



THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

J U D G E M E N T

on Behalf of the Republic of Latvia

in Riga on 23 May 2017

in Case No. 2016-13-01

The Constitutional Court of the Republic of Latvia, comprised of: chairperson of the court hearing Aldis Laviņš, Judges Artūrs Kučs, Gunārs Kusiņš, Jānis Neimanis, Sanita Osipova, Daiga Rezevska, and Ineta Ziemele,

having regard to a constitutional complaint by limited liability company “Cell Finance”,

on the basis of Article 85 of the Constitution of the Republic of Latvia, Para 1 of Section 17, Para 11 of Section 17 (1), as well as Section 19² and Section 28¹ of the Constitutional Court Law,

at the court hearing of 26 April 2017 revied in written procedure the case

“On Compliance of Section 629 (5) of the Criminal Procedure Law with the First Sentence of Article 92 of the Constitution of the Republic of Latvia”.

The Facts

1. On 21 April 2005, the *Saeima* [the Parliament of the Republic of Latvia] adopted the Criminal Procedure Law, which entered into force on 1 October 2005.

On 8 July 2011, the *Saeima* adopted the law “Amendments to the Criminal Procedure Law”, adding the fifth part to Section 629 of the Criminal Procedure Law.

Since 11 August 2011 when the law of 8 July “Amendments to the Criminal Procedure Law” entered into force, Section 629 (5) of the Criminal Procedure Law has not been amended and is in effect in the following wording: “In court proceedings regarding criminally acquired property, the materials in the case shall be a secret of investigation and the person directing the proceedings, the prosecutor and the court which is reviewing the case shall have the right to familiarise themselves with them. The persons referred to in Section 628 of this Law may familiarise themselves with materials in the person’s case with permission of the person directing the proceedings and in the scope determined by him.” The persons related to property, referred to in Section 628 of the Criminal Procedure Law (hereafter also – persons related to property) are the suspect or the accused or a person, from whom property has been seized or arrested or another person who has the right to the particular property.

2. The applicant – limited liability company “Cell Finance” (hereafter – the Applicant) – holds that Section 629 (5) of the Criminal Procedure (hereafter also – the contested provision) is incompatible with the first sentence of Article 92 of the Constitution of the Republic of Latvia (hereafter – the Constitution).

The Applicant points out that the contested provision places disproportionate restrictions on its right to a fair trial, i.e., the principle of equal opportunities of the parties, falling within the scope of the right to a fair trial, as well as a person’s right to be heard. Allegedly, the second sentence of Article 92 of the Constitutions protects several interconnected rights and principles: the right to an effective legal remedy, the principle of equal opportunities of the parties, as well as the principle of procedural justice.

On the basis of the contested provision, the Applicant has been denied the possibility to familiarise oneself with the materials in the case, which had been used to substantiate the opinion of the person directing the proceedings, i.e., the prosecutor’s opinion on the illicit origins of the Applicant’s property or its connection to a criminal offence. Thus, in the proceedings regarding criminally acquired property, the Applicant’s right to prepare duly and equally for the hearing of the case

has not been ensure, neither in the first instance court, nor in the appellate-instance court.

When the proceedings regarding criminally acquired property had been initiated a decision on initiating these proceedings had been issued to the Applicant. However, all circumstances that are significant in the case, allegedly, are not reflected in this decision. The decision comprises interpretation of the person directing the proceedings of the materials in the particular criminal proceedings, as well as the list of documents, which are separated from the criminal case under investigation regarding a criminal offence into a case regarding criminally acquired property. The Applicant points out that the presentation of the decision on initiating proceedings regarding criminally acquired property does not ensure that the right to a fair trial is respected. Allegedly, it follows from the content of the right to a fair trial that both the person directing the proceedings and the person, on the criminal origins or connection to a criminal offence of the property of whom is being decided, should have the possibility to familiarise themselves with the arguments and evidence, as well as to comment thereon. The Applicant cannot verify in full whether the arguments that are stated in the decision on initiating proceedings regarding criminally acquired property are valid and comply with the truth or reasonably refute and comment on these arguments because it cannot refer to the materials in the case.

Pursuant to the Criminal Procedure Law, the decision on the right of persons, referred to in Section 629 of this law, to familiarise themselves with the materials in the case in the proceedings regarding criminally acquired property is made by the same person directing the proceeding who adopted the decision on initiating proceedings regarding criminally acquired property. It is contended that the contested provision creates advantages for the person directing the proceedings compared to the person, the nature of whose property is decided on. In proceedings regarding criminally acquired property, the person directing the proceedings cannot be regarded as being a neutral and unbiased person but rather should be regarded as procedural opponent.

The Applicant notes that the contested provision does not envisage criteria that the person directing the proceedings should follow in deciding whether to grant

permission to familiarise oneself with the materials in the case and, thus, the contested provision makes the making of the decision dependent on the subjective view of the person directing the proceedings. Systemic examination of the Criminal Procedure Law allows establishing that, for example, in the pre-trial stage of criminal proceedings when also other matters are decided on, e.g., application of the security measure – arrest, the need to ensure a person’s right to a fair trial does not allow the person directing the proceedings to restrict fully a person’s access to the case materials.

The Applicant holds that the restriction on fundamental rights, included in the contested provision, lacks a legitimate aim. However, the Applicant admits that the need to keep the secret of investigation and to ensure effective course of criminal proceedings, i.e., the need to protect other persons’ rights and public security, could be regarded as such. The Applicant, however, holds that the proceedings regarding criminally acquired property could not have such a legitimate aim.

Allegedly, when sufficient evidence regarding a criminal offence already has been gathered in criminal proceedings the risk that persons might hide evidence or hinder investigation of the criminal offence no longer exists. The prohibition to familiarise oneself with the materials in the case regarding criminally acquired property cannot in any way increase the effectiveness of criminal proceedings. The amount of evidence gathered in criminal proceedings at the time when usually criminal proceedings regarding criminally acquired property are initiated is said to be such that, substantially, excludes the risk that familiarising oneself with materials in the case could hinder the effective course of criminal proceedings.

However, if protection of other persons’ rights and public security were recognised as the legitimate aim of the restriction on fundamental rights then, in the Applicant’s opinion, this probable legitimate aim could be reached by a warning, i.e., by warning the persons who are familiarising themselves with materials in the case regarding criminally acquired property about the prohibition to disclose information obtained in the pre-trial proceedings. Procedural sanctions or threatening with criminal penalty if the criminal proceedings are hindered are said to be a sufficiently effective measure. Likewise, regulation that would allow the court, which is

reviewing the case regarding criminally acquired property, or the investigative judge make the decision on a person's right to familiarise oneself with the materials in the case regarding criminally acquired property could be considered as being an alternative measure for reaching the legitimate aim.

Additionally, it should be taken into account that in proceedings regarding criminally acquired property such property issues that are not linked to the particular person's guilt are being decided on. Likewise, special public interest that could be linked to the purpose of criminal procedure cannot be discerned in the such proceedings. In the proceedings regarding criminally acquired property, the court, actually, is dealing with a private law dispute between a person who has a claim to recover property and a person who owns or possesses the property, regarding which the proceedings are ongoing. Neither possible public interest in supplementing the State budget by confiscating the property faster, nor the possible interest of the victim in achieving faster solution to the matter can be recognised as being such that could justify substantial restriction on the right to a fair trial in proceedings regarding criminally acquired property.

After familiarising oneself with materials in the case, the Applicant underscored: the fact that the person directing the proceedings decides on permission to familiarise oneself with materials in the case is not linked to the practice of applying the contested provision but to the very content of this provision. The person directing the proceedings is the one who decides on the extent to which other persons, involved in the proceedings, will be able to exercise their procedural rights.

The Applicant holds that only those materials should be separated from the case materials in criminal proceedings, the procedural verification of which, on the one hand, will not endanger the course of the primary case but, on the other hand, would ensure the right to a fair trial to participants in the case regarding criminally acquired property.

The Applicant notes, in addition, that a prosecutor cannot provide unbiased and independent assessment of the matters to be resolved in criminal proceedings, which can result in restricting the right to a fair trial. Therefore a prosecutor should not be regarded as "a tribunal" in the meaning of Article 6 of the European

Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter – the Convention).

3. The institution, which issued the contested act, – the *Saeima* – does not uphold the Applicant’s opinion and holds that the contested provision complies with the first sentence of Article 92 of the Constitution.

Allegedly, there are grounds for terminating legal proceedings in the present case. The *Saeima*, referring to Para 6 of Section 29 (1) of the Constitutional Court Law, requests terminating legal proceedings in the case since the infringement on the Applicant’s fundamental rights is not caused by the contested provision but by the practice of application thereof. The scope in which particular rights can be exercised in each case is said to depend on the decision made by the person directing the proceedings. The contested provision grants to the person directing the proceedings broad discretion in assessing the scope, in which persons would be allowed to familiarise themselves with case materials. In conducting this assessment, the person directing the proceedings takes into account the substance of the respective criminal offence, the particular stage of the criminal proceedings, the nature of materials in the case, as well as information included therein and its connection to other interests to be protected in criminal proceedings.

During the pre-trial criminal proceedings, persons’ rights can be restricted to a larger extent than in the trial stage. Moreover, in practice, it is not always possible to separate those case materials that pertain only to the particular property. Materials in the case regarding criminally acquired property still pertain to the pre-trial criminal proceedings, including information about circumstances that are significant in it and, possibly, also about persons’ private life or a commercial secret. Hence, the restriction on fundamental rights, included in the contested provision, has been established with the aim of ensuring effective investigation of criminal offences and protecting the interests of those persons, information about whom might be included in the said case materials. The *Saeima* is of the opinion that, in each particular case, the person directing the proceedings can, depending on the circumstances of the case, assess persons’ right to familiarise themselves with case materials in the proceedings

regarding criminally acquired property and make a decision in compliance with the proportionality principle. Whereas the warning not to disclose information obtained in the pre-trial criminal proceedings would not allow reaching the legitimate aim in the same quality because it cannot be regarded as being an effective measure for protecting the interests of investigation and other persons' rights.

The *Saeima* does not subscribe to the Applicant's argument that, in the proceedings regarding criminally acquired property, a prosecutor would be its procedural opponent. Upon initiating proceedings regarding criminally acquired property, the main task of the person directing the proceedings is to ensure timely resolution of property matters within the framework of criminal proceedings. Thus, not only the interests of a person, involved in criminal proceedings, but also the interests of society in general are said to be protected. Whereas the decision on criminally acquired property, on the basis of materials in the separated case and opinion of all involved persons, is adopted by the court. The person directing the proceedings is the one who is responsible for the course of the primary criminal proceedings and is aware of the related risks, thus being able to make a reasoned decision, complying with the fundamental rights of all involved persons, on the scope, in which it is permitted to familiarise oneself with the separated materials.

As regards the issue of whether special criteria should be defined for making the decision by the person directing the proceedings, the *Saeima* underscores that the content and nature of materials in a criminal case may be different in various cases. The legislator has granted to the person directing the proceedings the discretion to ensure a reasonable balance between the interests of the involved parties. Moreover, pursuant to Section 627 of the Criminal Procedure Law, the person directing the proceedings is obliged to substantiate their decision. The decision by the person directing the proceedings comprises not only enumeration of materials separated from the case but also a detailed description of information included therein.

Allegedly, the contested provision does not prohibit persons from familiarising themselves with case materials. In view of the fact that the criminally acquired property is closely linked to the criminal offence, which is still investigated in the pre-trial criminal proceedings, there are grounds for determining that case materials

are a secret of investigation. Moreover, it should be taken into account that such materials are accessible to the court which rules on the matter of criminally acquired property on its merits. Namely, in such a case, a court assesses whether the property has criminal origins and decides on further actions in relation to the criminally acquired property. In these proceedings, the owner of the infringed property does not have to prove that a criminal offence had occurred at all but must substantiate the legal origins and ownership of the particular property. Thus, it could happen that there is no need for the owner of the infringed property to familiarise oneself with all those materials in the criminal case that pertain to the criminal offence.

Having familiarised itself with the case materials, the *Saeima* notes that issues that pertain to persons' civil rights, in the meaning of the first part of Article 6 of the Convention, are decided on in the proceedings regarding criminally acquired property. In the proceedings regarding criminally acquired property, the owner of the infringed property has the task to submit evidence regarding legal origins of the property rather than to prove that the reasoning and evidence submitted by the person directing the proceedings are invalid or erroneous. In the proceedings regarding criminally acquired property, the person directing the proceedings is the one who is informed about all aspects of the primary criminal proceedings. Access to case materials is one of those factors, which might have a significant impact on the course of criminal proceedings, therefore the issue of who and in what scope can access the case materials cannot be decided on by any other official.

4. The summoned person – the Ministry of Justice – holds that the contested provision complies with the first sentence of Article 92 of the Constitution.

Allegedly, the contested provision cannot be considered as being general prohibition to familiarise oneself with case materials in proceedings regarding criminally acquired property as it is said to give to the person directing the proceedings the discretion to decide in each particular case on the scope of case materials to be presented to persons.

Proceedings regarding criminally acquired property should be considered as being an exception to the general criminal procedural order. The purpose of these

proceedings is to decide in a timely manner on property issues that have arisen in criminal proceedings and not to recognise a person as being guilty of committing a particular criminal offence.

Pursuant to Section 375 (1) of the Criminal Procedure Law, materials in a criminal case during the course of criminal proceedings is a secret of investigation and only the officials who conduct criminal proceedings, as well as persons to whom the officials present the respective materials in the procedure set out in law have the right to familiarise themselves with the materials.

The nature of pre-trial criminal proceedings and effective course of criminal proceedings, allegedly, require that information, gathered in the course of criminal proceedings, should not be fully accessible because untimely presentation of case materials to persons might jeopardise achieving the aims of criminal proceedings. In proceedings regarding criminally acquired property, the status of the secret of investigation should be granted to case materials in order to guarantee the right to a fair trial, as well as to protect the right of persons involved in criminal proceedings to inviolability of private life. In the proceedings regarding criminally acquired property, the Criminal Procedure Law is said to ensure reasonable balance between the interests of criminal proceedings, *inter alia*, the need to keep the secret of investigation, and the principle of procedural equality.

The Ministry of Justice does not agree with the Applicant and underscores that, within the framework of these proceedings, a prosecutor may not be considered as being a procedural opponent. In the proceedings regarding criminally acquired property, the prosecutor does not maintain prosecution but ensures that property matters in criminal proceedings are resolved in a timely manner. It is the official who, at the particular moment, is conducting the criminal proceedings, who is able to make a substantiated and objective decision on permission to familiarise oneself with the case materials in proceedings regarding criminally acquired property, being able to assess whether the fact that particular persons familiarise themselves with the respective materials would not be detrimental for the interests of criminal proceedings. Adoption of a well-considered, objective and substantiated decision, taking into account the circumstances of the particular case and on the basis of

fundamental principles of criminal procedure, is said to fall within the competence of the person directing the proceedings.

5. The summoned person – the Ombudsman of the Republic of Latvia (hereafter – the Ombudsman) – holds that the contested provision is incompatible with the first sentence of Article 92 of the Constitution.

In examining the compliance of the contested provision with the first sentence of Article 92 of the Constitution, the safeguards for the right to a fair trial that follow from Para 1 of Article 6 of the Convention should be applied.

It is maintained that the contested provision sets out clearly persons' rights and determines the order, in which persons may familiarise themselves with materials in the case regarding criminally acquired property. The Ombudsman upholds the statement included in the *Saeima's* written reply that the legitimate aim, i.e., protection of other persons' rights and public security, is reached by the contested provision. Presenting of case materials is admissible only if the disclosure of the respective information does not jeopardise the course of criminal proceedings. The possibility that persons familiarise themselves with materials in the case regarding criminally acquired property without prior assessment whether access to these materials is at all admissible should be excluded because this could lead to unlawful influence on the criminal proceedings.

However, the Ombudsman points out that the principle of equality of parties prohibits from placing one procedural opponent in a more favourable situation than the other one. It is contended that the adversarial principle defines that a person has the right to familiarise oneself with the considerations made by the other party and to rebut them. Therefore, in the present case, it is important to examine the prosecutor's role in examining in criminal proceedings matters that are important in the context of human rights, as well as the compatibility of a prosecutor with the concept of "a tribunal", included in Para 1 of Article 6 of the Convention.

Pursuant to the findings made by the European Court of Human Rights, "a tribunal" should be independent, objective and such that ensures procedural safeguards. Pursuant to legal regulation, a prosecutor can be considered an

independent and objective official; however, not an independent and objective “tribunal” in the meaning of the Convention because guarantees for a fair trial are absent. A prosecutor is said to be unable to provide objective and independent assessment with respect to matters to be decided on in criminal proceedings, in connection to which a person’s right to a fair trial could be restricted. A court, not a prosecutor, should assess whether and the scope in which a person has the right to familiarise oneself with case materials. An investigative judge, according to their status and competence, also could conduct such assessment.

6. The summoned person – the Prosecutor General’s Office – holds that the contested provision complies with the first sentence of Article 92 of the Constitution.

The Prosecutor General’s Office draws attention to the fact that, pursuant to information at its disposal, from 1 January 2015 until 31 July 2016, seven proceedings regarding criminally acquired property were separated from criminal cases received at the stage of criminal prosecution, and persons had requested the possibility to familiarise themselves with the case materials in two of these proceedings. In both cases, persons directing the proceedings had rejected the persons’ requests regarding familiarising themselves with these materials. As regards cases under investigation, 40 proceedings regarding criminally acquired property have been initiated. No complaints have been registered at the structural units of the Prosecution Office regarding decisions on denying the possibility to familiarise oneself with case materials.

Reaching the aims of criminal procedure, i.e., effective application of the provisions of the Criminal Procedure Law and fair regulation of criminal law relations, is said to justify the fact that the secret of investigation is maintained in pre-trial criminal proceedings. The Prosecutor General’s Office upholds the statement made in the *Saeima’s* written reply that the contested provision does not prohibit persons from familiarising themselves with case materials in proceedings regarding criminally acquired property and that the person directing the proceedings assesses the respective situations.

Exercise of the powers granted to a person directing the proceedings in pre-trial criminal proceedings cannot be examined in isolation from the exercise of their powers in the proceedings regarding criminally acquired property. In proceedings regarding criminally acquired property, the person directing the proceedings cannot be considered as being the prosecution party or the procedural opponent of the Applicant. Proceedings regarding criminally acquired property is intended exactly for resolving property matters in a timely manner. Moreover, assessment whether all persons, involved in the legal proceedings, have had the possibility to exercise their rights, established in law, which would guarantee just regulation of criminal law relations, is said to fall within the court's competence.

The obligation of the person directing the proceedings to warn persons about the prohibition to disclose information obtained in criminal proceedings cannot be considered as an alternative measure for reaching the legitimate aim. Thus, possible counteractions by persons against securing the evidence, gained in criminal proceedings, would be ignored, as well as the possibility to use the obtained information to restrict the opportunity for a person directing the proceedings to gain new evidence.

The Prosecutor General's Office is of the opinion that neither the court nor the investigative judge would have comprehensive information about the course of investigation. The powers of these subjects, established by law, do not include deciding on assessing a person's guilt or sufficiency of evidence in the pre-trial criminal proceedings, therefore they cannot assess which materials should be presented to a person in the proceedings regarding criminally acquired property. Allegedly, the fact that the person directing the proceedings decides on the scope, in which a person has the right to familiarise oneself with case materials, does not influence the court in assessing the origins of property.

7. The summoned person – *Dr. iur. Sandra Kaija, Professor at the Faculty of Law of Riga Stradins University* – holds that the contested provision, insofar it does not set out criteria that the persons directing proceedings should follow when

deciding on permission to a person to familiarise oneself with the case materials, is incompatible with the first sentence of Article 92 of the Constitution.

The principle of equivalence of procedural authorisations is said to be one of the basic principles of criminal procedure. The principle of equivalence of procedural authorisations does not mean that the rights and obligations of all persons, involved in criminal proceedings, should be identical. Quite to the contrary, this principle provides that “equivalent exercise” must be assessed in each particular case.

Most often, the proceedings regarding criminally acquired property are completed before the primary criminal proceedings. Therefore, in such cases, the need to keep the secret of investigation must be assessed with utmost care. However, the absence of clear and precise legal regulation, i.e., of concrete criteria, may lead to unfounded violations of persons’ rights in the practice of applying the provision, denying them full legal protection. Moreover, systemic examination of the Criminal Procedural Law reveals the trend to broaden the right of persons, involved in criminal proceedings, to familiarise themselves with materials in the criminal case, e.g., in cases where the decision on applying security measures is made.

However, persons’ right to familiarise themselves with case materials in proceedings regarding criminally acquired property is not absolute and may be restricted. Unfounded disclosure of the data related to criminal proceedings could complicate significantly the investigation in those pre-trial proceedings, from which materials related to criminally acquired property have been separated. Likewise, the risk that the evidence obtained in criminal proceedings could be lost or destroyed, that persons giving testimonies could be unlawfully influenced or the person who has the right to defence could evade pre-trial proceedings and the trial should be considered.

At the same time, S. Kaija underscores that, in the proceedings regarding criminally acquired property, the court and not the person directing the proceedings decides on the matter whether property should be recognised as criminally acquired. Moreover, in these proceedings, the court’s task is not to decide on the matter of a person’s guilt but on the matter whether the particular property is linked to a criminal

offence and whether its origins are or are not criminal. The validity of charges is not examined in these proceedings.

Currently, the Criminal Procedure Law does not envisage unequivocal prohibition to familiarise oneself with the case materials in proceedings regarding criminally acquired property. However, the fact that no criteria have been set out for examining this issue could lead to violations of persons' rights in the application of the contested provision.

8. The summoned person –*Mg. iur. Juris Stukāns, PhD student of Riga Stradins University*, – holds that the contested provision does not infringe upon a person's right to a fair trial.

It is contended that the contested provision validly determines the status of a secret of investigation to materials in cases regarding criminally acquired property. Disclosing the content of such materials might impact the further course of criminal proceedings and jeopardise objective pre-trial investigation, detection of guilty persons, gathering and preservation of evidence. In assessing the restriction on familiarising oneself with the case materials in proceedings regarding criminally acquired property, it should be taken into account that, in such proceedings, the final decision is made on the matter, whether property should be recognised as being criminally acquired, and currently law does not provide for its re-examination.

The contested provision does not establish general prohibition to familiarise oneself with the materials in such cases. Assessment of the scope, in which persons are allowed to familiarise themselves with materials in the case, falls within the competence of the person directing the proceedings. Nevertheless, J. Stukāns underscores that the contested provision does not envisage the possibility for the person directing the proceedings to refuse absolutely a person's request to allow them to familiarise themselves with the case materials.

The Criminal Procedure Law sets out that the copy of the decision is issued to the person whose property has been arrested, providing, *inter alia*, information on the facts that substantiate the link between the property and the criminal offence or the criminal origins of the property, as well as what kind of materials are separated from

the case under investigation regarding a criminal offence to be included in the case regarding criminally acquired property. Physical presentation of case materials, allegedly, is not of decisive importance in the exercise of rights. The content of the decision on initiating proceedings regarding criminally acquired property ensures and does not restrict the possibility for a person to defend their right to property, which has been seized or arrested. The person who has the right to the particular property is said to know the reasoning, arguments and the evidence submitted by the person directing the proceedings and, thus, can submit their arguments and evidence regarding the origins and legal status of the property.

Likewise, in the proceedings regarding criminally acquired property, a person may exercise their rights by participating in a court hearing. The court, in turn, in view of the fact that the case materials are a secret of investigation, must ensure appropriate and comprehensible decision in a way that would not jeopardies further investigation and would allow the person, who has the right to the particular property, to exercise their rights. Participants in the case regarding criminally acquired property do not have to rebut the arguments of the other party but have to present evidence to the court that would allow it to assess objectively the origins of property. Hence, the restriction, included in the contested provision, on familiarising oneself with the case materials in proceedings regarding criminally acquired property, is said to be proportional since it is aimed at ensuring and protecting the interests of all persons, involved in criminal proceedings.

The Findings

9. Pursuant to the Constitutional Court's case law, procedural matters must be examined before reviewing the constitutionality of legal provisions on their merits (*see, for example, Judgement by the Constitutional Court of 19 October 2011 in Case No. 2010-71-01, Para 11, and Judgement of 10 February 2017 in Case No. 2016-06-01, Para 17*).

The Applicant expresses the opinion that the contested provision restricts its right to a fair trial in the proceedings regarding criminally acquired property because

it denies the possibility to familiarise oneself with materials in these proceedings that have been separated from the materials in the criminal case. The *Saeima*, in turn, points out that the restriction on the Applicant's fundamental rights is caused by the practice of applying the contested provision and not by this provision itself. Allegedly, the contested provision grants to the person directing the proceedings broad discretion to assess, taking into account the nature of the respective criminal offence, the stage of criminal proceedings, case materials and other circumstances, the scope, in which persons would be allowed to familiarise themselves with materials in the case regarding criminally acquired property. Therefore, the *Saeima* requests termination of legal proceedings, on the basis of Para 6 of Section 29 (1) of the Constitutional Court Law.

The assertion that the possible infringement on a person's fundamental rights had not been caused by the contested provision but had been caused by the practice of application thereof *per se* are not the grounds for terminating legal proceedings in the case. To decide whether legal proceedings in this case should be terminated on the basis of Para 6 of Section 29 (1) of the Constitutional Court Law, the Constitutional Court must examine whether the contested provision affects the Applicant's rights, falling within the scope of the first sentence of Article 92 of the Constitution, taking into account the true content and meaning of the contested provision.

10. The Applicant holds that the contested provision is incompatible with the first sentence of Article 92 of the Constitution. Different opinions are included in the case materials as to whether the safeguards for the right to a fair trial should be applicable to the Applicant as a person related to property. The Constitutional Court has recognised that the first sentence of Article 92 of the Constitution guarantees to persons the right to defend at a fair trial their "rights and lawful interests" (*see Judgement by the Constitutional Court of 23 April 2003 in Case No. 2002-20-0103, Para 1 of the Findings*). Therefore, the Constitutional Court must establish, first and foremost, whether the contested provision applies to those rights of the Applicant that fall within the scope of Article 92 of the Constitution.

Article 89 of the Constitution provides that the State recognises and protects fundamental human rights in accordance with the Constitution, laws and international agreements binding upon Latvia. The finding has been enshrined in the Constitutional Court's case law that the State's obligation to take into consideration the international commitments in the area of human rights is derived from this article of the Constitution. The aim of the constitutional legislator was to achieve harmony between the human rights provisions, included in the Constitution, and the international human rights provisions (*see, for example, Judgement by the Constitutional Court of 30 August 2000 in Case No. 2000-03-01, Para 5 of the Findings*).

The Constitutional Court has concluded that the first sentence of Article 92 of the Constitution should be interpreted, first and foremost, in conjunction with Article 6 of the Convention. The first part of Article 6 of the Convention provides: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." It follows from the provisions of the Convention and interpretation thereof in the case law of the European Court of Human Rights that if the respective human rights, enshrined in the Convention, cover the particular situation then this situation also falls within the scope of the respective fundamental rights, enshrined in the Constitution (*see Judgement by the Constitutional Court of 19 October 2011 in Case No. 2010-71-01, Para 12.1.*).

Para 38 in the Preamble to the Directive 2014/42/ EU of the European Parliament and of the Council (3 April 2014) on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union provides that this Directive respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted in the case law of the European Court of Human Rights. The first part of Article 8 of this Directive sets out that Member States must take the necessary measures to ensure that the persons affected by confiscation of property have the right

to an effective remedy and a fair trial in order to uphold their rights. Moreover, the sixth part of this Article envisages that Member States must provide for the effective possibility for a person in respect of whom confiscation is ordered to challenge the order before a court. Whereas the ninth part of the same Article stipulates that also third parties, to whom confiscation is applied in proceedings, must be entitled to claim title of ownership or other property rights.

It has been recognised in the case law of the European Court of Human Rights that legal proceedings that are not related to the application or establishment of criminal penalty (*inter alia*, also proceedings regarding confiscation of criminally acquired property) do not pertain to “validity of charges in a criminal case”, in the meaning of the first part of Article 6 of the Convention. However, the confiscation of property as the outcome of proceedings regarding criminally acquired property represents “control” of the use of property, within the meaning of Article 1 of Protocol No. 1 to the Convention, and, hence, legal proceedings related to it pertain to the establishment of a person’s civil rights and obligations, within the meaning of the first part of Article 6 of the Convention (*see, for example, Judgement by the European Court of Human Rights of 12 May 2015 in Case “Gogitidze and Others v. Georgia”, Application No. 36862/05, Para 121*). The confiscation measures that have a negative effect upon the rights of those persons, charges against whom have not been brought, pertain to the civil law aspects in the functioning of Article 6 of the Convention (*see Judgement by the European Court of Human Rights of 10 April 2012 in Case “Silickiene v. Lithuania”, Application No. 20496/02, Paras 45–46*).

Proceedings regarding criminally acquired property are characterised by the fact that a person’s guilt is not established in these proceedings but only the criminal origins of the property or its connection to the criminal offence are decided on (*see also: Latvijas Republikas Augstākās Tiesas Biļetens, Nr. 1/2010, 31.–32. lpp.*). Such proceedings are directed at effective and timely resolution of property issues in criminal proceedings. Whereas, pursuant to Section 630 of the Criminal Procedure Law, a court adopts a decision on criminally acquired property. One of the models for handling criminally acquired property, allowed by the Criminal Procedure Law, in turn, is transferring property into the State’s ownership without compensation –

confiscation of property (*see Decision by the Constitutional Court of 6 January 2011 on Terminating Legal Proceedings in Case No. 2010-31-01, Para 7.2., and Judgement of 8 March 2017 in Case No. 2016-07-01, Para 23.1.*). Since, in the proceedings regarding criminally acquired property, a decision is made regarding the property rights of persons related to property, referred to in Section 628 of the Criminal Procedure Law, matters that affect persons' civil rights and obligations, in the meaning of the first part of Article 6 of the Convention, are affected. Thus, the safeguards of the first part of Article 6 of the Convention, in conjunction with the safeguards included in the first part of Article 92 of the Constitution, are fully applicable to these proceedings.

Hence, in the proceedings regarding criminally acquired property, the safeguards for the right to a fair trial are applicable to persons related to property.

11. The contested provision is one of the provisions regulating the proceedings regarding criminally acquired property, included in Chapter 59 of the Criminal Procedure Law. Proceedings regarding criminally acquired property is to be regarded as one of the special types of proceedings in criminal procedure (*see Decision by the Department of Criminal Cases of the Supreme Court Senate of 19 February 2009 in Case No. SKK-2/2009*). Proceedings regarding criminally acquired property are to be considered as being an exception to the general criminal procedure where the decision on how to handle criminally acquired property is made simultaneously with the final decision in criminal proceedings.

The contested provision provides *expressis verbis* that the case materials in proceedings regarding criminally acquired property is a secret of investigation. At the same time, the contested provision stipulates that the person directing the proceedings, the prosecutor and the court may familiarise themselves with these materials, whereas a person related to the property, referred to in Section 628 of the Criminal Procedure Law, – only with the permission of the person directing the proceedings and in the scope determined by them. Therefore, the scope in which the procedural rights of persons, referred to in Section 628 of the Criminal Procedure

Law, can be effectively exercised directly depends upon the decision made by the person directing the proceedings. This decision influences the possibilities of the person related to the property to defend their fundamental rights, i.e., the right to property, when the decision on the merits is made in the proceedings regarding criminally acquired property. Likewise, this decision by the person directing the proceedings influences also the equal rights at the court hearing of persons involved in the legal proceedings, envisaged in Section 629 (4) of the Criminal Procedure Law.

Pursuant to Section 27 (2) of the Criminal Procedure Law, during the investigation stage, the person directing the criminal proceedings is the investigator or, in exceptional cases, the prosecutor, whereas during the stage of criminal prosecution – the prosecutor. The outcome of applying the lexical element of the grammatical method of interpretation indicates that, within the meaning of the contested provision, as well as the entire Chapter 59 of the Criminal Procedure Law, the person directing the proceedings is the subject who, during the pre-trial proceedings, has made the decision to initiate the proceedings regarding criminally acquired property.

The legislator adopted the contested provision on 8 July 2011, introducing amendments to the Criminal Procedure Law. The legislator's historical aim for adopting the contested provision was to establish that the case materials in the proceedings regarding criminally acquired property was to be considered as being a secret of investigation, as well as to determine who and in what kind of procedure was allowed to familiarize themselves with these materials. The need to adopt this provision was substantiated by the fact that the regulation on the proceedings regarding criminally acquired property, set out in Chapter 59 of the Criminal Procedure Law, was ineffective and was not applied in practice. Namely, uniform understanding as to whether the general regulation on protecting the secret of investigation, established in Section 375 of the Criminal Procedure Law, was applicable to the proceedings regarding criminally acquired property, was lacking (*see Opinion of the Ministry of Justice in Case Materials, Vol. 2, p. 18.*). Therefore the Legal Affairs Committee of the *Saeima*, supporting the proposal made by the Minister for Justice, used the wording of Section 396 (1) of the Criminal Procedure

Law on familiarising oneself with the secret of investigation in pre-trial criminal proceedings as the basis to provide, similarly, that a person could familiarise oneself with materials in the case regarding criminally acquired property only with the permission given by the person directing the proceedings and in the scope determined by this person (*see Minutes of the Sitting of the Saeima Legal Affairs Committee in Case Materials, Vol. 2, pp. 28–29, and Letter of the Ministry of Justice from 21 June 2011 No. 1-11/2725, in Case Materials, Vol. 2, pp. 34–36*). The law “Amendments to the Criminal Procedure Law” of 8 July 2011 also deleted from Chapter 59 of the Criminal Procedure Law the provision that, at the court hearing in proceedings regarding criminally acquired property, the court verifies the submitted evidence (*see Case Materials, Vol. 2, pp. 34–36*).

The legislator, by the contested provision, has granted to the person directing the proceedings the right to decide on the extent to which persons related to the property, referred to in Section 628 of the Criminal Procedure Law, will be able to exercise their right to a fair trial. Namely, upon receiving the request from a person related to the property, the person directing the proceedings is obliged to assess the arguments presented by this person and to decide, first and foremost, on the permission to this person to familiarise oneself with the case materials in the proceedings regarding criminally acquired property. Whereas if the person directing the proceedings has decided to allow the person related to property to familiarise oneself with the case materials, he must also determine the scope, in which these materials should be presented to the person. No judicial review has been envisaged over the decision made by the person directing the proceedings regarding the right of the person related to property to familiarise oneself with the case materials in the proceedings regarding criminally acquired property, i.e., the court does not re-examine the legality and validity of such a decision, made by a prosecutor. This is proven by the scope of the contested provision and the uniform application of it (*see, for example, Decision by the Panel of Criminal Cases of the Riga Regional Court of 21 October 2014 in Case No. 11816005213, Decision by the City of Riga Latgale District Court of 5 January 2016 in Case No. 15830019113 and Case Materials, Vol. 1, p. 118*). The Constitutional Court has concluded that a legal provision cannot

be understood outside the practice of its application and the legal system, within which it functions (*see Judgement by the Constitutional Court of 28 November 2014 in Case No. 2014-09-01, Para 20.2.2.*). The decision by the person directing the proceedings may be appealed against in the procedures set out in Chapter 24 of the Criminal Procedure Law only within the framework of the prosecution office.

Thus, the contested provision and not the practice of its application affects the Applicant’s fundamental rights, falling within the scope of the first sentence of Article 92 of the Constitution. Hence, legal proceedings in the case must be continued.

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

The finding has been consolidated in the Constitutional Court’s case law that Article 92 of the Constitution imposes a positive obligation upon the State, pursuant to which it not only should create and maintain national infrastructures that are needed to implement a fair trial but also should adopt and implement legal provisions that guarantee that the procedure is fair and unbiased. In conjunction with Article 90 of the Constitution, this obligation denotes the legislator’s duty to envisage unambiguously such procedure that would create in an individual a clear and safe conviction regarding the possibility of defending their fundamental rights (*see Judgement by the Constitutional Court of 5 March 2002 in Case No. 2001-10-01, Para 2 of the Findings, and Judgement of 24 October 2013 in Case No. 2012-23-01, Para 14.4.*).

Hence, the concept “fair court”, referred to in Article 92 of the Constitution, comprises two aspects, i.e., “fair court” as an independent institution of the judicial power, which reviews the case, and “fair trial” as due proceedings in which the case is heard, compatible with a state governed by the rule of law. A fair trial as due proceedings, compatible with the state governed by the rule of law, means envisaging legal safeguards for complying with the principles of rule of law and justice in the adjudication of cases and comprises several elements – interconnected rights, *inter alia*, also the principle of equality of parties and the adversarial principle (*see,*

Judgement by the Constitutional Court of 5 November 2008 in Case No. 2008-04-01, Para 8.2., Judgement of 17 May 2010 in Case No. 2009-93-01, Para 8.3., and Judgement of 30 March 2011 in Case No. 2010-60-01, Para 19). The principle of a state governed by the rule of law requires reviewing of cases in such procedure that would ensure fair and unbiased adjudication thereof (*see Judgement by the Constitutional Court of 9 January 2014 in Case No. 2013-08-01, Para 6).*

Thus, this constitutional provision has both substantive and procedural nature. This means that everyone has the right not only to fair legal proceedings but also to access to court (*see Judgement by the Constitutional Court of 5 March 2002 in Case No. 2001-10-01, Para 2 of the Findings, and Judgement of 17 October 2005 in Case No. 2005-07-01, Para 6).*

The Constitution does not provide directly for cases where the right to a fair trial could be restricted; however, it is not absolute. This right may be restricted insofar it is not substantial deprivation of this right (*see, for example, Judgement by the Constitutional Court of 10 February 2017 in Case No. 2016-06-01, Para 27).*

Hence, a person may not be substantially denied or deprived of the right to a fair trial.

13. The Constitutional Court has concluded that Article 92 of the Constitution does not guarantee to a person the right to have any issue of importance to them decided in a court (*see Judgement by the Constitutional Court of 6 December 2004 in Case No. 2004-14-01, Para 8).* However, the State must ensure effective protection to any person whose rights or lawful interests have been infringed upon. Ensuring a person's right to a fair trial is the most important measure for reaching this aim because the protection of other fundamental rights of a person directly depends on proper provision of this right (*see Judgement by the Constitutional Court of 20 April 2012 in Case No. 2011-16-01, Para 9).*

Also in the proceedings regarding criminally acquired property, the State has the positive obligation to ensure the right to a fair trial in a way to ensure effective protection of rights. Simultaneously, this means the State's obligation to ensure to a person also procedural safeguards for defending their right to property so that the case

would be decided on its merits in the special proceedings by respecting a person's right to a fair trial.

The Constitutional Court must verify whether the procedure, included in the contested provision, in which the rights of persons related to property, referred to in Section 628 of the Criminal Procedure Law, to familiarise themselves with the case materials in proceedings regarding criminally acquired property, ensures to these persons the right to a fair trial. First and foremost, the Constitutional Court will examine whether access to "a court", in the institutional meaning of this word, is ensured to a person.

The first sentence of Article 92 of the Constitution does not require the possibility for a person, in order to defend their infringed rights and lawful interests, to turn only to the institutions of judicial power, referred to in Article 82 of the Constitution. On the basis of the case law of the European Court of Human Rights regarding Article 13 of the Convention, it can be concluded that effective provision of rights protection depends not only on the possibility to turn to court but on the entire general mechanism of supervision and the functioning thereof (*see Judgement by the Constitutional Court of 11 May 2011 in Case No. 2010-55-0106, Para 20.1.*).

If a person related to property does not consent to the decision made by the person directing the proceedings, which is adopted on the basis of the contested provision, they may appeal against the decision in the procedure set out in Chapter 24 of the Criminal Procedure Law, only within the framework of the prosecution office. Legal regulation does not provide for a court's jurisdiction to review this decision made by the person directing the proceedings. Moreover, it should be taken into account that the proceedings regarding criminally acquired property are precisely regulated as to their terms in order to resolve the property issues in due time and effectively. For example, Section 629 (2) of the Criminal Procedure Law sets out that the court hearing should take place within 10 days following the receipt at the court of the decision by the person directing the proceedings. Whereas pursuant to Section 339 (2) of the Criminal Procedure Law, a person related to property may appeal a decision of an investigator or a prosecutor (person directing the proceedings) within 10 days from the day of the receipt of notification regarding the decision taken.

Pursuant to the procedure, established in Section 343 of this law, such complaints are examined within 10 days, with the possibility of extending this term up to 30 days. Thus, a court hearing in proceedings regarding criminally acquired property may take place earlier, before the person related to property has had time to appeal against the decision by the person directing the proceedings in the procedure set out in Chapter 24 of the Criminal Procedure Law. Therefore, such appeal against the decision within the framework of the prosecution office cannot be considered as being effective protection of a person's fundamental rights.

The Constitutional Court has concluded that, in certain areas in Latvia, the prosecution office can be considered as being an effective and accessible legal remedy because the prosecutor's status and role in supervising legality ensures independent and unbiased examination of complaints, pursuant to Article 13 of the Convention (*see, for example, Judgement by the Constitutional Court of 10 February 2017 in Case No. 2016-06-01, Para 31.2.1.*). However, at the same time, the Constitutional Court has acknowledged: the objective neutrality of a court means that any reasonable doubts among the participants in the case and society regarding the court's objectivity must be excluded. Moreover, even semblance might be important, therefore, even seeming biasedness must be prevented. These findings are equally applicable also to the prosecution office as an institution of the judicial power (*see Judgement by the Constitutional Court of 14 May 2013 in Case No. 2012-13-01, Para 13.2. and Para 14.2.3., and Judgement of 29 April 2016 in Case No. 2015-19-01, Para 16.1.*).

The Applicant and the Ombudsman note that a prosecutor, reviewing persons' right to familiarise themselves with the case materials in the proceedings regarding criminally acquired property, is unable to provide unbiased and independent assessment (*see Case Materials, Vol. 2, pp. 11–12 and p. 72*). Whereas the *Saeima* and several of the persons summoned in the case point out that the decision on recognising property as being criminally acquired is made by the court, therefore no circumstances are present that would allow contesting the prosecutor's unbiasedness (*see Case Materials, Vol. 1, p. 143, and Vol. 2., p. 18*).

The person directing the proceedings who has made the decision to initiate the proceedings regarding criminally acquired property is the one who has the best knowledge of the materials in the case, therefore, the legislator has entrusted to them the adoption of this decision and to decide on a person's right to familiarise oneself with the case materials in the proceedings regarding criminally acquired property. However, simultaneously, the person directing the proceedings regarding criminally acquired property acts as one of the participants in the case, therefore, valid doubts may arise regarding the unbiasedness and independence of the decision made by this person.

Since the decision on permission to familiarise oneself with the case materials in proceedings regarding criminally acquired property affects a person's fundamental rights, all risks related to the validity of this decision and any doubts regarding the independence and unbiasedness of the person adopting the final decision must be precluded.

The Constitutional Court recognises that a prosecutor may not be considered as being an independent institution of judicial power that would comply with the designation "tribunal", being at the same time one of the participants in the case and the one who adopts the final decision on the scope, in which a person is ensured the right to familiarise oneself with the case materials in proceedings regarding criminally acquired property.

Thus, the decision regarding how the persons referred to in Section 628 of the Criminal Procedure Law familiarise themselves with the case materials in proceedings regarding criminally acquired property is not made by "a tribunal" in the institutional meaning thereof.

14. The Constitutional Court must also examine whether in the procedure of adopting the decision on familiarising oneself with the case materials in proceedings regarding criminally acquired property, defined in the contested provision, a person's procedural rights, complying with the first sentence of Article 92 of the Constitution, are effectively ensured.

14.1. The Applicant holds that the contested provision violates the principle of equal opportunities of parties, falling within the scope of the first sentence of Article 92 of the Constitution. Allegedly, in the proceedings regarding criminally acquired property, persons' right to familiarise themselves with case materials and make statements regarding them is restricted, thus, they do not have the possibility to influence, equally and effectively, the decision on criminally acquired property on its merits (*see Case Materials, Vol. 1, pp. 5 – 7, and p. 13*).

The *Saeima* and the persons summoned in the case, in turn, underscore that the person directing the proceedings is the one who is able to make the decision and assess persons' right to familiarise themselves with the case materials. Namely, in this procedure, the person directing the proceedings has the right to make various decisions related to the course of criminal proceedings. Moreover, the person directing the proceedings is informed about all basic aspects of the criminal proceeding, thus, can take the best decision on how to balance the particular interests (*see Additional explanations by the Saeima, Vol. 2., p. 64. Opinion of the Prosecutor General's Office, Vol. 2, p. 13, and Opinion of the Ministry of Justice, Vol. 2, p. 18*).

In the present case, it is not essential to discern the extent to which, the person directing the proceedings, pursuant to the contested provision, has been granted the discretion to assess a person's right to familiarise themselves with the materials in the case but rather whether the person directing the proceedings, in assessing the balancing of interests, can implement the safeguards of the right to a fair trial if the decisions adopted by this person are not re-examined by a court.

Pursuant to Section 27 of the Criminal Procedure Law, the person directing the proceedings is leading the criminal proceedings: organises the progress of criminal proceedings and the record-keeping therein, takes decisions on the direction of the criminal proceedings, implements State authorisation in the relevant step or stage of the criminal proceedings by oneself or by involving another official, requests that each person fulfils the criminal procedural duty and complies with the procedural order, ensures the opportunity for persons involved in criminal proceedings to exercise their rights, specified in law.

In the proceedings regarding criminally acquired property, in turn, this persons directing the proceedings is the one who, during the pre-trial criminal proceedings, takes the decision on initiating proceedings regarding criminally acquired property. Namely, in the presence of conditions, referred to in Section 626 of the Criminal Procedure Law, decides to separate from the criminal case materials related to criminally acquired property. Simultaneously, the same person directing the proceedings is the one who, in the proceedings regarding criminally acquired property, decides on the rights of persons related to property, referred to in Section 628 of the Criminal Procedure Law, to familiarise themselves with case materials. Likewise, pursuant to Section 629 of the Criminal Procedure Law, he is one of the persons who participate in the court hearing as a participant in the case. Thus, the Criminal Procedure Law grants to the person directing the proceedings extensive and diverse authorisation both in the criminal proceedings and in the proceedings regarding criminally acquired property.

The principle of equal opportunities of the parties, derived from the concept of a fair trial, provides that, in the course of hearing the case, the rights of participants in the proceedings should be fairly balanced, i.e., adequate possibilities to use procedural measures should be ensured to each participant in the proceedings and none of the participants in the proceedings may be unfoundedly placed in a more unfavourable situation compared to other participants in the proceedings (*see, for example, Judgement by the Constitutional Court of 16 April 2015 in Case No. 2014-13-01, Para 20.1.*). The Constitutional Court, in interpreting Article 92 of the Constitution, has underscored that the principle of equal opportunities of the parties in criminal proceedings, on the one hand, envisages that the possibility to present the facts of the case should be ensured to all involved parties and, on the other hand, prohibits from granting substantial advantages to any of the parties, compared to the opponent (*compare, see Judgement by the Constitutional Court of 27 June 2003 in Case No. 2003-03-01, Para 6 of the Findings*).

The European Court of Human Rights also has recognised in its case law that the principle of equality of parties is “a fundamental aspect of the right to a fair trial” (*see Judgement by the European Court of Human Rights of 16 February 2000 in Case*

“Rowe and Davis v. the United Kingdom”, Application No. 28901/95, Para 60). The European Court of Human Rights has reiterated consistently in its case law: the equality of parties means that “each party must be afforded a reasonable opportunity to present its case [...] under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.” (*Judgement by the European Court of Human Rights of 27 October 1993 in Case “Dombo Beeher BV v. the Netherlands”*, Application No. 14448/88, Para 33).

The right to equality of parties in criminal cases means that each party should have the right to have knowledge of and comment on the observations filed and the evidence adduced by the other party. However, whatever method is chosen, it should ensure that this requirement is met in the national legal system, it should ensure that the other party will be aware of the observations that have been filed and will be given a real opportunity to comment thereon (*see Judgement by the European Court of Human Rights of 28 August 1991 in Case “Brandstetter v. Austria”*, Applications No. 11170/84, No. 12876/87, and No. 13468/87, Para 67).

The principle of equivalence of procedural authorisations is defined in Section 18 of the Criminal Procedure Law. Summoned person S. Kaija underscores that this principle imposes the obligation on the respective participant in the proceedings to ensure to persons equivalent rights and the possibilities to exercise them. The Constitutional Court consents that the principle of equivalence of procedural authorisations is one of the fundamental principles of criminal procedure, which operates throughout the entire criminal proceedings, i.e., both during the pre-trial stage and during the court proceedings (*see Case Materials, Vol. 2, p. 45*).

In the special criminal proceedings regarding criminally acquired property, compliance with the principle of equal opportunities of parties must be ensured in a democratic state governed by the rule of law, which, *inter alia*, is linked to a person’s right to familiarise oneself with the case materials in the proceedings regarding criminally acquired property.

14.2. The Applicant holds that at the time when, usually, criminal proceedings regarding criminally acquired property are initiated, the amount of collected evidence is such that, essentially, excludes the risk that familiarising oneself with the case

materials could hinder effective course of the criminal proceedings. Moreover, protection of the materials in the case regarding criminally acquired property could be ensured as well by warning in writing the persons related to property about the prohibition to disclose information obtained in the pre-trial criminal proceedings (*see Case Materials, Vol. 1, p. 16 and pp. 18.–19*).

Whereas the *Saeima* underscores that the person directing the proceedings must take into consideration that the separated materials could comprise information that might infringe upon other persons' right or endanger the further course of criminal proceedings (*see Case Materials, Vol. 1, p. 143*).

The society's interest in the effective course of the criminal proceedings and the need to ensure other persons' rights should be ensured in the proceedings regarding criminally acquired property. This conforms with the purpose of criminal procedure, enshrined in Section 1 of the Criminal Procedure Law. Therefore, in assessing a person's right to familiarise oneself with the case materials in the proceedings regarding criminally acquired property, it is essential to take into account the need to protect the secret of investigation.

Case materials in the proceedings regarding criminally acquired property may be separated from the materials in the criminal proceedings in their pre-trial stage. The criminal proceedings are still ongoing, and disclosing the content of the materials might have an adverse impact on the course of the criminal proceedings, therefore also the case materials in proceedings regarding criminally acquired property should be recognised as being a secret of investigation. Although property issues are decided on also in the proceedings regarding criminally acquired property, presentation of evidence in full scope at the time when criminal proceedings have not been completed yet might jeopardise the public interest in disclosing a criminal offence and identifying the guilty person, as well as infringe upon the security and interests of the involved persons.

The Constitutional Court, referring to the case law of the European Court of Human Rights, has noted already before that the need to ensure an effective course of the criminal proceedings might be the grounds for keeping as secret a part of the information collected during the criminal proceedings. Thus, the possibility that the

person, with respect to whom criminal proceedings had been initiated, might hide other evidence or hinder investigation, would be prevented (*see Decision by the Constitutional Court of 3 April 2014 on Terminating Legal Proceedings in Case No. 2013-11-01, Para 13*).

The Department of Administrative Cases of the Supreme Court Senate, in interpreting the concept of the secret of investigation, referred to in Section 375 (1) of the Criminal Procedure Law, has noted that it should be understood not as general prohibition in the pre-trial proceedings to issue materials in the criminal case to persons, not referred to in this provision, but is directed at reaching the purpose of the criminal procedure. However, not issuing such materials in criminal proceedings cannot be an end in itself (*see Judgement by the Department of Administrative Cases of the Supreme Court Senate of 6 November 2008 No. SKA-705/2008*). In each case, the person directing the proceedings must assess carefully the rights of the person related to property to familiarise oneself with case materials in the proceedings regarding criminally acquired property and must substantiate this decision by aligning it with the interests of the particular criminal proceedings and successful course thereof. The person directing the proceedings must assess the person's request and make a valid and reasoned decision – general reference to the secret of investigation cannot be regarded as being sufficient.

Case materials in the proceedings regarding criminally acquired property comprise materials, which are also included in the materials of the primary criminal case. Thus, the case materials in the proceedings regarding criminally acquired property comprise evidence and information gathered during the pre-trial criminal proceedings (*see Opinion of the Ministry of Justice in Case Materials, Vol. 2, p. 16*). The Constitutional Court consents that the interest in successful course of pre-trial criminal proceedings requires ensuring that materials, comprising such information, would not be fully accessible to all persons involved in the criminal proceedings. Untimely presentation of evidence might jeopardise ensuring other persons' right to a fair trial, as well as the right to inviolability of private life of other persons, involved in the criminal proceedings, because evidence would be disseminated before having been assessed by the court (*see, for example, the Saeima's written reply in Case*

Materials, Vol. 1, p. 142, Opinion of the Ministry of Justice, Case Materials, Vol. 2, p. 16). Summoned person J. Stukāns also underscored that, although the persons related to property no longer can influence this evidence, presentation therefore before completion of criminal proceedings might jeopardise the interests of other persons, involved in criminal proceedings, and public interests. Disclosing the content of the respective materials might hinder detection of the guilty persons, acquisition and preservation of further evidence (*see Case Materials, Vol. 2, p. 40*).

Disclosure and presentation of materials in the case regarding criminally acquired property without prior assessment would be contrary to other persons' right to a fair trial and might jeopardise successful course of the pre-trial criminal proceedings. The person directing the proceedings must ensure protection for the secret of investigation not only in deciding on a person's right to familiarise oneself with the case materials but also when this permission is granted, by warning the persons, on the basis of Section 396 (1) of the Criminal Procedure Law, about criminal liability for disclosing this information pursuant to Section 304 of this law.

Thus, to ensure that the purpose of criminal procedure is reached, protection for the secret of investigation must be ensured in the proceedings regarding criminally acquired property. It is necessary in order not to jeopardise the course of criminal proceedings and ensure to other persons effective exercise of fundamental rights.

15. In the proceedings regarding criminally acquired property, such balancing of the rights and interests of participants in the proceedings should be ensured that would reach the purpose of criminal procedure. In assessing persons' right to familiarise themselves with the case materials in proceedings regarding criminally acquired property, balance must be reached between the persons' interest in ensuring the principle of equal opportunities of the parties and protecting the secret of investigation, which is public interest in effective course of criminal proceedings.

15.1. The *Saeima* notes that proportionate balance between various interests is ensured in proceedings regarding criminally acquired property. Allegedly, such balance, which simultaneously ensures both compliance with the principle of equal

opportunities of parties and effective course of criminal proceedings, is ensured by issuing to persons the decision on initiating the proceedings regarding criminally acquired property. Moreover, in these proceedings, equal opportunities to exercise their rights is ensured to persons in accordance with Section 629 (4) of the Criminal Procedure Law (*see Case Materials, Vol. 1, p. 143*). The Applicant, however, holds that the decision to initiate the proceedings regarding criminally acquired property does not always reflect all circumstances that are important in the case, being only interpretation of the materials in the particular criminal proceedings made by the person directing the proceedings (*see Case Materials, Vol. 1, p. 8*).

Section 628 of the Criminal Procedure Law defines *expressis verbis* the obligation of the person directing the proceedings to issue to the persons related to property a copy of the decision, substantiating the choice to initiate proceedings regarding criminally acquired property. The decision by the person directing the proceedings to initiate the proceedings regarding criminally acquired property comprises not only enumeration of the separated materials but also a detailed description of information, included in these materials, and substantiation, which is the grounds for assuming that the origins of the respective property are criminal or it is connected to a criminal offence.

The Criminal Procedure Law defines in a detailed and accurate way the content of the decision on initiating the proceedings regarding criminally acquired property. It is also essential that this decision comprises enumeration of the separated case materials. However, the decision by the person directing the proceedings on initiating the proceedings regarding criminally acquired property cannot always be considered sufficient to ensure that a person exercises their equal rights at a court hearing, envisaged in Section 629 (4) of the Criminal Procedure Law.

15.2. The Applicant holds that the contested provision does not envisage clear procedure, in which the person directing the proceedings assesses whether and the scope in which persons related to property may familiarise themselves with the case materials in the proceedings regarding criminally acquired property. Allegedly, the contested provision does not envisage any criteria, hence, the adoption of the decision depends only on the subjective assessment by the person directing the proceedings

and, thus, unfounded advantages for the person directing the proceedings are created (*see Case Materials, Vol. 1, pp. 8 – 9*).

The *Saeima* and the Ministry of Justice, in turn, underscore that it is not necessary to define separate criteria for the adoption of such a decision because the person directing the proceedings conducts individual assessment of each case and the principles that they must comply with already now follow from the Criminal Procedure Law and the legal system in general (*see Case Materials, Vol. 1, p. 142 and Vol. 2, p. 18*).

The criteria that the person directing the proceedings must consider, in deciding on a person's right to familiarise oneself with the case materials in the proceedings regarding criminally acquired property, exist already now in the legal system and, through systemic interpretation of legal provisions, are directly applicable, therefore there is no need to include them repeatedly in the legal regulation.

It follows from Section 1 of the Criminal Procedure Law that the person directing the proceedings is obliged to ensure effective application of the provisions of the Criminal Procedure Law and just regulation of criminal law relations without unjustified interference into a person's life. This should be taken into account also in deciding on permission to familiarise oneself with the case materials in the proceedings regarding criminally acquired property, as well as assessing the scope of this permission. One of the principles of criminal procedure, i.e., guaranteeing of human rights, has been enshrined in Section 12 of the Criminal Procedure Law. The obligation of the person directing the proceedings to adopt such a decision that would ensure respect for human rights in the proceedings follows from this principle.

Thus, already now, the person directing the proceedings, in deciding on a person's right to familiarise oneself with the case materials in the proceedings regarding criminally acquired property, must be taken into account both the general valid legal principles and the legal regulation, established by the legislator.

15.3. In deciding on familiarising oneself with the case materials in the proceedings regarding criminally acquired property, in each particular case, the interests of persons involved in the case must be aligned, taking into consideration

the purpose of criminal procedure. However, the secret of investigation, envisaged in the contested provision, or the need to protect other persons' rights cannot serve as the grounds for not ensuring the principle of equal opportunities for parties in the proceedings regarding criminally acquired property, namely, the right to prepare properly for the examination of the case and the right to be heard.

The Constitutional Court recognises that the person directing the proceedings is the subject who ensures timely and effective course of the special proceedings. In view of the competence of the person directing the proceedings, they have been granted broad discretion in order to make individual assessment in each case, whether the respective materials should be presented to a person, and, at the same time, take into account the need to protect the secret of investigation. Moreover, since such a decision by the person directing the proceedings affects the fundamental rights of a participant in the case, the person directing proceedings must provide special substantiation for this decision.

However, a person directing the proceedings who simultaneously is also one of the parties in the proceedings regarding criminally obtained property, in deciding on familiarisation with materials in the case regarding criminally acquired property, causes valid doubts regarding unbiasedness and independence of this decision if such a decision is not re-examined by a court in accordance with the principle of a fair trial. A fair court's ruling on the merits can be achieved only in such proceedings, in which the principle of equal opportunities for the parties is ensured.

Section 17 of the Criminal Procedure Law, in turn, includes the principle of the separation of procedural functions, which, at the same time, imposes an obligation on each official involved in criminal proceedings to control the restrictions on human rights in the respective stage of criminal proceedings. In the proceedings regarding criminally acquired property, the decision on merits is made by a court, thus, the court, in deciding on the case on its merits, should ensure the function of controlling the restrictions on human rights. At the same time, this means that the court must also decide whether, in the proceedings regarding criminally acquired property, proportionate balance between persons' interests had been found, respecting the fundamental rights of persons. This conclusion is substantiated also by systemic

interpretation, i.e. interpretation of the contested provision in conjunction with the title of Section 629 of the Criminal Procedure Law: “Court Proceedings Regarding Criminally Acquired Property”, and the meaning of the proceedings regarding criminally acquired property within the system of the Criminal Procedure Law. It should be taken into account that, in examining a matter on its merits in proceedings regarding criminally acquired property, the court must verify carefully whether the proceedings regarding criminally acquired property had been initiated in accordance with the requirements set in the Criminal Procedure Law (*see, for example, Decision by the Department of Criminal Cases of the Supreme Court Senate of 6 March 2008 in Case No. SKK – 93/2008 and Decision of 19 February 2009 in Case No. SKK–2/2009*).

The legislator should envisage such procedure that would ensure the principle of equal opportunities for the parties, providing for the possibility for the court to review the validity and legality of the decision made by the person directing the proceedings on a person’s right to familiarise themselves with case materials in the proceedings regarding criminally acquired property, thus ensuring to a person effective protection of the right to property. The court is exactly the subject who, in examining the matter on its merits, at the same time should fulfil the function of controlling whether the fundamental rights of a person related to property have been respected. Moreover, the court, in examining the case on its merits, anyway, familiarises itself with all case materials in the proceedings regarding criminally acquired property.

Thus, the contested provision, to the extent it does ensure compliance with the principle of equal opportunities for the parties, is incompatible with the first sentence of Article 92 of the Constitution.

16. Pursuant to Section 32 (3) of the Constitutional Court Law, a legal provision that has been recognised by the Constitutional Court as being incompatible with a superior legal provision must be considered as being void from the date when the Constitutional Court’s judgement has been published, unless the Constitutional Court has provided otherwise. The aforementioned provision of the Constitutional

Court Law grants to the Constitutional Court broad discretion in deciding on the date as of which a legal provision that has been recognised as being incompatible with a superior legal provision becomes void.

Thus, the Constitutional Court must consider the date, as of which the contested provision should be recognised as being void.

16.1. The Applicant requests recognising the contested provision as being incompatible with the first sentence of 19 May 2015, i.e., as of a past date – when the person directing the proceedings decided to initiate proceedings regarding criminally acquired property.

The Constitutional Court takes into account also the fact that the present case has been initiated on the basis of a constitutional complaint. The Constitutional Court's task is to prevent, to the extent possible, an infringement on a person's fundamental rights (*see, for example, Judgement by the Constitutional Court of 16 December 2005 in Case No. 2005-12-0103, Para 25*). By the decision made by the Senior Prosecutor of the Criminal Justice Department of the Prosecutor General's Office on 13 July 2015, the decision of the person directing the proceedings, rejecting the Applicant's request for the permission to familiarise oneself with the case materials in the proceedings regarding criminally acquired property, had been recognised as being legal and valid. If the Applicant did not have the possibility to protect its rights then, in the particular case, doubts regarding the unbiasedness and independence of that person directing the proceedings who made the decision on the person's right to familiarise oneself with the case materials in the proceedings regarding criminally acquired property would not be eliminated.

To ensure protection for the rights of the limited liability company "Cell Finance" and give it the possibility to submit an application to a court of general jurisdiction in connection with newly discovered circumstances, pursuant to Section 629 (5) of the Criminal Procedure Law, insofar a court may not re-examine the legality and validity of the decision by the person directing the proceedings on a person's right to familiarise oneself with the case materials in the proceedings regarding criminally acquired property, ensuring to the person effective protection

for the right to property, should be recognised as being void as of the moment when the infringement on fundamental rights occurred.

16.2. In exercising its rights granted to it in Section 32 (3) of the Constitutional Court Law, the Constitutional Court must ensure, to the extent possible, that the situation that might develop from the date when the contested provision has been recognised as being void until the legislator has replaced it by a new provision, would not cause infringements on persons' fundamental rights, guaranteed in the Constitution, as well as would not significantly harm the interests of the State or society (*see Judgement by the Constitutional Court of 16 December 2005 in Case No. 2005-12-0103, Para 25, and Judgement of 31 January 2013 in Case No. 2012-09-01, Para 16.1.*). Recognition of the contested provision as being void may not cause new infringement of the fundamental rights, established in the Constitution (*see Judgement by the Constitutional Court of 29 April 2016 in Case No. 2015-19-01, Para 17.*).

The Constitutional Court notes that the proceedings regarding criminally acquired property are aimed at timely and effective resolution of property matters in criminal proceedings. Within criminal proceedings, the fundamental rights of those persons who, in the proceedings regarding criminally acquired property, want to familiarise themselves with the case materials, must be protected until the time when the legislator adopts new regulation, compatible with the Constitution, pursuant to which these persons related to property, referred to in Section 628 of the Criminal Procedure Law, could exercise their right to familiarise themselves with the case materials in the proceedings regarding criminally acquired property.

The Constitutional Court has concluded: if a person's fundamental rights, established in the Constitution, have been infringed upon then this person has the right to turn to court, by referring directly to the respective constitutional provision (*see Judgement by the Constitutional Court of 5 December 2001 in Case No. 2001-07-0103, the Findings*). In the present case, the Constitutional Court draws attention to the fact that, until the adoption of new legal regulation, the rights of persons related to property, referred to in Section 628 of the Criminal Procedure Law, to request the court to re-examine the decision by the person directing the proceedings on

permission to familiarise themselves with case materials in the proceedings regarding criminally acquired property, must be ensured by applying directly Article 92 of the Constitution and the findings of this Judgement.

The Substantive Part

On the Basis of Sections 30–32 of the Constitutional Court Law, the Constitutional Court

h e l d :

1. To recognise Section 629 (5) of the Criminal Procedure Law, insofar a court may not re-examine the legality and validity of the decision by the person directing the proceedings on the right to familiarise oneself with case materials in the proceedings regarding criminally acquired property, as being incompatible with the first sentence of Article 92 of the Constitution of the Republic of Latvia.

2. To recognise Section 629 (5) of the Criminal Procedure Law, insofar a court may not re-examine the legality and validity of the decision by the person directing the proceedings on the right to familiarise oneself with case materials in the proceedings regarding criminally acquired property, with respect to the limited liability company “Cell Finance” as being incompatible with the first sentence of Article 92 of the Constitution of the Republic of Latvia as of the moment when the infringement on fundamental rights occurred.

The judgement is final and not subject to appeal.

The judgement enters into force on the date of its publication.

Chairperson of the court hearing

A. Laviņš