of the *Satversme*. The *Saeima*, in its turn, points out that the proceedings in respect of the claim on compliance of the contested norms with the first sentence of Article 91 of the *Satversme* should be dismissed because, firstly, the groups of persons identified by the Bank's creditor are not comparable to each other and, secondly, they are not in substantially different circumstances. However, whether and which groups of persons are comparable and whether they are in the same or different circumstances is a question for the merits of the case.

Consequently, in order to decide on whether there are grounds to continue the proceedings and to assess compliance of the contested norms with the first sentence of Article 91 of the *Satversme*, the Constitutional Court must also

ascertain whether the Bank's creditor has complied with the time limit for submitting a constitutional complaint to the Constitutional Court.

Section 19^{-2} Paragraph 4 of the Constitutional Court Law provides that a constitutional complaint (application) may be submitted to the Constitutional Court within six months after coming into effect of the decision of the last authority. If it is not possible to defend the fundamental rights stipulated in the Constitution using general remedies for protection of rights, a constitutional complaint (application) may be submitted to the Constitutional Court within six months from the time when the fundamental rights were infringed.

The *Saeima* points out that the Bank's creditor has not complied with this time limit. The time limit for submitting an application to the Constitutional Court was to be counted from the date when the court decisions in criminal proceedings came into force, by which the court finally decided on the issue of recognising the funds deposited in the accounts opened with the Bank as criminally acquired, by determining their confiscation for the benefit of the State. This opinion of the *Saeima* is also shared by other persons invited in the case*(see the opinions of the Ministry of Justice and the Ombudsman in volume 7 of the case materials). page 88 and 138*).

On the contrary, the Bank's creditor indicates that it has complied with the time limit for submitting an application to the Constitutional Court, since the issue of what constitutes confiscated property and − accordingly − how the confiscation of property should be carried out, has been assessed in the afore-mentioned civil case. In particular, it was established in the civil case that the Bank's financial resources are confiscated for the benefit of the State and not the depositors' rights of action, thus allowing the State to confiscate financial assets by “bypassing” other creditors of the credit institution in the insolvency proceedings.

30.1. By the decision of the Riga City Vidzeme District Court of 18 July 2018 and the decision of 5 February 2019, in separate proceedings , the funds held in the accounts of the three depositors at the Bank were recognisedas criminally acquired , and confiscation of these criminally acquired property for the benefit of the State was ordered. On 6 August 2018 a sworn bailiff, and on 27 May 2019, the Director of the Tax Debt Recovery Department of the State Revenue Service, approached the Bank's insolvency administrator with a request to transfer the criminally acquired property to the State Treasury. On 2 September 2019, the insolvency administrator of the Bank adopted decisions replacing the Bank's

creditors whose accounts with the Bank contained financial resources that had been recognised as criminally acquired property in the Bank's accounting records with the State of Latvia.

In the Senate's decision of 17 September 2020 in case SPC-27/2020, which was initiated following a complaint by the State Revenue Service against the actions of the insolvency administrator of the Bank, the decision of the Riga City Vidzeme District Court of 12 November 2019 was assessed. The Senate annulled this decision, stating that the court of first instance had wrongly recognised the State as a creditor of the Bank in place of the Bank's former creditors, as a result of which the State's claim should be satisfied in accordance with the procedure for satisfaction of creditors' claims set out in Articles 192-195 of the Credit Institutions Law (hereinafter in the version in force until 14 November 2018). The Senate held that this failed to take into account the purpose, meaning and essence of confiscation of the criminally acquired property. The Riga City Vidzeme District Court, reviewing the case afresh, by its decision of 9 October 2020, declared the insolvency administrator's actions to be unlawful and annulled its orders replacing the Bank's depositors with the State of Latvia.

Taking into account the above, the Constitutional Court finds that the financial resources were recognised as criminally acquired by the decision of the Riga City Vidzeme District Court of 18 July 2018 in criminal proceedings, which entered into force on 31 July 2018, and the decision of the Riga City Vidzeme District Court of 5 February 2019 in criminal proceedings, which entered into force on 16 April 2019. These decisions also definitively decided on the confiscation and transfer to the state budget of the funds deposited in the Bank's accounts.

If the Bank's creditor's point that the question of what constitutes confiscated property – depositors' rights of action or funds – was finally decided in Civil Case No. C30768819 is correct, it would mean that it would have been possible to find in the civil proceedings that property other than the property declared criminally obtained by the decisions in the criminal proceedings should be confiscated. It would also mean that it would have been possible to decide in civil proceedings on the amount of the property to be confiscated, contrary to the way it is decided in criminal proceedings for the criminally acquired property. This would not be permissible, as issues relating to the specific confiscation of property are to be decided in the context of criminal proceedings.

30.2. By establishing in the second sentence of Section 19.[2] Paragraph 4 of the Constitutional Court Law a time limit of six months from the moment when

the infringement of fundamental rights occurred, the legislator has provided that if the contested norm causes infringement of fundamental rights to a person, he or she shall immediately apply to the Constitutional Court. At the same time, it may be concluded that the moment when a person experienced such an infringement may be considered as the moment of occurrence of the infringement of fundamental rights and the reference point for calculation of the time limit for submitting an application*(see Paragraphs 12.1 and 12.3 of the Judgement of the Constitutional Court of 27 June 2013 in Case No 2012-22-0103*). There may also be situations when the contested norm already infringes the fundamental rights included in the *Satversme*, but the person is not yet aware of this infringement for some objective – verifiable and explainable – reasons. In such cases, the infringement of a person's fundamental rights is deemed to occur when the person has actual knowledge of it. From that moment on, a person is expected to take active steps to protect his or her fundamental rights, which includes submitting an application to the Constitutional Court, in compliance with the six month time limit provided for in the Constitutional Court Law.

The creditor of the Bank could not have become aware of the decisions taken in the criminal proceedings in which confiscation of criminally acquired property for the benefit of the State was ordered earlier than 6 November 2020, when it received the report of the insolvency administrator of the Bank dated 6 November 2020 entitled "Overview of the insolvency proceedings"*(see Volume 2 of the case file). pages 47-54*). Namely, the Bank's creditor was not a party to the above criminal proceedings and did not participate in the court hearings. Also, there were no other circumstances that would have given the Bank's creditor the opportunity to have known about these decisions earlier. For example, the Bank's creditor, unlike the Bank, was not informed about the attachment of the property and did not receive instructions from the bailiff or the State Revenue Service on the enforcement of the court decisions.

Therefore, the Constitutional Court recognises that the time limit for submitting an application should be counted from the moment when the creditor of the Bank became aware of the above-mentioned decisions, i.e., from 6 November 2020. Since the application of the creditor of the Bank to the Constitutional Court was received on 8 April 2021, the six month time limit for submitting the application has been complied with.

Thus, the Bank's creditor has complied with the time limit for submitting the application, the proceedings in respect of the claim of the

Bank's creditor regarding compliance of the contested norms with the first sentence of Article 91 of the *Satversme* should be continued.

31. First sentence of Article 91 of the *Satversme* states: "All human beings in Latvia shall be equal before the law and the courts."

In order to assess whether the contested norms comply with the principle of legal equality, it is necessary to establish:

1) whether and which persons (groups of persons) are comparable and whether they are in the same or different circumstances;

2) whether the contested norms provide for equal treatment of persons in different circumstances or for different treatment of persons in the same circumstances;

3) whether such treatment is established by a rule of law adopted in accordance with the procedure laid down in laws and regulations;

4) whether such treatment has an objective and reasonable basis, i.e., whether it has a legitimate aim and whether the principle of proportionality has been complied with*(see Paragraph 8 of the Constitutional Court's judgement of 2 November 2020 in Case No. 2020-14-01*).

The Creditor of the Bank considers that the principle of legal equality has been infringed in two aspects. Namely, the contested norms provide for unjustified different treatment of persons who are in the same circumstances and who have their right of action against an insolvent credit institution. Also, the contested norms provide for unjustified equal treatment of creditors of a credit institution who are in significantly different circumstances.

32. First of all, the Constitutional Court will evaluate whether the contested norms provide for unjustified differential treatment of persons who have their right of action against a credit institution directly in insolvency proceedings.

The Creditor of the Bank points out that according to certain criteria the State, for the benefit of which the criminally acquired property is confiscated, and such creditors of the credit institution as the Creditor of the Bank, who have right of action against a credit institution that is a subject of insolvency proceedings, are in comparable circumstances. The State is essentially the same creditor as other creditors of the credit institution and is not affected by the legal basis of the State's claim as a creditor against the credit institution*(see Case File Vol. 2. pages 34-35*). The Saeima, as well as several invited persons, disagree with this view of the

Creditor of the Bank, pointing out that a claim for confiscation of criminally acquired property for the benefit of the State and transfer of the acquired financial resources to the State budget is a special claim which is not comparable to other claims that persons have against a credit institution, for example, claims based on contract or arising from tort. Thus, the State, contrary to the Creditor of the Bank, is not in equal and comparable circumstances with other creditors of the credit institution*(see the Saeima's reply document, vol. 2 116. p., the opinion of the invited person, the Ombudsman, in the case-file, vol. 7. page 136 and the opinion of the invited person Mg. iur. Paulis Iljenkovs on the transcript of the court hearing of 13 April 2022, Case File volume 10 p. 84).*

The Constitutional Court has recognised that in order to determine whether and which groups of persons are in comparable circumstances according to certain criteria, it is necessary to find the main unifying feature of the group*(see, for example, paragraph 11 of the Constitutional Court's judgement of 10 July 2020 in Case No. 2019-36-01*). No two situations are ever exactly the same. Therefore, the situation to be compared should be one that has one or more common elements with the situation to be tested. The common element must unite both situations under one super-concept*(see paragraph 7 of the Constitutional Court's judgement of 4 January 2007 in Case No. 2006-13-0103*). Moreover, the Constitutional Court must also assess whether there are any significant considerations indicating that such groups of persons are not in mutually comparable circumstances*(see Paragraph 17.2 of the Judgement of the Constitutional Court of 9 April 2013 in Case No 2012-14-03*).

In order to determine whether creditors of the State and creditors of a credit institution, such as a Bank's creditor who have a claim against a credit institution in insolvency are comparable in terms of the principle of legal equality, it is necessary to establish under what circumstances and for what purpose both groups of persons have a claim against the credit institution.

32.1. A creditor is a State, municipality, natural or legal person or a group of natural or legal persons related by contract, which has a claim against a credit institution*(see Article 1(1)(32) of the Credit Institutions Law*).

The right of claim against a credit institution can vary, including according to the legal basis on which they arise. According to Article 1(4) of the Credit Institutions Law a credit institution provides various types of financial services, such as services for raising deposits and other repayable funds, lending services and other services. Thus, a claim may arise from various legal transactions related

to the financial services provided by a credit institution. However, a right of action may also have other legal bases. For example, the credit institution employs staff, so they may also have a claim against the credit institution*(see, for example, Section 139.*[2] (3) of the Credit Institutions Law). The State or a local authority may also have a claim against a credit institution, e.g. claims for taxes and other payments to the State or local authority budget, state claims for repayment of state-guaranteed loans*(see, for example, Article 139.*[2] (4) of the Credit Institutions Law).

Since it is clear from the outset of the insolvency proceedings that the assets of the credit institution will not be sufficient to cover all creditors' claims in full, the legislator has established a procedure for the satisfaction of creditors' claims in order to achieve as fair and proportionate a resolution of such a situation as possible. In particular, the Credit Institutions Law establishes a specific procedure for the coverage of costs and debts*(see the opinion of the Financial and Capital Market Commission, an external party, in vol. 7 of the case materials). p. 91).* Articles 192-195 of the Credit Institutions Law provided for the distribution of funds remaining after the insolvency proceedings or the liquidation expenses for the satisfaction of creditors' claims in accordance with the procedures set out in the aforementioned provisions. Currently, this procedure is laid down in Articles 139.[2] - 139.[8] of the Credit Institutions Law. Under both the former and the current legal framework, the funds remaining after the insolvency proceedings or the liquidation expenses have been paid are distributed to satisfy the principal amounts of creditors' claims in rounds. First, payouts are made to depositors who are legally entitled to guaranteed remuneration, then to depositors who are natural persons, micro, small and medium-sized enterprises to the extent of the portion of the deposit in excess of the covered deposit. Employees' claims are then settled. The next round of claims is for taxes and other payments to the state or local budget, followed by several more rounds of claims.

The claim of the creditor of the bank falls within the claims settlement procedure set out in Article 192($1^{.1}$) of the Credit Institutions Law (in the current wording of the Law - Article $139^{.2}$ (2)), i.e. the procedure providing for the payment to depositors who are natural persons, micro, small and medium-sized enterprises of the part of the deposit exceeding the covered deposit*(see volume 2 of the case file*). *p. 46).*

32.2. Already 26.2 of this judgement concludes that Latvia's international obligations obliged it to establish a legal framework ensuring that criminally acquired property to be confiscated. It was also concluded that the confiscation of

criminally acquired property fulfils an essential societal objective and is aimed at removing criminally acquired property from civil circulation*(see also paragraph 26.3 of the present judgement*).

The Bank's creditor points out that the confiscation of criminally acquired property can be compared to, for example, claims under the Credit Institutions Law arising from tortious acts or statutory obligations to make payments to the state budget. As an example, the Bank's creditor refers to Article 192(3) of the Credit Institutions Law, which regulated the order of satisfaction of creditors' claims related to taxes and other payments to the State budget*(see vol. 2 of the case file. p. 35).* Thus, the law expressly provides that any mandatory payment to the State budget is to be treated as a claim of the State as a creditor in the insolvency proceedings of a credit institution.

However, Article 192(3) of the Credit Institutions Law that determined the order of satisfaction of creditors' claims related to taxes and other payments to the state or local government budget, already allows to conclude from its content that these claims are related to unfulfilled obligations of the credit institution towards the state or local government. Moreover, the fact that such payments were not given priority over all other claims that creditors might have against a credit institution indicates the legislator's intention not to provide for a different procedure for recovery of debts solely on the ground that such a claim arose against the State or a local authority*(see Paragraph 11 of the judgement of the Senate Department of Administrative Cases of 7 June 2016 in case SKA-580/2016*). Namely, payment of taxes and other payments to the state or municipal budget shall take place only after creditors' claims have been satisfied in accordance with the orders provided for in Article 192(1), ($1^{.1)}$ and (2) of the Credit Institutions Law. It can be concluded that the legislator did not intend to place the State and the municipality in a more favourable position than all other creditors of the credit institution.

The confiscation of criminally acquired property meant compulsory alienation of such property without compensation or deprivation of such property, which was carried out due to the criminal origin of the property. The aforementioned separates confiscation of criminally acquired property from the types of state claims referred to in the Credit Institution Law and enforced in the insolvency proceedings. Namely, such deprivation of property is different in nature from the exercise by the State of its rights of recourse in relation to, for example, taxes and other payments to the State budget. The confiscation of the criminally

acquired property as a gratuitous disposal of such property on account of its criminal origin does not constitute a payment by the credit institution to the State budget which has not been made, thereby giving rise to a claim by the State for the recovery of such debt. Namely, due to the nature of confiscation of criminally acquired property, as well as when assessing this legal institution within the Latvian legal system, it cannot be compared with other state claims. Furthermore, it should be noted that a credit institution is a subject of the Anti-Legalisation Law, which is required to perform , *inter alia*, activities such as risk assessment and the establishment of an internal control system, customer due diligence, reporting suspicious transactions, refraining from transactions where there is reasonable suspicion that they are related to money laundering or reasonable suspicion that the funds have been directly or indirectly obtained as a result of a criminal offence. If, however, the criminally acquired property ends up in a credit institution, it must be removed from civil legal circulation on the basis of a confiscation order.

If the criminal origin of property is proven and it is concluded that it should be removed from civil legal circulation by confiscation, this should naturally be done immediately. Delaying confiscation would defeat the purpose of confiscation and prevent the proceeds of crime from benefiting.

In conclusion, the purpose, objectives and regulatory framework of confiscation of criminally acquired property, both at national and international level, indicate the importance and specific nature of confiscation of criminally acquired property. In particular, the removal of criminally acquired property from further circulation is an important objective of criminal law*(see*: *Boucht. J. The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds. Oxford, Portland, Oregon: Hart, 2017, p. 189*). In such a situation, the state, contrary to what the Bank's creditor indicated, does not use its right of claim in the same way as any other creditor, but acts as a subject entitled to expropriate criminally acquired property. This is done not only to comply with international obligations, but also to guarantee respect for the principle that a criminal offence does not bear fruit, which is also mentioned in the case law of the European Court of Human Rights*(see, for example, Paragraph 58 of the judgement of the European Court of Human Rights of 1 April 2010 in "Denisova and Moiseyeva v. Russia", application No. 16903/03*). Thus, confiscation of criminally acquired property as its compulsory gratuitous alienation to the State is not considered to be an exercise of the State's right to claim as a creditor under the Credit Institutions Law.

The fact that in the present case the Bank was a subject of the insolvency proceedings was not to be given weight. The Constitutional Court agrees with the Ombudsman's pointing out that persons involved in money laundering try to use credit institutions in order to merge criminally acquired funds with legal funds and to conceal their criminal origin*(see the opinion of the Ombudsman of the invited person in the case materials, volume 7 p. 137).* Also, financial resources deposited with a credit institution, including within the framework of insolvency proceedings, cannot be subject to any different requirements with regard to the need to confiscate them and to do so immediately as in other cases.

Consequently, the groups of persons identified by the creditor of the Bank – the state, for the benefit of which the criminally acquired property is confiscated, and such creditors of the credit institution as the creditor of the Bank, who have right of action against a credit institution that is a subject of insolvency proceedings – are not comparable in the circumstances of the present case in the aspect of the principle of legal equality.

Since the groups of persons identified by the Creditor of the Bank are not in comparable circumstances, the contested norms in this part comply with the principle of legal equality contained in the first sentence of Article 91 of the *Satversme*.

33. The Constitutional Court must also assess whether unjustified equal treatment of creditors of a credit institution who are in different circumstances. The Bank's creditor points out that the comparators, who are in different circumstances when criminal resources are confiscated, are the creditors of a credit institution in insolvency proceedings and the creditors of a credit institution which is not in insolvency proceedings. The contested norm provides for equal treatment of these groups of persons. The *Saeima*, on the other hand, points out that in the context of the contested norms the mere fact that a credit institution has been declared insolvent does not mean that the creditors of that credit institution would be in different circumstances than the creditors of a credit institution that has not been declared insolvent.

Thus, the Constitutional Court must first of all examine whether and which persons (groups of persons) are comparable and whether they are in different circumstances*(see Paragraph 8 of the Judgement of the Constitutional Court of 2 November 2020 in Case No. 2020-14-01*).

33.1. Funds in a credit institution's account indicate that the person has a right of claim against the credit institution for the payment of those funds.

Consequently, this means that the credit institution's customer can demand repayment under certain conditions and the obligation to repay the debt does not arise until the claim has been made*(see*: *Kārkliņš J., Rozenbergs J. Bezskaidras naudas līdzekļu juridiskais statuss, civiltiesiskie un kriminālprocesuālie aspekti. (Legal status of non-cash funds, civil and criminal procedural aspects.) Jurista Vārds, 21 February 2017, No 8, p. 9.*).

The insolvency proceedings of a credit institution do not in themselves affect the existence of depositors' rights of claim against the credit institution. In particular, as mentioned above, Articles 192-195 of the Credit Institutions Law provided for the distribution of funds remaining after the insolvency proceedings or the liquidation expenses for the satisfaction of creditors' claims in accordance with the procedures set out in the aforementioned provisions. Both the above-mentioned legal provisions and the nature of insolvency proceedings indicate that insolvency proceedings aim, *inter alia*, at satisfying creditors' claims to the extent objectively possible. Thus, the status of a creditor is not lost in insolvency proceedings, as the right of claim against the credit institution is still maintained, i.e. the characteristics of creditors referred to in Article 1(1)(32) of the Credit Institutions Law are fulfilled.

So, a creditor of a credit institution that is a subject of the insolvency proceedings and a creditor of a credit institution that is not a subject of insolvency proceedings shared both the creditor's status and the rights of action against the credit institution. These groups of persons are therefore mutually comparable.

33.2. The Bank's creditor states that the circumstance which places these groups of persons in fundamentally different situations is whether or not the credit institution has been declared insolvent. If financial resources held in accounts with a credit institution which is not in insolvency proceedings are declared to have been criminally acquired property and confiscated for the benefit of the State, the creditors of that credit institution who have not deposited criminally acquired property with that credit institution will not be affected by the confiscation. In particular, the ability of these creditors to obtain satisfaction of their claims would not be affected by the conduct of other creditors. Conversely, if the confiscation is carried out while the credit institution is in insolvency proceedings, the ability of all creditors of the credit institution to enforce their claims is directly affected. Thus, the confiscation of criminally acquired property on the basis of the contested norms places the creditors of a credit institution in insolvency proceedings in

different circumstances than the creditors of a credit institution which is not in insolvency proceedings.

The *Saeima* points out that even if the funds deposited with a credit institution declared to have been criminally acquired at a time when the credit institution has not been declared insolvent, the situation may arise in which the credit institution cannot fully satisfy the claims of its creditors. At the hearing, the representative of the *Saeima* pointed out that the reason why a creditor cannot get back his legally deposited share is not related to the confiscation, which is carried out when the credit institution has become insolvent, but to the credit institution itself and its financial difficulties*(see the transcript of the hearing of 21 April 2022 in volume 11 of the case files). p. 12).*

The Constitutional Court agrees with the *Saeima's* observations and concludes that, in essence, both in a situation when a credit institution is not in insolvency proceedings and in a situation when a credit institution is in insolvency proceedings, the possibility to satisfy the claims of its creditors depends directly on the property available to the credit institution. Insolvency proceedings undeniably affect the ability of a credit institution to satisfy the claims of its creditors, as this follows from the very nature of the insolvency proceedings and the purpose for which they have been opened. The reason for opening insolvency proceedings and whether and to what extent creditors' claims will be satisfied as a result of the confiscation of property is primarily related to the credit institution's past activities, such as the business model chosen by the credit institution, as well as the amount of property held by the credit institution before the property deposited in its accounts was declared criminally acquired and confiscated for the benefit of the state, and not to the fact of insolvency *per se*.

The Constitutional Court has recognised that it is not possible to regulate the specific situation of each person by law, however, the law should ensure a sufficiently differentiated treatment so that its norms in a different legal and factual situation would not result in non-compliance with the principle of legal equality included in the first sentence of Article 91 of the Satversme (*see Para 27.3 of the Constitutional Court's judgement of 19 October 2017 in Case No 2016-14-01*). Taking into account the fact that the ability of a credit institution to satisfy the claims of its creditors depends mainly on the amount of property available to it, the Constitutional Court concludes that the existence of insolvency proceedings is not in itself such a criterion which would place the groups of persons indicated by the creditor of the Bank in different conditions within the scope of the contested

norms. The legislator cannot and is not obliged to provide for such a differentiated treatment as to make confiscation of criminally acquired property conditional on the actions previously taken by the credit institution to preserve its property.

Also, the Constitutional Court repeatedly draws attention to the fact that the achievement of the objective of confiscation of criminally acquired property – to immediately remove such a property from civil legal circulation – could not be made dependent on whether the credit institution was in insolvency proceedings. To hold otherwise would mean the possibility of further money laundering*(see the opinion of the Financial Intelligence Unit in the transcript of the hearing of 13 April 2022, Case File volume 10 p. 155).*

The Constitutional Court concludes that if criminally acquired property was confiscated based on the contested norms, creditors of a credit institution that is a subject of insolvency proceedings are not in different circumstances than creditors of a credit institution which is not a subject of insolvency proceedings.

Consequently, the contested norms comply with the principle of legal equality included in the first sentence of Article 91 of the Satversme.

The Substantive Part

On the basis of Section 29, Part one, Paragraph six and Section 30-32 of the Constitutional Court Law, the Constitutional Court

held:

1. To dismiss proceedings in respect of the claim of the Joint-Stock Company

under liquidation "TRASTA KOMERCBANKA" on compliance of Section 70.[11], Paragraph Four of the Criminal Law and Section 358, Paragraph One of the

Criminal Procedure Law with the first sentence of Article 91 and Article 105 of the

***Satversme* of the Republic of Latvia.**

2. To dismiss proceedings in respect of the claim of *ERGO TEC LLP*, a merchant

registered in the United Kingdom, on compliance of Section 70.[11], Paragraph Four

of the Criminal Law and Section 358, Paragraph One of the Criminal Procedure

Law with the first three sentences of Article 105 of the *Satversme* of the Republic

of Latvia.

3. To recognise Section 70.[11], Paragraph Four of the Criminal Law and Section 358,

Paragraph One of the Criminal Procedure Law as being compatible with the first

sentence of Article 91 of the *Satversme* of the Republic of Latvia.

The Judgement is final and not subject to appeal.

The judgement is proclaimed on 23 May 2022.

The Judgement enters into force at the moment of its promulgation.

Chairman of the court hearing Aldis Laviņš