THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

JUDGEMENT

on Behalf of the Republic of Latvia

in Case No. 2015-11-03

2 March 2016, Riga

The Constitutional Court of the Republic of Latvia, comprised of: chairman of the court sitting Aldis Laviņš, Justices Kaspars Balodis, Gunārs Kusiņš, Uldis Ķinis, Sanita Osipova and Ineta Ziemele,

having regard to a constitutional compliant submitted by the limited liability company "TAVEX",

with the participation of authorised representatives of the submitter of constitutional complaint – sworn advocates Lauris Liepa and Matīss Šķiņķis, and

Jānis Pleps, the authorised representative of the institution, which issued the contested act - the Bank of Latvia,

with Elīna Kursiša as the secretary of the court hearing,

on the basis of Article 85 of the Satversme of the Republic of Latvia, Para 3 of Section 16, Para 11 of Section 17(1), as well as Section 19^2 and Section 28 of the Constitutional Court Law,

on 12 and 19 January, as well as on 1 February 2016 in Riga examined at an open court hearing the case

"On Compliance of Para 19 and Para 20 of the Bank of Latvia Regulation No. 141 of 15 September 2014 "Requirements Regarding Prevention of Money Laundering and Financing of Terrorism in Buying and

Selling Foreign Currency Cash" with Article 1 and Article 64, as well as the First Sentence in Article 91 of the Satversme of the Republic of Latvia."

The Facts

1. On 17 July 2008 the Saeima adopted the law On the Prevention of Money Laundering and Terrorism Financing (hereinafter Law on Prevention), which entered into force on 13 August 2008.

Para 13 of Section 1 of Law on Prevention provides that a supervisory and control authority is a Sate authority or professional organisation carrying out activities related to supervision and control of compliance with the requirements set in this Law. Section 47 of Law on Prevention, in turn, regulates the rights of supervisory and control authorities.

Section 32 of the law of 13 August 2014 "Amendments to the Law On the Prevention of Money Laundering and Terrorism Financing" (hereinafter – Amendments to Law on Prevention) added to Section 47 of Law on Prevention the third part, worded as follows: "The Bank of Latvia shall define for capital companies, which are engaged in buying and selling foreign currency cash, binding requirements for fulfilling the obligations defined in this Law with regard to establishing a system of internal control, identifying the true beneficiaries and verifying, whether the person, who has been indicated as the true beneficiary, is indeed the true beneficiary, as well as with regard to supervising transactions made by clients and having knowledge of clients' business activities." These amendments entered into force on 16 September 2014.

The Bank of Latvia, pursuant to Section 47(3) of Law on Prevention, on 15 September 2014 issued Regulation No. 141 "Requirements Regarding Prevention of Money Laundering and Financing of Terrorism in Buying and Selling Foreign Currency Cash" (hereinafter – the Bank of Latvia Regulation No. 141). This Regulation entered into force on 16 September 2014. Para 19 and Para 20 of it (hereinafter – the contested norms) provide:

"19. If the transaction is not unusual or suspicious and business relations are not initiated, but the sum of the transaction is equal to 2 000 – 7 999.99 euro, the capital company shall identify the client or the true beneficiary as follows:

19.1. shall make copies of the client's identity documents;
19.2. shall verify, whether a client's identity documents are authentic and valid;
19.3. shall immediately inform a competent law enforcement institution, if substantiated doubts arise regarding forgery of the submitted identity document.
20. If the total sum of transactions conducted by one client referred to in Para 19 within one month reaches the sum referred to in Sub-paragraph 13.1 of this Regulation [8000 euro], the capital company shall identify this client in accordance with the procedure referred to in Para 18 of this Regulation."

2. The applicant – **limited liability company "TAVEX"** (hereinafter – the Applicant) – requests the Constitutional Court to recognise the contested norms as being incompatible with Article 1 and Article 64, as well as the first sentence of Article 91 of the Satversme of the Republic of Latvia (hereinafter – the Satversme) and invalid as of the date of adoption thereof.

The Applicant is a capital company, which as part of its business activities is engaged in buying and selling foreign currency cash (hereinafter also – trading cash). Allegedly, pursuant to the valid regulatory enactments, this service is provided only by capital companies, which have received a licence from the Bank of Latvia, and credit institutions as one kind of financial services. The requirements of Law on Prevention are said to apply to both groups of subjects of law referred to above.

It is said to follow from Section 11(2) of Law on Prevention and Sub-para 8.2.4 and Sub-para 8.6 of the Cabinet Regulation of 22 December 2008 No. 1071 "Regulation on the List of Indications of Suspicious Transactions and on the Procedure for Reporting on Suspicious or Unusual Transactions" (hereinafter – Regulation No. 1071) that capital companies that are trading in cash and credit institutions have the obligation to identify the client (credit institutions – a client,

who does not hold an account) in all cases of trading cash in the amount equal to 8 000 euro or more.

The contested norms, which had been issued on the basis of authorisation included in Section 47(3) of Law on Prevention, are said to apply only to capital companies engaged in trading cash, but do not apply to credit institutions, which provide identical services.

On 16 December 2014 the Bank of Latvia approved the regulation on internal control for preventing money laundering and financing of terrorism adopted by the Applicant and recognised it as being compliant with legal requirements.

In assessing the impact of the contested norm upon trading cash, the Applicant had observed that during the first two months of 2015 87 clients had refused to conduct transactions to trade cash with the Applicant, indicating as one of the reasons their unwillingness to be identified. Whereas when conducting such transactions within the amounts defined by the contested norms at credit institutions, such identification is not performed.

The compliance of the contested norms with the principle of legal equality included in the first sentence of Section 91 of the Satversme should be examined in interconnection with the restriction upon the right to engage in commercial activities that falls within the scope of the first sentence of Article 105 of the Satversme.

Capital companies, engaged in trading cash, and credit institutions are said to be in similar and according to particular criteria comparable circumstances. First, both groups of persons referred to conduct their commercial activities as capital companies. Second, they are said to provide the same kind of service and to be participants of the relevant geographical market of the relevant type of services and of the same particular goods in the meaning of Section 1 of the Competition Law. Third, these two comparable groups are to be considered as being competitors; moreover, they conduct their commercial activities in close proximity to one another. Fourth, the Competition Council has pointed to the need to ensure similar legal regulation for both these groups.

Before the contested norms entered into force, the requirements regarding identification of the client and the true beneficiary, when trading cash, had been the same for credit institutions and for capital companies engaged in trading cash. Whereas the contested norms impose an obligation to identify the client or the true beneficiary upon capital companies engaged in trading cash in such cases, where the credit institutions do not have this obligation. Thus, it is alleged that the contested norms do not ensure equal rights to all persons, who are in similar and comparable circumstances.

The legitimate aim of the restrictions upon fundamental rights established in Article 105 of the Satversme and the aim of the differential treatment are to be differentiated between, with regard to trading cash the contested norms had been adopted in view of the need to protect public security. The contested norms had been adopted also to ensure compliance of legal regulation with the Report of 5 July 2012 by the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and Financing of Terrorism (hereinafter – MONEYVAL) on Latvia's system for preventing and combatting money laundering and financing of terrorism (hereinafter – the Report) and recommendations included therein.

Whereas with regard to the legitimate aim of differential treatment the Applicant notes that such does not exist. MONEYVAL Report is said to comprise only a general recommendation to ensure that the Bank of Latvia defines clear requirements with regard to identification of the client and the true beneficiary also in such cases, where a transaction as to its scope does not amount to the status of unusual or suspicious transactions. Therefore, allegedly, there are no objective and publicly recognised grounds to define stricter requirements regarding identifying the client and the true beneficiary for capital companies engaged in trading cash compared to credit institutions.

If the contested norms lack a legitimate aim, then it should be verified, whether, in establishing differential treatment, the principle of proportionality had been complied with. If it were recognised that the differential treatment, established by the contested norms, nevertheless, had a legitimate aim, then the

measures chosen by the Bank of Latvia are said to be inappropriate for reaching it in a situation, where persons, who are unwilling to be identified, can avoid being identified.

The preparatory materials for drafting the contested norms are not publicly accessible. However, the answers provided by the Ministry of Finance and the Bank of Latvia to the application submitted by "Association of Non-Bank Financial Service Providers" (hereinafter also – Non-Bank Association) containing a proposal to amend the contested norms do not lead to the conclusion that the Bank of Latvia had considered alternative measures or, in general, assessed, whether the contested norms were not contradictory to the first sentence of Article 91 of the Satversme. Hence, the differential treatment established by the contested norms is said to be unnecessary for reaching even a hypothetical legitimate aim.

The contested norms cause a situation, where potential clients refuses to conduct a transaction of trading cash, because they do not have personal identity documents with him or is unwilling to be identified. Allegedly, society gains nothing from the differential treatment, since persons are able to conduct the respective transactions at credit institutions. The differential treatment is said to be particularly incommensurate in a situation, where branches of capital companies engaged in trading cash and branches of credit institutions operate side by side.

Compliance of the contested norms with Article 1 and Article 64 of the Satversme should be examined in interconnection. The Bank of Latvia cannot be considered to be a democratically legitimised institution, since it is not linked to the will of the people. In view of the current textual regulation of the Satversme, which does not define *expressis verbis* the rights of the Bank of Latvia to issue external regulatory enactments, only enforcement of regulatory enactments, planning and other tasks could be delegated to it. Likewise, it is contended that the principle of a democratic state governed by the rule of law does not allow institutions of public administration to issue external regulatory enactments. Allegedly, neither do such right follows from the Satversme in substantial understanding of it, solely because a respective general constitutional tradition,

moreover, recognised by the Constitutional Court, does not exist. A tradition like this cannot be established by a newly adopted law. It can be only identified and accepted *post factum.* Reasonable doubts about the rights of the Bank of Latvia to adopt external regulatory enactments are said to follow also from Section 9(1) of the law On Official Publications and Legal Information, which does not provide for such type of external regulatory enactments as "Regulation of the Bank of Latvia". Thus, until now the Bank of Latvia, by issuing external regulatory enactments, is said to have acted *ultra vires*.

Even if it were hypothetically presumed that the Bank of Latvia had the right to issue external regulatory enactments, it had exceeded the limits of authorisation granted by the legislator. Moreover, the legislator even had not had the right to authorise another subject of law to issue such norms, which, pursuant to "theory of materiality", defined in the case law of the Constitutional Court, are solely within the Saeima's jurisdiction. The authorisation included in Section 47(3) of Law on Prevention is said to allow issuing only of such legal norms that would establish the procedure for performing obligations referred to in the authorisation, i.e., norms of procedural nature. Whereas the contested norms are to be recognised as norms of substantive law. Moreover, Law on Prevention and Regulation No.1071 exhaustively point to those cases, when the client or the true beneficiary should be identified. If this list needs to be expanded, then only the legislator has the competence to do so. The contested norms are said to comprise such indicators of legal constituent elements, which are not allowed by Law on Prevention.

In view of the abovementioned, the contested norms should be recognised as being incompatible as of the moment when the violation of Applicant's fundamental rights occurred.

At the court sitting the Applicant's authorised representative Matīss Šķiņķis repeated the arguments mentioned in the application and pointed, in particular, to the documents proving transactions of trading cash annexed to the case materials, which show that in a number of credit institutions it is possible to conduct

transactions, the amount of which is equivalent to 2 000–7 999.99 euro, without identification.

3. The institution, which issued the contested act, – the Bank of Latvia – holds that the contested norms comply with Article 1 and Article 64, as well as the first sentence in Article 91 of the Satversme.

It had been noted in MONEYVAL Report that Recommendations No. 37 of 13 May 2009 by the Bank of Latvia "Recommendations on establishing a system of internal control to prevent money laundering and financing of terrorism to capital companies, who have received a licence from the Bank of Latvia for buying and selling foreign currency cash" (hereinafter – the Bank of Latvia Recommendations No. 37) were not enough to ensure due supervision and control of such capital companies, which engaged in trading cash, therefore the competence of the Bank of Latvia in this field had to be expanded, granting to it the right to issue legally binding guidelines, or to entrust supervision and control of this field to the Financial and Capital Market Commission (hereinafter also – FCMC).

In view of observations made in the Report, it had been concluded in the Action Plan for Improving the System for Preventing Money Laundering and Financing of Terrorism, approved at the sitting of the Council for the Development of Financial Sector of 28 March 2013, that the Bank of Latvia should lay down stricter requirements regarding client scrutiny in capital companies engaged in trading cash. In accordance with the guidelines established by the Action Plan referred to above, Amendments to Law on Prevention had been adopted.

The annotation to the respective draft law had noted that Law on Prevention defined only the minimum requirements for preventing money laundering and financing of terrorism, therefore the Bank of Latvia had to establish more detailed requirements for the capital companies referred to, appropriate for the type of activities they engage in.

Allegedly, annotation to the Bank of Latvia Regulation No. 141 shows that in the elaboration of the contested norms the risks that are linked to the service provided by capital companies engaged in trading cash had been assessed. The Bank of Latvia had sent this draft regulation to ten major capital companies of the sector for approval. The Non-Bank Association had provided an expanded response, however, those capital companies, which were not members of this Association, had not expressed objections to this draft regulation. The Bank of Latvia had assessed the arguments provided and thus ensured to the addressees of the contested norms a possibility to participate in the process of elaborating the regulation.

It had been noted in MONEYVAL Report that capital companies conducted the supervision of only unusual and suspicious transactions and the clients performing such transactions, but did not supervise other clients and transactions conducted by them, even though they constituted the largest share of turn-over for these capital companies.

Before the contested norms were adopted, the valid Bank of Latvia Recommendations No. 37 had provided that capital companies themselves, pursuant to Law on Prevention, should assess possible risks in their operations and implement adequate measures for preventing thereof. The Bank of Latvia, upon implementing control measures, had concluded that capital companies, which were engaged in trading cash, mostly identified and registered only unusual transactions, the amount of which exceeded the threshold value defined in regulatory enactments – 8 000 euro, but did not register suspicious transactions that were below it. Likewise, avoiding identification of unusual transactions had been established, for example, by splitting one transaction into several transactions, conducting similar transactions in identical amounts within a short period of time. In addition to that, after the threshold value of the amount of a suspicious transaction was increased in Law on Prevention [from 7 100 *euro* (5 000 lats) to 8 000 *euro*], which was done with the introduction of *euro*, it was established that the number of such transactions, the amount of which exceeded the previous, but did not exceed the new threshold value, had increased. Thus,

prior adoption of the contested norms, a situation had evolved in practice, where the client supervision was done formally and capital companies, ignoring the purpose of Law on Prevention, did not identify and had no knowledge of their clients.

In adopting the contested norms a fact, established by control measures, had also been taken into account, i.e., that capital companies engaged in trading cash had not seen to it that their employees would have knowledge about regulatory enactments that regulate money laundering. The regulation included in the contested norms is said to be unambiguous and applicable without requiring substantial financial and human resources. Whereas in choosing the threshold value – 2 000 *euro*, the amounts of transactions noticed in the framework of control measures and the regularity of transactions corresponding to them had been taken into considerations. If the regulation established by the contested norms is in force, those persons, who want to avoid identification, have to conduct a number of transactions in various capital companies, and, thus, the possibility to detect such suspicious activities has significantly increased.

In deciding on the issue of admissibility of special authorisation, the Constitutional Court, allegedly, has consistently allowed that not only the Cabinet of Ministers, but also other state institutions have the right to issue external regulatory enactments within the framework of administrative activities. The legislator has established the Bank of Latvia as an independent, autonomous institution, which oversees a separate field of public administration, which has been removed from the competence of the Cabinet of Ministers. To ensure due governance of the respective field, the Bank of Latvia independently performs all administrative activities that follow from legal regulation. Issuing of external regulatory enactments, if the law comprises special authorisation, is said to be one of such activities. Since 1992 the Bank of Latvia has already issued more than 100 regulations. Thus, regulations of the Bank of Latvia as a special type of external regulatory enactment have existed and have been applied for extended period of time. Thus, the constitutional tradition has developed. Likewise, the issue of the

place of such regulations in the hierarchy of regulatory enactments is said to have been settled.

Pursuant to Article 57 of the Satversme, the issue of granting special authorisation is to be decided on by way of legislation. The right of an autonomous subject of public law to issue external regulatory enactments has been accepted within the system of Article 64 of the Satversme, i.e., it allows the legislator's discretion to authorise, when demanded by considerations of expedience, not only the Cabinet, but also other state institutions to issue external regulatory enactments.

Regulations of the Bank of Latvia, on the basis of special authorisation granted by the legislator, are issued by the Council of the Bank of Latvia, comprised of the President of the Bank of Latvia, his deputy and six members of the Council. Pursuant to Section 22 of the law "On the Bank of Latvia", the President of the Bank of Latvia is elected to the office by the Saeima, which also appoints to the office his deputy and members of the Council of the Bank of Latvia. Allegedly, this process ensures sufficient democratic legitimization, in particular, taking into consideration restrictions established for independent institutions.

If the legislator had wished to authorise the Bank of Latvia to establish the procedural order for performing the obligations defined for the subjects of Law on Prevention, then it would have included this term into the legal norm. However, the legislator had chosen another wording, and this, allegedly, is not coincidental. The authorisation of FCMC, included in Section 47(2) of Law on Prevention, points to it. Thus, the content of authorisation granted to the Bank of Latvia should be established within the framework of the system of the law.

The legislator had recognised the respective issue as such that should be regulated by regulations issued by the Bank of Latvia and not by a norm of law. This approach is said to comply with the purpose and the system of law, since also in other cases the legislator had not regulated in detail all necessary issues with regard to a particular subject, but authorised the control and supervisory authority

of the particular subject to regulate its activities. Thus, it is alleged that the Bank of Latvia did not act *ultra vires*.

In establishing, whether in the case under review there are persons, who are in similar and according to concrete criteria comparable circumstances, it should be taken into consideration that the Competition Council had assessed the issues referred to by the Applicant in the context of the Competition Law. The test of compliance with the principle of legal equality as to its methodology is said to differ from the test of compliance of competition law, and the finding reached in the framework of one test cannot be directly or automatically adopted in another test.

Inhabitants are said to differentiate between capital companies engaged in trading cash and services provided by credit institutions and to be able to identify significant differences between the two.

Likewise, subjects, whose risks in commercial activities with regard to attempts at money laundering and financing of terrorism are different, cannot be considered as being in similar and comparable circumstances. The legislator had regulated many issues pertaining to subjects of Law on Prevention together, however, this law also lays down special regulation for specific subjects. Section 47 of Law on Prevention provides for different models of supervision and control for credit institutions and other subjects. This is said to prove the legislator's conscious decision to provide a regulation on credit institutions that differs from the one on capital companies that are engaged in trading cash. The aforementioned groups should be compared in the total context of services offered by them, without singling out only one type of services.

Trading in cash is said not to be the most essential of services provided by credit institutions. They provide numerous other financial services with the aim of establishing long-term business relationships. Pursuant to the requirements of Law on Prevention, a credit institution, prior to establishing a business relationship, always performs client identification, irrespectively of the amounts of planned transactions. The legal regulation established for capital companies engaged in

trading cash in general is said to differ significantly from the legal regulation for credit institutions.

A concrete form – that of a legal person, as well as special requirements regarding establishment and the initial capital have been set for credit institutions in the Credit Institutions Law, which ensure that credit institutions have access to extensive resources for providing financial services, *inter alia*, equipping premises and attracting clients. Thus, credit institutions are able to invest resources in employee training, control mechanisms and various security systems, which can be based upon employees' assessment and margin of appreciation. Violations of Law on Prevention that have been committed may make the commercial activities of a credit institution, as well as participation in international financial markets difficult, as well as decrease trust in it.

Whereas Regulation of the Bank of Latvia of 13 May 2009 No. 36 "Regulations on Buying and Selling Foreign Currency Cash" comprises requirements for capital companies engaged in trading cash. Pursuant to this Regulation, a licence is issued not to the capital company, but to each site for buying and selling foreign currency at its disposal. Therefore the equipment of currency exchange points created by capital companies significantly differs from the equipment of credit institutions and their branches. Requirements that Law on Prevention defines for capital companies engaged in trading cash and for credit institutions are said to be different, and also the significantly differentiated system of sanctions is said to illustrate these differences.

In view of the above, it should be concluded that credit institutions and capital companies that engage in trading cash are not in similar and comparable circumstances.

At the court sitting the authorised representative of the Bank of Latvia Jānis Pleps repeated and expanded the arguments provided in the written reply and underscored that MONEYVAL Report included recommendations with regard to the Bank of Latvia, but made no references to activities of FCMC in supervising credit institutions in the field of trading cash.

4. The summoned person – **the Saeima** – holds that the Bank of Latvia has the right to issue external regulatory enactments and that in adopting the contested norms it did not exceed the limits of authorisation granted by the legislator.

The Bank of Latvia is said to be responsible for a specific field of public administration. Moreover, it has the right to issue binding regulations only in this specific field and only on the basis of special authorisation included in law. Such regulations are adopted by a collegial institution, the President of which is elected and the members of which are appointed by directly legitimized state body – the Saeima. Even though the Bank of Latvia is independent in performance of its tasks, it is, nevertheless, subject to supervision by the Saeima and to parliamentary control. The Bank of Latvia has sufficient democratic legitimization to issue external regulatory enactments, subject to law, in the field of its activities.

Allegedly, the constitutional tradition that external regulatory enactments are issued on the basis of special authorisation granted by the legislator – regulations of the Bank of Latvia – has existed in Latvia's legal system for an extended period of time (both in the inter-war period and following restoration of independence). It is objectively necessary to maintain this tradition, since the respective specific field of administration needs to be regulated in detail, but the legislative capacity of the Saeima is said to be limited.

Whether the issuing of the contested norms complies with "the theory of materiality" should be examined in the contexts of the scope of authorisation granted by the legislator; i.e., by establishing, whether the contested norms do not include such issues, with regard to which political decisions have not been taken. The legislator had taken a conceptual decision with regard to the subject regulated by the contested norm and had included in the law the most essential issues, which point to the main lines of the content for the regulations to be drafted.

In issuing the contested norms the legislator's authorisation had been the grounds for the Bank of Latvia, since it envisaged its right to issue binding requirements with regard to performance of obligations defined in the law, *inter alia*, development of system for internal control, surveillance of client's

transactions and reporting on unusual or suspicious transactions. The authorising norm is said to include a reference that the scope of authorisation is to be deducted from other norms of the law, which define the obligations of subjects of law in the particular field. This, obviously, envisages wide discretion for the Bank of Latvia in drafting and adopting such requirements that would ensure that obligations established by the legislator are established substantially and would not be limited to the concept of "procedure". The contested norms are to be regarded as such that establish a more detailed regulation regarding performance of obligations defined in the Law on Prevention. The contested norms ensure reaching of those aims and performing of those obligations, on the necessity of which the legislator has taken a conceptual decision. Thus, the Bank of Latvia, in issuing the contested norms has not exceeded the limits of authorisation granted by the legislator.

Prevention of money laundering and financing of terrorism is based not only upon risk assessment of the service provided, but also upon assessing the risk of service providers and recipients. In this regard differences between credit institutions and capital companies engaged in trading cash have a direct influence upon the scope and content of the necessary legal regulation.

At the court sitting the authorised representative of the summoned person Ilze Tralmaka repeated and expanded the arguments presented in the written reply and noted that identification envisaged by the contested norms is to be regarded as a simplified instrument for meeting the requirements of Section 7 of Law on Prevention and was not be regarded as a new case of client identification in the meaning of Section 11 of the Law on Prevention.

5. The summoned person – the Ombudsman of the Republic of Latvia (hereinafter – the Ombudsman) – holds that the Bank of Latvia has the right to issue external regulatory enactments that are binding upon the Applicant and that by adopting the contested norms it has not exceeded the limits of authorisation. However, the contested norms are said to be incompatible with the first sentence of Article 91 of the Satversme.

In view of the points made in MONEYVAL Report, the mechanism for identifying the client and the true beneficiary, which is included in the contested norms and applied to transactions of trading cash, is necessary and should be given conceptual support.

Through interpretation of the Satversme, the rights of some autonomous institutions to issue external regulatory enactments has been recognised in Latvia's legal system, if their authorisation has been granted by law. As noted in the annotation to Amendments to Law on Prevention, the legislator has imposed upon the Bank of Latvia the obligation to establish binding requirements to capital companies engaged in trading cash, to fulfil the obligations envisaged in Law on Prevention. The contested norms comprise such detailed requirements, and the Bank of Latvia, in issuing the contested norms, has complied with the purpose of Law on Prevention and has performed its tasks in the environment of financial services provided by capital companies, acting within the framework of the legislator's authorisation.

To establish, to what extent capital companies engaged in trading cash can be compared to credit institutions, the Ombudsman has identified, according to certain criteria, features that they share, thus, finding out, whether they are comparable as to their legal form and functional activities in the field impacted by Law on Prevention.

The structural differences between capital companies and credit institutions are said not to be essential, because they have similar principles of functioning. Even though the procedure for receiving a licence and of supervision differs, both capital companies and credit institutions within the framework of their commercial activities provide comparable financial services – by engaging in trading cash. The difference in the scope of services provided by these subjects are said not influence their comparability. Likewise, the location and accessibility of capital companies and credit institutions, as well as differences in the risks of commercial activities and procedure of supervision should not be considered as different circumstances in the legal aspects regulated by Law on Prevention. Transactions of trading cash cannot be considered as business relationships in the

meaning of Para 3 of Section 1 of Law on Prevention, and thus credit institutions are not obliged to perform client identification in such cases. Thus, the abovementioned groups of persons are said to be in similar and comparable circumstances, insofar it pertains to transactions of trading cash.

The contested norms envisage differential treatment of persons, which are in similar and comparable circumstances. Since a potential client is able to receive identical service and without identification at a credit institution, the legitimate aim of the contested norm, indicated in the annotation to Amendments to Law on Prevention, is not reached. MONEYVAL Report does not mention a need to adopt different or stricter requirements with regard to capital companies engaged in trading cash than with regard to credit institutions. The Bank of Latvia has not indicated objective reasons for establishing differential treatment of the Applicant.

At the court sitting the authorised representative of the summoned person Ineta Rezevska repeated and expanded the arguments presented in the written opinion.

6. The summoned person – the Ministry of Justice – founds its opinion upon the conclusions included in the Informative Report by the Ministry of Justice on subjects that have the right to issue external regulatory enactments, taken note of at the sitting of Cabinet of Ministers on 21 June 2011.

The Satversme not only does not envisage *expressis verbis* the rights of autonomous institutions to issue external regulatory enactments, but in general does not provide that there are such institutions of public administration that are not subjected to the Cabinet. However, the Satversme provides for exemptions from the procedure established in its Article 58, which, therefor, should not be considered as being absolute. The existence of autonomous institutions is said not to be incompatible with the Satversme.

An institution, which is managed by non-political officials, is said to function autonomously within the limits defined in law and to be responsible for the legality of its activities. The need for autonomous status of some institutions is, for the most part, recognised in three cases:

1) with regard to institutions, which control other institutions of administration, to ensure effectiveness of this control;
2) with regard to institutions, whose competence includes monetary politics;
3) with regard to institutions, which have been established on the principles of representing societal groups (not on the basis of the principle of political majority) and which have in their competence protection of certain freedoms and balancing of certain interests.

Autonomous institutions receive their democratic legitimization not in he sense that voters would have the possibility to exert political influence upon the content of these institutions' activities, but only to reach the aim of its autonomous status.

Activities of institutions with autonomous competence in issuing regulatory enactments is said to be legal, if it has been established by respective laws and if such acts have been referred to in Section 9 of law on Official Publications and Legal Information. Such competence has been envisaged due to considerations of expedience and also because the autonomous status of institutions has indissoluble links with regulatory and supervisory functions in its sector. If such institutions had no rights to issue regulatory enactments, then the particular sector of public administration would be unable to function, since in addition to regulatory enactments issued by the legislator it requires more detailed and more technical regulations. The legislator has granted the right to issue such regulations to the Bank of Latvia in the same procedure as to the Cabinet of Ministers.

At the court sitting the authorised representative of the summoned person Inta Salinieka repeated and expanded the arguments presented in the written opinion.

7. The summoned person – the Financial and Capital Market Commission – provides the following opinion:

Even though both comparable groups pointed out by the Applicant provide similar services, there are several circumstances, in which they are said to differ

significantly in the aspect of preventing of money laundering and financing of terrorism.

First, any capital company, which has met the minimum requirements and received a licence from the Bank of Latvia, may engage in trading cash. Whereas stricter requirements have been set for a person, who wishes to provide services typical of a credit institution.

Second, a credit institution needs good reputation and needs to ensure that the system for preventing money laundering and financing of terrorism introduced by it meets international standards. The international compliance of this system is verified not only by FCMC as a supervisory authority, but also by other market players, for example, correspondent banks.

Third, sanctions envisaged by regulatory enactments for violations of rules on preventing money laundering and financing of terrorism are stricter and more differentiated with regard to credit institutions than for capital companies engaged in trading cash.

In the majority of cases trading cash at credit institutions is offered as an additional service. Hence, part of the persons making use of this service is clients of the credit institution, which, pursuant to Section 11(1) of Law on Prevention have already been identified upon beginning business relationship.

The contested norms are included in regulations of an institution authorised by the legislator, which it has issued in in the procedure of administration and comply with the Satversme. Pursuant to law, external regulatory enactments issued by the Bank of Latvia and FCMC are binding only upon subjects of their supervision, and such regulation is necessary to ensure compliance with specific requirements of the financial sector.

Law on Prevention is said to apply to a wide circle of persons, and, thus, only minimum requirements for all subjects of this Law could be defined in it, even though these subjects have different commercial activities and risk levels. Thus, it was necessary to establish specific requirements for those subjects, whose activities are linked to increased risk or who are of essential significance with regard to stability of the financial sector. It is exactly risk assessment based

approach that helps to prevent most effectively money laundering and financing of terrorism.

Cash transactions are characterised by high risk of money laundering and financing of terrorism, since they are more difficult to trace compared to transfer settlements. This risk is increased even more by circumstances, where a person can conduct the respective transactions anonymously, as in the case, when the amount of currency exchange transaction is lower than the established threshold value. The fact referred to by the Applicant that its potential clients do not wish to be identified is one of the indicators pointing to a person's possible link to money laundering or financing of terrorism. This indicator has been included also in the list of indicators of suspicious transactions elaborated by the Office for the Prevention of the Laundering of Proceeds Derived from Criminal Activity (hereinafter also – the Control Service). This allows concluding that the Applicant provides services to high-risk clients.

FCMC, with regard to credit institutions and transactions of trading cash that they have conducted, has not established such violations that would require application of sanctions or corrective measures. Credit institutions have submitted more reports on suspicious transactions than capital companies engaged in trading cash.

At the court sitting the authorised representative of the summoned person Kristaps Markovskis repeated and expanded the arguments presented in the written opinion.

8. The summoned person – association "The Association of Latvian Commercial Banks" – holds that the contested norms comply with Article 1 and Article 64, as well as the first sentence of Article 91 of the Satversme.

Allegedly, the contested norms do not restrict the Applicant's right to engage in commercial activities, and the purpose thereof is to protect public security. There are no grounds to consider that in order to reach this aim identical legal norms should have been adopted also with regard to credit institutions.

Capital companies engaged in trading cash and credit institutions are said not to be in similar and according to definite criteria comparable circumstances. Credit institutions base their work upon long-term relationship with a client, and this relationship, in turn, is founded upon client identification and assessment of transactions before cooperation is started. Transactions of trading cash to clients without an account at credit institutions constitute less than 0.1 per cent of all daily transactions.

Credit institutions conduct more extensive client scrutiny and assessment of transaction security than other commercial companies. Moreover, credit institutions are subjected to regular and complex supervision by a number of national and international institutions.

At the court sitting the authorised representative of the summoned person sworn advocate Ketija Tola repeated and provided more extensive explanations of the arguments presented in the written opinion and noted that major credit institutions in their systems of internal control, which are confidential, have envisaged a threshold value of transaction amount lower than 7 999.99 euro, and in cases, when it is exceeded, presentation of personal identity documents is requested.

9. The summoned person – association "Association of Non-Bank Financial Service Providers" – upholds the Applicant's arguments, noting that the contested norms are incompatible with Article 1 and Article 64, as well as the first sentence in Article 91 of the Satversme.

The most significant reason for incompatibility of the contested norms with the Satversme is unequal circumstances in the market of services for trading cash. It is said to happen most frequently that the client at the moment of concluding transaction does not have a personal identification document with him; likewise, clients often are cautious towards identification, they feel anxious during it and express incomprehension, because personal data are not processed at credit institutions.

Services in trading cash are not extensively provided at all credit institutions, nevertheless, this is still an essential kind of services provided by credit institutions. A number of branches of credit institutions are especially oriented to provide exactly such services. Therefore commercial companies engaged in trading cash and credit institutions should be compared exactly in the context of this service.

The statements made by the Bank of Latvia that credit institutions, pursuant to requirements of Law on Prevention, always conduct client identification before establishing business relationships, irrespectively of the amount of planned transactions, are said to be incompatible with the actual circumstances and to be misleading. At credit institutions services of trading cash are freely accessible to any person, irrespectively of whether he has opened an account. Only some banks have established stricter requirements regarding control and client identification for these transactions. In such circumstances the contested norms are said to be unable to reach the purpose of Law on Prevention, to distort competition and exclude the possibility to rectify deficiencies of the legal regulation in a complex way in cooperation with FCMC.

It is alleged, that neither are the conclusions made by the Bank of Latvia with regards to the content of MONEYVAL Report correct, i.e., this Report is not at all examining the activities of credit institutions in trading cash. Likewise, the Order by the Cabinet of 31 March 2014 No. 139 "On the Development Plan for the Financial Sector, 2014-2016" is aimed at preventing risks of money laundering, in view of the development of financial system as a whole, *inter alia*, at reinforcing the capacity of competent authorities (for example, organising training for employees of capital companies) and at facilitating competition. This issue has been totally ignored by the contested norms. The Competition Council has recognised that not all consideration noted by the Bank of Latvia should be regarded as important in a situation, where unequal conditions of competition are created for the participants of the same relevant market. The aim of the contested

norms could be reached by other measures, which would leave lesser impact upon competition.

Following adoption of the contested norms the Bank of Latvia had expressed understanding of concerns that the Non-Bank Association had had and had stated: if the Competition Council were to recognise that the contested norms distorted competition, then appropriate amendments could be introduced to the legal regulation. However, such amendments were not introduced, even though the Competition Council had submitted to the Bank o Latvia proposals regarding advisable amendments to the contested norms.

At the court sitting Andris Arhipenko, board member of the summoned person, repeated and expanded the arguments presented in the written opinion.

10. The summoned person – ***prof. Dr. h. c., Assessor. jur., Dipl.-Pol.* Egils Levits** – notes that issuing of the contested norms had been admissible pursuant to Preamble, Article 1 and Article 64 of the Satversme, by abiding with certain prerequisites.

Granting the right to issue external regulatory acts to a body, which is outside the scope of Section 64 of the Satversme, or to an institutions with weaker democratic legitimization in any case is said to be restriction upon the overarching principle of democracy. Considerations with regard to the Saeima's rights to authorise by law the Cabinet of Ministers to issue law based regulatory enactments cannot be directly applied to independent institutions. In difference to Cabinet regulations, the regulatory enactments issued by independent institutions are said to place twofold restrictions upon the overarching principle of democracy.

Exclusion of independent institutions from the subordination to the Cabinet of Ministers established in Article 58 of the Satversme allegedly makes it difficult to ascribe the will of the people expressed by the Saeima to the activities of these institutions. Basically, democratic legitimization of independent institutions is said to be based upon a law, adopted by the Saeima, which comprises the will of the people to establish such an institution and to grant it respective competence, as well as upon personal legitimization, through appointing the head of this

institution for a certain term. However, such an institution is said to lack the most powerful element of legitimization – hierarchic subordination to the Cabinet of Ministers.

Allegedly, if an independent institution issues external regulatory enactments, an essential element of the overarching principle of democracy is ignored – the link between the level of the issuer's democratic legitimization and the right to issue such acts. The purpose of so significant restriction upon democracy should be very important, whereas the restriction itself – as minor as possible and, nevertheless, such that would allow reaching this purpose.

The argument that recommendations made by the European Union or international institutions could justify such an essential restriction upon democracy as this is to be rejected, because, pursuant to Article 68 of the Satversme, the Republic of Latvia participates in the European Union with "the purpose of strengthening democracy", not of weakening it. Likewise, the opinion that in the particular case such a restriction would be required by the principle of efficiency cannot be upheld, since *per se* it could never compensate for any of the overarching principles included in the Preamble to the Satversme.

The principle of effectiveness could be taken into consideration as an element of the principle of good governance, which belongs to the principle of a state governed by the rule of law; i.e., in considering the issue of restricting the overarching principle of democracy for the sake of the principle of a state governed by the rule, equal to it. However, the conclusion made within the framework of the methodology referred to cannot be such that the Saeima itself were unable to decide with sufficient effectiveness on issues, which the Bank of Latvia decides upon by its regulations. Those regulations are not so numerous that they could seriously alleviate the work of Saeima.

The conclusion that the Bank of Latvia has more competence in a certain issue compared to the Saeima is admissible, where the technical aspects, rather than the political ones are of essential importance, with respect to which Latvia must integrate into the international system. Whereas this conclusion leads to the conclusion that the authorising law has expressed the Saeima's will to participate

in this international system, that this system is very complicated and that Latvia's participation therein does not leave for the Saeima's political will great discretion. Therefore, the need for the Saeima to regulate this issue, according to the overarching principle of democracy, is not so great and therefore the Saeima may delegate it to the Bank of Latvia as a more competent institution, which has close contacts with the participants of the international system.

However, from the vantage point of democracy, such considerations are said to be risky and admissible only in very narrow cases of exception, when the political will is being reduced to a very concrete decision, following which the Saeima has only minimal possibilities to determine the content of the regulation, since the Bank of Latvia in dealing with issues of international cooperation may act faster and with greater competence. Moreover, also in such circumstances, the supremacy and responsibility of the Saeima should be ensured.

At the court sitting the summoned person repeated and expanded the arguments presented in his written opinion, underscoring, in particular, that the Saeima should not transfer part of its competence into unrestricted competence of an autonomous institution of public administration. The Saeima should always have the possibility to regulate such an issue itself. An autonomous institution of public administration may not be entrusted with issuing of external regulatory enactments within the field of jurisdiction within the framework of Article 58 of the Satversme. The fact that the principle of good governance requires separation between fiscal policy and everyday policy is said to be the basis of the autonomous competence of the Bank of Latvia. Transferring of a certain competence to the Bank of Latvia is said to be admissible; however, it should be assessed on a case-by-case basis.

11. The summoned person – Professor of the Faculty of Law, University of Latvia Latvijas *Dr. iur.* Daiga Rezevska – notes that the contemporary understanding of constitutional law, as well constitutional traditions of the Latvian legal system, which reflect the long-standing and still existing right of autonomous institutions to issue external regulatory enactments should be taken

into consideration. Adopting amendments to the texts of the Satversme as a basis for activities of autonomous institutions would be a desirable law policy decision by the Saeima; however, only from the perspective of making the legal system clearer and more simple.

If it is established that in a particular field of public administration a state institution, subordinated to the Cabinet of Ministers, would not be able to ensure due governance, the Saeima, as a directly democratically legitimized institution may establish an autonomous institution, assuming responsibility for incorporating a mechanism for ensuring the rule of law within it and its effectiveness in law. Thus the right to perform governance activities in this field, by issuing external regulatory enactments, successively pass on to the independent institution and the Saeima retains the right to decide on issues within this field that must be solved in legislative process.

12. The summoned person – **docent of the Faculty of Law, University of Latvia *Dr. iur.* Aivars Lošmanis** – notes that the right of the Bank of Latvia to issue external regulatory enactments complies with the Satversme and that the contested norms do not violate the first sentence of Article 91 of the Satversme.

The legality of the existence of autonomous institutions is said not be contested in the framework of the case under review. The Bank of Latvia, as an autonomous state institution, would not be able to perform functions delegated to it without issuing binding regulations with respect to the sector under its supervision. A situation, where the legislator would guarantee the autonomy of such an institution, but would grant the right to issue external regulatory enactments in the respective sector to another, "more legitimate" subject would be absurd. This consideration is said to be decisive not only from the perspective of expedience, but also from the legal point of view.

Independence of the central bank is said to be a typical solution in contemporary states, moreover, this status is said to follow not only from the Satversme and the law "On the Bank of Latvia", but also Article 130 of the Treaty on the Functioning of the European Union and Protocol No. 4 on the Statute of the

European System of Central Banks and of the European Central Bank. The central bank has its own instruments required for performing its functions, and one of them is said to be the right to issue external regulatory enactments, which ensures independence of such a bank. These two elements cannot be reviewed separately.

The fact that the capital companies, which are engaged in trading cash, and credit companies provide the same service, is said not to be decisive. The level of risks that this service carries is said to be a more significant factor, and according to it these comparable groups of persons differ significantly. Thus, they are not in similar and comparable circumstances.

Even assuming that capital companies, which are engaged in trading cash, and credit companies were in similar and comparable circumstances, because they provide financial services of the same type, conclusions regarding increased level of risk that the transactions of trading cash carry would not lose their legal importance in the context of proportionality.

The contested norms are said to have a legitimate aim – combatting money laundering and financing of terrorism and defending public security. The Bank of Latvia has provided sufficient arguments regarding proportionality of such hypothetically differential treatment.

From the point of view of allocation of competences between the Bank of Latvia and FCMC, it is said to be doubtful, whether the Bank of Latvia, abiding by the regulation of the second and third part of Section 47 of the Law on Prevention, could by itself ensure the same level of responsibilities for all subjects referred to in the law. This fact could also influence the conclusion on whether these groups are in similar and comparable circumstances.

During the court sitting the summoned person repeated and expanded the arguments presented in his written opinion.

13. The summoned person – docent of the Faculty of Law, University of Latvia *Dr. iur.* Edvīns Danovskis – notes that until now in Latvian state law

admissibility of law based external regulatory enactments had been a consistently recognises legislative practice.

Independent institutions, for example, the Bank of Latvia, FCMC and he Public Utilities Commission, are not subordinated to the Cabinet of Ministers, and they have been granted the right to issue external regulatory enactments so that they would be able to exercise their autonomous competence. The existence of such regulatory enactments is said to be reflected in Section 17(1) of the Law on Coming into Force of the Administrative Procedure Law and Section 9(2) of the law On Official Publications and Legal Information. Therefore the right of the Bank of Latvia Council to issue external regulatory enactments is said not to be unique and to form a part of the totality of law-based external regulatory enactments issued by the bodies of independent institutions.

Law based external regulatory enactments, to the extent the content thereof complies with the authorisation included in the law, are issued in fulfilling the function of the executive power and not the legislative function, which follows from Section 57 of the Satversme and is not incompatible with Article 64 of the Satversme.

The overarching principle of democracy that follows from Article 1 of the Satversme, allegedly, allows concluding that issuing of generally binding legal norms, in the basis of a law, requires higher democratic legitimization than performing other activities of the executive power. Moreover, also in the case of broad and comparatively abstract authorisation the aims and values included in the law are binding upon the executive power, thus, the executive power is said to act as the implementer and not the creator of political positions included in the law.

During the term of office of the Bank's of Latvia Council members, the Saeima has no possibilities to exert political influence upon them – they can be dismissed from the office only in cases envisaged by law, which are precisely defined and do not envisage margin of appreciation or discretion for the Saeima. However, the democratic legitimization of the Bank's of Latvia Council is said to be sufficient for it to issue, within the limits of its autonomous competence, in compliance with the authorisation established by law, legal norms required for

implementing the law, since the Saeima expresses political will with respect to all members of the Bank of Latvia Council (the first and the second part of Section 22 of the law "On the Bank of Latvia"). The difference between the democratic legitimization of the Bank of Latvia as a derived public person and that of its Council is said to be essential. The authorisation established in Section 47(3) of the Law on Prevention is to be reduced only to the Council of the Bank of Latvia as a democratically legitimized institution. Other institutions of the Bank of Latvia and structural units thereof may not issue such regulatory enactments on the behalf of the Bank of Latvia.

It is contended that there are no grounds to apply the authorisation granted in Section 47 of the Law on Prevention to procedural rules only. An external regulatory act, which has been issued on the basis of a law, may not comprise such regulations, which has been exhaustively included in the law itself. Compliance of the contested norms with the authorisation is said to depend upon, whether they apply to any of the client identification cases envisaged in Section 11(2) of the Law on Prevention. If it is established that the enumeration of respective cases, included in the aforementioned legal norm, is exhaustive, but the contested norms envisage a new case, not referred to in the law, then the contested norms should be recognised as being incompatible with Section 47(3) of the Law on Prevention and Article 64 of the Satversme.

At the court sitting the summoned person repeated and expanded the arguments presented in his written opinion and noted that the respective groups of persons in the case under review could be recognised as being in comparable circumstances. The analysis of money laundering risks referred to by the Bank of Latvia and a number of summoned persons may not be as decisive as to conclude that the groups of persons are in different circumstances.

14. Viesturs Burkāns, the head of **the summoned person** – **the Office for the Prevention of the Laundering of Proceeds Derived from Criminal Activity,** expressed the following opinion at the court sitting:

Currently the international practice in the field of preventing money laundering and financing of terrorism is to use approach that is based upon risk analysis, which has replaced approach that was based upon concrete regulatory requirements. An approach, based upon risk analysis, has been introduced by the leading organisation in this sector "*Financial Action Task Force*".

These recommendations have been integrated also in the Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

Until now the risk of money laundering and financing of terrorism had not been assessed in the Republic of Latvia; however, currently the Control Service is preparing a report that is going to cover all risks existing in the sector. It is planned to proceed to drafting a plan of measures for decreasing these risks and submit it to the Cabinet of Ministers for approval.

Capital companies, which are engaged in trading cash, and credit institutions are said to be incomparable, in view of the differences in terms of experience, types of services provided, risks and the share of cash flow. Credit institutions are said to have special structural units, which are engaged in issues of preventing money laundering risks. Such risk assessment is said to be complex, and credit institutions are said to have the largest experience in this field. Likewise, reports from credit institutions on suspicious and unusual transactions constitute 70-80 per cent of all reports received by the Control Service. Whereas the employees of capital companies, which are engaged in trading cash, are less knowledgeable, technical provisions – less complete, and the number of their employees, of organised training events and of the types of services provided is smaller. Credit institutions are said to be more capable of fulfilling the duty of reporting, since client identification in them is said to be conducted before establishing business relationships, and if the client for any reasons has not concluded the transaction, all his persona data are said to be available.

MONEYVAL Report had assessed the field of trading cash as being linked to high risk of money laundering and financing of terrorism. Therefore the

recommendations included in this Report had been applicable to the Bank of Latvia.

15. At the court sitting Ilze Tarvāne, the authorised representative of **the summoned person** – **the Competition Council**, expressed the following opinion:

In the scope of the Competition Law capital companies, which are engaged in trading cash, and credit institutions can be compared. Both these groups are said to provide equal services – buying and selling cash, so the client may turn to a subject belonging to any of the two groups, and the representatives of both groups are competing.

The legal norm provided for a different regulation for each of the abovementioned groups. The internal control systems developed by credit institutions are also said to comprise different requirements.

The fact that regulatory enactments give the possibility to receive the service from one of the subjects without a personal identity document, but make it impossible at the other subject, is said to point to unequal conditions of competition.

The Competition Council had turned to the Bank of Latvia, requesting it to assess, whether no other measures existed that would leave less impact upon competition, since the contested norms in no way eliminated the cause for adoption thereof – lack of knowledge among employees of capital companies.

The Facts

16. The application comprised a request to review compatibility of the contested norms with Article 1 and Article 64, as well as the first sentence of Article 91 of the Satversme.

Article 1 of the Satversme provides: “Latvia is an independent democratic republic.” Pursuant to Article 64 of the Satversme the right to legislate is vested in the Saeima and also the people, in accordance with the procedures and to the extent provided for by the Satversme.

The first sentence of Article 91 of the Satversme, in turn, provides that all human beings in Latvia are equal before the law and the courts.

The first part of Section 19^2 of the Constitutional Court Law provides that a constitutional complaint (application) may be submitted to the Constitutional Court by any person, who holds that a legal norm that is incompatible with a legal norm of higher legal force, violates his or her fundamental rights established in the Satversme. The term "violates" has been included in the Law to separate the constitutional complaint from *action popularis* (*see Judgement of 22 February 2002 by the Constitutional Court in Case No. 2001-06-03, Para 2.4 of the Findings*). To review a case, which has been initiated on the basis of a constitutional complaint, the Constitutional Court must establish a violation of a person's fundamental rights.

The Applicant is linking the possible violation of its fundamental rights with the prohibition of differential treatment, included in the first sentence of Article 91 of the Satversme, which, *inter alia*, is said to have occurred because the contested norms had not been adopted in procedure complying with Article 1 and Article 64 of the Satversme.

Thus, in the case under review, the Constitutional Court must, first of all, examine compliance of the contested norms with the first sentence in Article 91 of the Satversme and establish, whether the contested norms cause differential treatment.

Thus, the Constitutional Court shall examine, whether the contested norms comply with the first sentence in Article 91 of the Satversme.

17. The objective of the principle of equality enshrined in the first sentence of Article 91 of the Satversme is to ensure that such a requirement of a state governed by the rule of law as comprehensive impact of law upon all persons and application of law without any privileges whatsoever would be ensured (*see Judgement of 2 February 2010 by the Constitutional Court in Case No. 2009-46-01, Para 7; and Judgement of 23 November 2015 in Case No. 2015-10-01, Para 15*). However, such unity of legal order does not mean levelling out, since

equality permits differential treatment, if it is justifiable in a democratic society (*see Judgement of 26 June 2001 by the Constitutional Court in Case No. 2001-02-0106, Para 4 of the Findings*). I.e., the equality principle prohibits state institutions to issue such norms that without reasonable grounds permit differential treatment of persons, who are in similar and according to concrete criteria comparable circumstances. At the same time the equality principle allows and even demands differential treatment of persons, who are in different circumstances, as well as allows differential treatment of persons, who are in similar circumstances, if there are objective and reasonable grounds for it (*see, for example, Judgement of 11 November 2005 by the Constitutional Court in Case No. 2005-08-01, Para 5, and Judgement of 13 June 2014 in Case No. 2014-02-01, Para 10*).

To assess, whether the contested norms comply with the equality principle that the first sentence of Article 91 of the Satversme comprises, it must be established:

1) whether and which persons (groups of persons) are in similar an according to concrete criteria comparable circumstances;
2) whether the contested norm envisages similar or differential treatment of these persons (groups of persons);
3) whether there are objective and reasonable grounds for this treatment, i.e., whether it has a legitimate aim and whether the principle of proportionality has been complied with (*see, for example, Judgement of 2 February 2010 by the Constitutional Court in Case No. 2009-46-01, Para 7*).

18. To establish, whether the contested norms comply with the equality principle enshrined in the first sentence of Article 91 of the Satversme, at least two groups of persons should be compared (*see Judgement of 3 November 2011 by the Constitutional Court in Case No. 2011-05-01, Para 17*).

In the case under review it is not disputed that in the sector of trading cash two following groups can be discerned:

1) capital companies, which are engaged in trading cash;

2) credit institutions, which provide the service of trading cash as one type of financial services.

From the perspective of the first sentence of Article 91 of the Satversme, the fact, whether several groups have a common feature, applicable to all of them, is decisive (*see, for example, Judgement of 13 June 2014 by the Constitutional Court in Case No. 2014-02-01, Para 11*).

The Applicant holds that the feature, which points to the fact that both the aforementioned groups are in similar and according to concrete criteria comparable circumstances, should be linked to the operations of both groups in the same market, i.e., that of services of trading cash. Moreover, the subjects belonging to both groups are capital companies, which should be regarded as competitors (*see application in Case Materials, Vol. 1, pp. 8–10*).

The summoned persons – the Competition Council, the Ombudsman and the Non-Bank Association – uphold this opinion. The Competition Council, in particular, underscores that the services provided by the two indicated groups of persons are mutually substitutable (*see transcript of the Constitutional Court sitting of 19 January 2016, Case Materials, Vol. 4, pp. 39 and 43*).

Whereas the Bank of Latvia holds that the aforementioned groups of persons are not in similar and according to concrete criteria comparable circumstances, since within the system for preventing money laundering and financing of terrorism credit institutions are always separated from other financial institutions. This separations is based upon such an essential criterion as the assessment of the risk of money laundering and financing of terrorism (*see written reply in Case Materials, Vol. 1, pp. 183 –188*).

A number of summoned persons uphold this opinion, i.e., the Saeima, FCMC, association ”The Association of Latvian Commercial Banks”, the Control Service and Aivars Lošmanis, substantiating this with the fact that credit institutions have submitted to the Control Service many more reports on unusual and suspicious transactions than capital companies engaged in trading cash. Moreover, this conclusion is said to be based upon the international practice in

preventing money laundering and financing of terrorism and the experience gained thus far (*see, for example, transcript of the Constitutional Court sitting of 19 January 2016, Case Materials, Vol. 4, pp. 9 –10, and the Saeima's opinion in Case Materials, Vol. 2, pp. 65 and 66*).

Summoned person Edvīns Danovskis holds that the issue of the level of risk for money laundering and financing of terrorism is important in evaluating proportionality of the restriction upon fundamental rights, established by the contested norms (*see transcript of the Constitutional Court sitting of 1 February 2016, Case Materials, Vol. 5, p.88*). At the court sitting the representative of the Bank of Latvia also admitted that these risks could be regarded as the criteria for justifying the differential treatment (*see transcript of the Constitutional Court sitting of 12 January 2016, Case Materials, Vol. 3, p. 158*).

Assessment of money laundering and financing of terrorism risks is to be considered as being an essential aspect. However, the opinion that in credit institutions these risks are lower *per se* does not prove that the assessment thereof should be considered as being the most important criterion in comparing the two groups of persons. Analysis of the aforementioned risks can be used to assess, whether it is necessary to impose certain obligations upon subjects of Law on Prevention.

The Constitutional Court has recognised before that participants of the same relevant market are in similar and according to concrete criteria comparable circumstances (*see Judgement of 9 February 2004 by the Constitutional Court in Case No. 2003-21-0306, Para 9.2*).

A number of documents that the case materials hold, as well as arguments presented by the participants of the case indicate that in case, if the particular service is not received at a capital company, which is engaged in trading cash, it can be received at a credit institution (*see Case Materials, Vol. 1, pp. 134 –137, and Vol. 3 pp. 39–47*). This means that the services provided by both subjects are mutually substitutable. The case materials also comprise information about the share of services provided by both groups of persons within the framework of the same market (*see Case Materials, Vol. 3, pp. 5 and 6*).

The Constitutional Court holds that in assessing, whether groups of persons are in similar and according to concrete criteria comparable circumstances, it is of decisive importance that both groups of persons may be identified according to particular criteria; i.e., according to totality of common essential features, – the subjects belonging to both groups are capital companies, which operate in the same market, i.e., the market of services of trading cash, the services they provide are mutually substitutable, and they are to be considered as being competitors.

Consequently, capital companies, which are engaged in trading cash, and credit institutions, which provide the service of trading cash as one type of financial services, in providing this service are in similar and according to concrete criteria comparable circumstances.

19. The contested norms impose upon capital companies, which are engaged in trading cash, an obligation to identify the client or the true beneficiary in such cases, where external regulatory enactments do not impose such an obligation upon credit institutions (if the transaction is not unusual or suspicious and business relationship is not initiated, but the amount of transaction is equivalent to 2 000–7 999.99 *euro*).

It follows from the case materials that such situations are possible, where a potential client refuses to conduct a transaction of trading cash at capital companies, which are engaged in trading cash. Unwillingness to be identified, absence of personal identification documents, as well as the fact that at credit institutions during an analogous transactions identification of persons is not done are mentioned as reasons for such refusal (*see Case Materials, Vol. 1, pp. 46 - 133).*

Thus, the contested norms set the requirement to identify the client or the true beneficiary only with regard to one market participant – a capital company, which is engaged in trading cash, whereas such requirement is not imposed upon the other market participant – a credit institution, which also is engaged in trading cash.

Thus, the contested norms envisage differential treatment of groups of persons, which are in similar and according to concrete criteria comparable circumstances.

20. The Constitutional Court has repeatedly noted that abiding by the procedure for adopting a legal norms is a pre-requisite for the validity of the legal norm (*see Judgement of 21 November 2005 by the Constitutional Court in Case No. 2005-03-0306, Para 10.4, and Judgement of 21 December 2015 in Case No. 2015-03-01, Para 23*). To assess compatibility of differential treatment established by the contested norms with the first sentence of Article 91 of the Satversme, it must be, first and foremost, verified, whether the differential treatment has been established by a legal norm that has been adopted in the procedure envisaged in regulatory enactments.

It has been recognised in the case law of the Constitutional Court that differential treatment may be established in accordance with law (*compare, Judgement of 19 December 2007 by the Constitutional Court in Case No. 2007-13-03, Para 12*). The word "law" comprises not only laws adopted by the Saeima, but also generally binding (external) regulatory enactments, if these have been adopted on the basis of law, published in the procedure established by regulatory enactments, are worded with sufficient clarity, so that the addressee would be able to understand his rights and obligations, and also comply with the principle of a state governed by the rule of law (*compare, for example, Judgement of 20 May 2002 by the Constitutional Court in Case No. 2002-01-03, the Findings, and Judgement of 12 December 2014 in Case No. 2013-21-03, Para 11*).

The Bank of Latvia has issued the contested norms, which envisage differential treatment, on the basis of Section 47(3) of Law on Prevention. The Applicant holds that the Bank of Latvia even does not have the right to issue external regulatory enactments; but, if it were recognised, that the Bank of Latvia has such right, then it, in issuing the contested norms, has exceeded the authorisation granted in law.

Thus, the Constitutional Court must establish, whether differential treatment has been established by law.

21. The Applicant is not contesting the legal status of the Bank of Latvia as an institution of public administration; however, it holds that the right of the Bank of Latvia to issue external regulatory acts does not follow from the Satversme and that the Bank of Latvia should not be recognised as being a democratically legitimized institution, since it is not linked to the people's will (*see transcript of the Constitutional Court sitting of 1 February 2016, Case Materials, Vol. 5, p. 93, and application, Case Materials, Vol. 1, p. 19*).

The Bank of Latvia, in turn, notes that its right to issue external regulatory enactments follows from the Satversme and that it has sufficient democratic legitimization (*see written answer in Case Materials, Vol. 1, pp. 177 –178*).

21.1. To assess, whether the contested norms were adopted in due procedure, the Constitutional Court must verify, whether the right of the Bank of Latvia as an autonomous institution of public administration to issue external regulatory enactments follows from the Satversme.

Among others, the principle of separation of powers, which manifests itself as division of the state power into legislative, executive and judicial power, follows from the concept of democratic republic enshrined in Article 1 of the Satversme [*see Judgement of 1 October 1999 by the Constitutional Court in Case No. 03-05(99), Para 1 of the Findings*]. Separation of powers has the purpose of ensuring a person's fundamental rights and a democratic state order, guaranteeing a system of checks-and-balances between institutions of state power (*see, for example, Judgement of 20 December 2006 in Case No. 2006-12-01, Para 6.1*). The principle of separation of powers must ensure implementation and protection of the fundamental values of a democratic state governed by the rule of law (*see Judgement of 18 December 2013 by the Constitutional Court in Case No. 2013-06-01, Para 11*).

Pursuant to Article 64 of the Satversme, the right to legislate, i.e., the right to regulate an issue by law, is vested into the Saeima, as well as into the people, in

the procedure and scope established by the Satversme. The case under review pertains only to the issue of the actions by the Saeima as the legislator. Pursuant to the principle of separation of powers, general passing of laws on any issues of state policy falls within the legislator's competence. To ensure effective exercise of the state power, exceptions to the principle of the legislator's supremacy are admissible. These exceptions follow from the Satversme. The purpose thereof is to make the legislative process more effective, as well as respond faster and more adequately to the needs for amendments to legal regulation.

Pursuant to the Satversme functions of the executive power fall within the competence of the Cabinet of Ministers, even though some activities of the executive power may be entrusted to other institutions. One of the activities of public administration is issuing of external regulatory enactments in case, where the legislator, in abiding by the Satversme, has authorised an institution of executive power to issue such. Since issuing of such regulatory enactments is an activity of public administration, the Cabinet of Ministers or another institution of executive power specifies in greater detail the political will included in the law or sets our the procedure for implementing the law. The content of these acts, adopted as part of such activity, mainly comprises procedural norms, which function as a tool for embodying the norms established by the law. In some cases the content may consist also of substantial norms; however, these should be adopted on the basis of the legislator's authorisation. External regulatory enactments, which are issued on the basis of authorisation, constitute that part of regulatory enactments, which have developed not through elaboration of laws, but through implementation thereof (*compare: Judgement of 9 October 2007 by the Constitutional Court in Case No. 2007-04-03, Para 13, 14 and 16*).

Article 58 of the Satversme combines all institutions of public administration, which perform functions of public power, into one common system subordinated or subjected to the Cabinet of Ministers [*see Judgement of 9 July 1999 by the Constitutional Court in Case No. 04-03(99), Para 2 of the Findings*]. However, Article 58 of the Satversme does not automatically require mandatory subordination of all institutions of public administration to the Cabinet

of Ministers (*see Judgement of 16 October 2006 by the Constitutional Court in Case No. 2006-05-01, Para 15.4*).

Section 1 of the law "On the Bank of Latvia" provides that the Bank of Latvia is the central bank of the Republic of Latvia with the full rights of an autonomous state institution.

Article 57 of the Satversme allows establishment of such autonomous state institutions, which perform some activities of executive power, without being subordinated to the Cabinet of Ministers. However, in this case Article 58 of the Satversme defines a mechanism, which ensures democratic legitimization of an institution of public administration and its responsibility for exercising its competence. If the legislator, exercising the right envisaged in Article 57 of the Satversme to define by law the relations between state institutions, releases an institution of public administration from subordination to the Cabinet of Ministers, it should envisage also another, but not less effective democratic legitimization of this institution and responsibility thereof for its activities (*see Judgement of 16 October 2006 by the Constitutional Court in Case No. 2006-05-01, Para 16.1*). In view of the above, the Bank of Latvia as an autonomous institution of public administration, in being outside subordination to the Cabinet of Ministers, requires appropriate democratic legitimization.

The Constitutional Court has already recognised that the Bank of Latvia is an autonomous institution of public administration, which is not subordinated to the Bank of Latvia and fulfils its functions independently (*see Judgement of 16 October 2006 by the Constitutional Court in Case No. 2006-05-01, Para 16.3 and 16.4*). The case under review does not comprise a dispute on whether the legitimization of the Bank of Latvia is appropriate for it as an autonomous institution of public administration to perform governance activities, which are not linked to issuing of external regulatory enactments.

In difference to other activities of executive power, issuing of external regulatory enactments requires appropriate democratic legitimization for it. Thus, the Satversme allows for the right of autonomous institutions of public administration to issue external regulatory enactments in the framework of

governance activities, is such institutions have received appropriate democratic legitimization.

Consequently, in the case under review it will be assessed, whether the democratic legitimization of the Bank of Latvia is appropriate, allowing the legislator to authorise it to issue external regulatory enactments.

21.2. Article 6 of the Satversme provides that the Saeima is elected in general, equal and direct elections, and by secret ballot based upon proportional representation. Thus, the Saeima is directly democratically legitimized. Whereas pursuant to the first and the second part of Section 22 of the Law "On the Bank of Latvia", the President of the Bank of Latvia is elected into office by the Saeima, which appoints also the Vice-president and the members of the Bank of Latvia Council to their offices. Thus, all members of the Bank of Latvia Council are indirectly (not immediately) democratically legitimized.

The democratic legitimization of the Bank of Latvia Council is influenced by the pre-requisite that a member thereof, within his term of office, may be dismissed from the office only in cases envisaged in Section 22 of the law "On the Bank of Latvia". However, the fact indicated by the Applicant that during their term in office, the Saeima has no possibility to exert political influence upon the members of the Bank of Latvia Council, does not mean that the members of the Bank of Latvia Council would lack democratic legitimization. The Bank of Latvia Council being outside political influence is an essential pre-requisite for the independence of the national central bank, which follows not only from the Satversme and the law "On the Bank of Latvia", but also from Article 130 of the Treaty on the Functioning of the European Union and Protocol No. 4 on the Statute of the European System of Central Banks and of the European Central Bank.

The Saeima has the right, within the limits of the Satversme, to define the competence of an autonomous institution of public administration and to amend it at any time. The scope of competence granted to such an institution must be established in interconnection with the democratic legitimization thereof.

The Saeima has the right to authorise an autonomous institution of public administration to issue external regulatory enactments that are necessary for implementing the law in a field of competence granted by law, for example, with regard to preventing money laundering and financing of terrorism, the supervision of which requires particular competence and autonomy. An autonomous institution of public administration, in exercising the authorisation granted by the legislator in the particular field of competence, has the right to define binding requirements only for a concrete circle of subjects in accordance with the specificity of their activities. Thus, the Bank of Latvia as an autonomous institution of public administration established by the Saeima is to be considered as having appropriate democratic legitimization, in order for it to have the right to issue external regulatory enactments within the field of restricted competence granted by the law with regard to a concrete circle of subjects.

Thus, the Bank of Latvia has the right to issue external regulatory enactments in accordance with the authorisation in the field of competence granted to it by law with regard to concrete circle of subjects.

22. The Applicant holds that the regulation established by the contested norm comprises such issues, the deciding on which falls solely within the legislator's competence (*see transcript of the Constitutional Court sitting of 1 February 2016, Case Materials, Vol. 5, pp. 92–94*). Whereas the Bank of Latvia notes that, in adopting the contested norms, it has acted within the limits of competence granted by the legislator (*see transcript of the Constitutional Court sitting of 1 February 2016, Case Materials, Vol. 5, p. 101*).

22.1. When acting as the legislator, the Saeima does not have the right to transfer to the executive power for deciding upon such issues, which according to the Satversme fall with only within the exclusive competence of the Saeima itself (*see Judgement of 14 October 2015 by the Constitutional Court in Case No. 2015-05-03, Para 10*). The legislator, in authorising the executive power to elaborate regulation on a particular issue, may not cause a risk that the balance between the legislative power and the executive power might tip to the side of the executive

power to the extent that it might jeopardize the principle of separation of powers and, thus, also the essence of a democratic state order (*see Judgement of 11 January 2011 in Case No. 2010-40-03, Para 10.2*). In deciding on authorisation, the legislator has the duty to consider the significance of the particular issue and connection thereof with the fundamental rights (*see Judgement of 14 October 2015 by the Constitutional Court in Case No. 2015-05-03, Para 10*).

The Bank of Latvia may not issue regulations on issues, which have not been decided in full by the legislator itself. Thus, the Constitutional Court must establish, which issues in the particular field had been decided by the legislator itself.

22.2. The Saeima has adopted Law on Prevention and Amendments to Law on Prevention, authorising the Bank of Latvia to define binding requirements for capital companies, which are engaged in trading cash, with regard to fulfilling obligations in the particular field, established in this law.

The Saeima has decided that credit institutions and capital companies, which are engaged in trading cash, have the obligation to identify the client or the true beneficiary in particular cases (Section 11 of Law on Prevention), as well as to report on unusual or suspicious transactions (Section 30 of Law on Prevention). In Section 30(2) of Law on Prevention, the Saeima has authorised the Cabinet of Ministers to issue regulations approving the list of features of an unusual transaction and the procedure for submitting reports on unusual or suspicious transactions. In accordance with this authorisation the Cabinet of Ministers has issued Regulation No. 1071, Para 8 of which provides that a transaction is to be considered as being unusual, if it complies with even one feature referred to in this paragraph. Subparagraph 8.2.4 and 8.6 of Regulation No. 1071 define both with regard to capital companies, engaged in trading cash, and credit institutions as such a feature the case, where a client (for credit institutions – a client without an account) buys or sells foreign currency cash in the amount equivalent to 8 000 *euro* or exceeding it. A reference to the features included in the list of features of an unusual transactions is included also in Para 2 of Section 11(2) of

Law on Prevention, thus, these features, *inter alia*, refer to identification of the client or the true beneficiary.

The legislator has authorised several institutions of public administration, *inter alia*, the Bank of Latvia, to issue binding requirements in particular fields for those subjects, the supervision and control of which these institutions implement.

The Saeima has chosen a model of identification and reporting, which is based upon risk assessment, and has defined the main lines thereof in the law.

Thus, the legislator itself has decided upon the issue of requirements to be set for credit institutions and capital companies engaged in trading cash, *inter alia*, the requirement to identify the client or the true beneficiary.

23. The Constitutional Court in its case law has recognised as being incompatible with the Satversme such regulatory enactments that had been issued without abiding by the legislator's authorisation, i.e., *ultra vires.* This doctrine is applicable to compliance of regulatory enactments issued by an institution, which has been authorised by the legislator, with legal norms of higher legal force (*see Judgement of 9 October 2007 by the Constitutional Court in Case No. 2007-04-03*). The Constitutional Court has already reviewed compliance of legal norms issued by derived public law legal persons with norms of higher legal force (*see Judgement of 24 December 2002 by the Constitutional Court in Case No. 2002-16-03*).

In view of the fact that the Bank of Latvia has been authorised by the legislator to issue external regulatory enactments, the findings by the Constitutional Court expressed in the framework of *ultra vires* doctrine are applicable to the case under review.

23.1. The Constitutional Court has recognised that the legislator's authorisation should maintain the system of checks-and-balances in the relationships between the branches of power, as well as comply with the principle of a state governed by the rule of law [*see Judgement of 1 October 1999 by the Constitutional Court in Case No. 03-05(99), Para 1 of the Findings*]. The Bank of Latvia has the right to issue external regulatory enactments only insofar this right

has been transferred to it by law. The Bank of Latvia has the right to issue an external regulatory enactment only if the legislator has clearly defined the content and limits of the authorisation.

Regulatory enactments that are subordinated to law may not include such legal norms, which cannot be considered as being supplementary aid for implementing a norm of the law (*compare: Judgement of 9 October 2007 by the Constitutional Court in Case No. 2007-04-03, Para 14 and 15*). The legislator has the right to authorise the Bank of Latvia or other autonomous institutions of public administration to elaborate the regulation necessary for implementing a law only insofar it specifies the requirement of the law or establishes a procedure for implementing it. An authorisation of this kind is included in the second and third part of Section 47 of Law on Prevention with respect to FCMC and the Bank of Latvia.

The Applicant holds that the Bank of Latvia has acted contrary to Article 64 of the Satversme, because the contested norms had been issued *ultra vires*; i.e., by exceeding the authorisation established in the third part of Section 47 of Law on Prevention. The Bank of Latvia had defined in the contested norms a new case for identifying the client or the true beneficiary in the meaning of Section 11 of Law on Prevention, but this is said to be inadmissible, since the enumeration of features of the legal elements, included in the legal provision referred to, is exhaustive (*see transcript of the Constitutional Court sitting of 1 February 2016, Case Materials, Vol. 5, pp. 94 and 95*).

Whereas the Bank of Latvia and the Saeima hold that the contested norms were issued in compliance with authorisation granted by the Saeima. A supervisory and control authority may not establish new cases for client identification; however, identification envisaged in the contested norms is said to be a special simplified type of identification or an instrument for implementing requirements of Section 7 of Law on Prevention. Therefore the contested norms, allegedly, should not be examined in the context of Section 11 of Law on Prevention (*see transcript of the Constitutional Court sitting of 1 February 2016, Case Materials, Vol. 5, pp. 89 – 90 and 104–105*).

The Constitutional Court must establish the purpose and the content of the authorising norm and of the contested norms, as well as whether the Bank of Latvia has not exceeded the scope of authorisation granted to it.

23.2. The executive power also must understand authorisation granted by the legislator not only as one concrete, laconic legal norm, but the very substance and purpose of the law (*see Judgement of 11 January 2011 by the Constitutional Court in Case No. 2010-40-03, Para 10.4*). The purpose of authorisation should be understood as that, what the legislator tried to achieve by granting the right to regulate the particular issue (*see Judgement of 9 October 2007 by the Constitutional Court in Case No. 2007-04-03, Para 19*).

Pursuant to Section 2 of Law on Prevention, the purpose of the law is preventing money laundering and financing of terrorism. Persons referred to in Section 2(1) of Law on Prevention have been entrusted performance of this obligation, *inter alia*, capital companies, which are engaged in trading cash, themselves.

The legislator has envisaged applying an approach that is based upon risk assessment to the subjects of Law on Prevention (*see transcript of the sitting of 24 January of the 9th Saeima's winter session*). Section 6(1) of the Law on Prevention that the subject of law, in accordance with the type of its activities, shall implement measures to identify, assess and understand the risks of money laundering and financing of terrorism typical of it activities and clients, and, on the basis of the risk analysis conducted, shall establish a system of internal control for preventing money laundering and financing of terrorism. The legislator has included in Section 7(1) of Law on Prevention provides minimum requirements with regard to the content of internal control system. Section 8 of Law on Prevention, in turn, defines for the subjects of the law a regular duty to assess, how effectively the system of internal control functions, and to implement measures to improve it.

The purpose of Section 47(3) of Law on Prevention must be established by taking into consideration Action Plan for Improving the System for Preventing Money Laundering and Financing of Terrorism approved at the sitting of the

Council for the Development of Financial Sector on 28 March 2013 (*see Case Materials, Vol. 4, pp. 84 –129*), Sub-paragraph 3.2.8 of which underscores recommendation included in MONEYVAL Report: "Latvia should ensure that the Bank of Latvia provides clear requirements for ongoing due diligence in two important areas: establishing the source of funds and nature of business of the customer when the transactions does not qualify as an unusual or suspicious transaction or the customer is a high-risk customer or a politically exposed person." In adopting Section 47(3) of Law on Prevention, the legislator has emphasized recommendations included in MONEYVAL Report. The purpose of the norm is to include in the law an obligation for the Bank of Latvia to establish more detailed requirements for capital companies, engaged in trading cash, in accordance with the type of activities thereof (*see annotation to the draft law No. 1153/Lp11 submitted to the Saeima on 13 May 2014 "Amendments to Law on Prevention Money Laundering and Financing of Terrorism, Para 2 of Section 2).*

Authorisation included in Section 47(3) of Law on Prevention means that the Bank of Latvia, in performing the duties of control and supervisory authority, must assess the risks of money laundering and financing of terrorism that the capital companies, which are engaged in trading cash, encounter in their operations and must define binding requirements for eliminating these risks.

In view of the above, the purpose of the authorising norm is to set for capital companies, which are engaged in trading cash, such requirements with respect to preventing money laundering and financing of terrorism that are based on the assessment of risks in their operations.

Whereas the annotation to draft Regulation No. 141 of the Bank of Latvia, which comprises the contested norm, shows that for the Bank of Latvia the risks linked to cash transactions in capital companies, which are engaged in trading cash, have been the basis for issuing these (*see annotation to draft Regulation No. 141 of the Bank of Latvia, Case Materials, Vol. 1, p. 194).* The written answer by the Bank of Latvia also includes the aforementioned risk assessment (*see Case Materials, Vol. 1, pp. 168 –172*).

Thus, in the process of drafting the Bank of Latvia Regulation No. 141 the risks that capital companies, which trade in cash, encounter in their operations were assessed. Hence, the Bank of Latvia Regulation No. 141 was elaborated to reach the purpose of the legislator's authorisation.

23.3. The content of authorisation should be sufficiently clear to reveal the essence of authorisation (*see, for example, Judgement of 21 November 2005 by the Constitutional Court in Case No. 2005-03-0306, Para 10, and Judgement of 9 October 2007 in Case No. 2007-04-03, Para 20*).

The Section 47(3) of Law on Prevention includes authorisation to issue "binding requirements for performing obligations established in this Law with respect to establishing a system of internal control, identifying true beneficiaries and verifying, whether the person, who has been indicated as the client's true beneficiary, is the true beneficiary of the client, as well as with respect to supervising of the transactions conducted by clients and knowing business activities of clients."

The Constitutional Court has recognised that the term "procedure" means way of implementing a process or of organising activities (*see Judgement of 9 October 2007 by the Constitutional Court in Case No. 2007-04-03, Para 20 and Judgement of 14 October 2015 in Case No. 2015-05-03, Para 13.2*). This concept is not used in Section 47(3) of Law on Prevention. This indicates that the authorisation granted to the Bank of Latvia is different and comprises not solely the right to regulate the procedural aspect of activities.

The content of authorisation included in Section 47(3) of Law on Prevention must be established, by analysing also norms of the same law, which regulate issues referred to in Section 47(3). The second part of Section 11 of Law on Prevention defines the cases, when the subject of law identifies the client, before conducting a particular transaction, without initiating business relationship. The Constitutional Court must assess, whether the contested norms apply to any of the client identification cases referred to in Section 11(2) of Law on Prevention.

As the Bank of Latvia and the Saeima note, Section 47(3) of Law on Prevention provides, *inter alia*, for the rights of the Bank of Latvia to establish

binding regulations for capital companies, which are engaged in trading cash, for performing the duties established in this law as regards creating of an internal control system. Whereas pursuant to Para 5 of Section 7(1) of Law on Prevention, the subject of law, in establishing a system of internal control must envisage, *inter alia*, a procedure for detecting unusual transactions.

One of the ways that allow detecting unusual transactions is to establish a certain threshold value of the amount of a transaction, and if it is exceeded, the client must be identified, even if the transaction has no signs of an unusual or suspicious transaction. However, the legislator's authorisation means that the executive power, in exercising it, must act within the framework of requirements of a particular law and of the whole legal system.

Thus, the authorising norm, as to its content, indicates that the legal requirement with regard to establishing a system of internal control must be implemented insofar the implementation of those legal requirements, which the Bank of Latvia has not been authorised to specify, is not substantially altered. The Bank of Latvia has not been authorised to add to the regulation of Section 11 of Law on Prevention.

23.4. The scope of authorisation means the range of those issues, which an institution, in exercising authorisation granted by the legislator, has the right to regulate.

In establishing the scope of authorisation granted by the legislator, specific features of the particular sector, the regulation of which has been tasked by the legislator, must be taken into account (*see Judgement of 11 January 2011 by the Constitutional Court in Case No. 2010-40-03, Para 10.4*). To understand the substance of the law, the regulation of the particular field and also the general regulations should be assessed. Authorisation granted by the legislator means that the executive power, in exercising it, must act within the framework of the legal system (*see Judgement of 14 October 2015 by the Constitutional Court in Case No. 2015-05-03, Para 13.3*). The scope of authorisation granted to the Bank of Latvia is to be understood by analysing the system of Law on Prevention as a whole.

It is noted in the annotation to Law on Prevention that the law defines only the general, minimum requirements regarding prevention of money laundering and financing of terrorism. Therefore the Bank of Latvia must define more detailed requirements for capital companies, which are engaged in trading cash, appropriate for the type of their activities (*see annotation to the draft law No. 1153/Lp11 submitted to the Saeima on 13 May 2014 "Amendments to Law on Prevention Money Laundering and Financing of Terrorism, Para 2 of Section 1).* The Saeima notes that the Bank of Latvia, assessing the risks of money laundering and financing of terrorism in accordance with the subject's of law types of activities, has exercised the right envisaged in law to issue regulatory enactments with additional requirements with regard to detecting unusual transactions, which is an issue to be regulated by the system of internal control. Such requirements, allegedly, do not automatically envisage the obligation to identify the client in the procedure of Section 11 of Law on Prevention and to report about this transaction in accordance with Section 30 of this Law (*see transcript of the Constitutional Court sitting on 1 February 2016, Case Materials, Vol. 5, p. 89*).

The Constitutional Court has recognised in its rulings that fundamental rights may be restricted only by law or on the basis of law, which clearly indicates the scope of restriction upon fundamental rights. Restriction of fundamental rights without a clear authorisation from the legislator is inadmissible. Whereas in exercising the authorisation, restriction of a person's fundamental rights must be avoided, if the authorising norm has not clearly indicated it (*see Judgement of 21 November 2005 by the Constitutional Court in Case No. 2005-03-0306, Para 10, and Judgement of 12 February 2016 in Case No. 2015-13-03, Para 15.2*). In the case under review it is essential that the legal norm, which authorises an autonomous institution of public administration to issue an external regulatory enactments, should be worded with sufficient clarity, in view of the legal nature of democratic legitimization of this institution. Thus, the obligations included in the norms issued on the basis of such authorisation and – even more so – restrictions upon fundamental rights must clearly follow from the text of the authorising norm.

The binding requirements for fulfilment of duties with regard to establishing a system of internal control defined in Law on Prevention that the text of the authorising norm refers to does not apply to identification of clients or true beneficiaries referred to in annotation to the Bank of Latvia draft Regulation No. 141. Moreover, Para 1 of Section 7(1) of Law on Prevention, which regulates establishing the system of internal control, refers only to the procedure of client identification, which clearly points to the procedural nature of such identification.

The documents from drafting and adopting the contested norms do not confirm the arguments of the Bank of Latvia and the Saeima that the contested norms envisage only "simplified" identification and only specify requirements of Law on Prevention with regard to establishing a system of internal control, i.e., detecting unusual transactions. Annotation to the Bank of Latvia draft Regulation No. 141 with regard to the contested norms focuses upon the obligation to identify clients and register transaction, whereas another paragraph refers to the requirements for capital companies to review the documents of the existing internal control system (*see annotation to the Bank of Latvia draft Regulation No. 141, Case Materials, Vol. 1, p. 194*).

The Bank of Latvia and the Saeima note that the contested norms had been adopted in compliance with a recommendation included in MONEYVAL Report. However, recommendation "Latvia should ensure that the Bank of Latvia provides clear requirements for ongoing due diligence in two important areas: establishing the source of funds and nature of business of the customer when the transactions does not qualify as an unusual or suspicious transaction or the customer is a high-risk customer or a politically exposed person" as to its content points to specific activities for establishing the source of funds and nature of the customer's business, which are impossible in the case, if only the "simplified" identification, referred to by the Bank of Latvia and the Saeima, is conducted.

The contested norms substantially envisage procedure for identifying the client or the true beneficiary. The Bank of Latvia Regulation No. 141 comprises both a section on establishing a system of internal control (Section II) and a section on identifying unusual and suspicious transactions (Section IV); however,

the contested norms are included in Section V “Identification of the client and the true beneficiary”.

Also in terms of actual consequences the contested norms envisage identification of clients or true beneficiaries; i.e., making copies of a client’s personal identification documents and verifying, whether a client’s personal identity documents are authentic and valid. The term “to identify” means “to establish” (according to certain features), “to know” (according to typical, peculiar features), to “recognise” (*Latviešu valodas vārdnīca. Rīga: Avots, 1998, 257. lpp.; Svešvārdu vārdnīca. Rīga: Jumava, 1999, 294. lpp.*). Also FCMC and the Control Service emphasize that client supervision and due diligence essentially are impossible without identification, envisaged in the contested norms (*see, for example, transcript of the Constitutional Court sitting of 19 January 2016, Case Materials, Vol. 4, p. 30, and transcript of the Constitutional Court sitting of 1 February 2016, Case Materials, Vol. 5, p. 71).*

It is not disputed in the case under review that client identification cases referred to in Section 11 of Law on Prevention have been listed exhaustively and that the legislator has not authorised the Bank of Latvia to supplement this list of cases. The Constitutional Court does not uphold the argument of the Bank of Latvia and the Saeima that the legal regulation that the contested norms comprise differs in terms of legal consequences from the regulation established in Section 11 of Law on Prevention, which is said to be directly linked to the obligation to report on suspicious or unusual transactions envisaged in Section 30 of the same Law. The abovementioned obligations established in Law on Prevention are to be recognised as being independent. Thus, regulation of Section 11 of Law on Prevention does not allow revision thereof, envisaging, on the basis of authorisation, another identification of the client or the true beneficiary.

The contested norms establish requirements regarding identification of the client or the true beneficiary – thus, regulate an issue, which has already been exhaustively regulated in Section 11 of Law on Prevention.

In view of the abovementioned it can be concluded that the Bank of Latvia, in adopting the contested norms, has acted contrary to the principle of separation of powers and has exceeded authorisation granted by the legislator.

Hence, the contested norms have been issued *ultra vires* and are incompatible with Article 1 and Article 64 of the Satversme.

24. If the contested norms have been issued *ultra vires,* then the differential treatment that they comprise has not been established by law and therefore is incompatible with the first sentence of Article 91 of the Satversme. In view of the abovementioned, it is not necessary to examine, whether the aim of differential treatment established by the contested norms is legitimate and whether such treatment is commensurate (*compare: Judgement of 12 December 2014 by the Constitutional Court in Case No. 2013-21-03, Para 12.6*).

Thus, the contested norms are incompatible with the first sentence of Article 91 of the Satversme, since the differential treatment that they envisage has not been established by law.

25. Pursuant to Para 11 of Section 31 of Constitutional Court Law, the Court must decide on the date, as of which the contested norm (act) becomes invalid.

Pursuant to Section 32(3) of Constitutional Court Law, a legal norm, which has been recognised by the Constitutional Court as being incompatible with a norm of higher legal force, is to be recognised as being invalid as of the date when the judgement by the Constitutional Court is published, unless the Constitutional Court has provided otherwise. Thus, the legislator has granted to the Constitutional Court broad discretion in deciding on the date, as of which a norm, which has been recognised as being incompatible with a norm of higher legal force, becomes invalid. To recognise a contested norm as being invalid not as of the day of its publication, but as of another date, the Constitutional Court must substantiate its opinion (*see Judgement of 21 December 2009 by the*

Constitutional Court in Case No. 2009-43-01, Para 34, and Judgement of 28 November 2014 in Case No. 2014-09-01, Para 21).

It has been found in the case law of the Constitutional Court that legal norms, which have been adopted *ultra vires*, are to be recognised as unlawful and invalid as of the moment of their adoption [*see Judgement of 10 June 1998 by the Constitutional Court in Case No. 04-03(98), the Findings, and Judgement of 9 October 2007 in Case No. 2007-04-03, Para 25*]. It must be presumed with regard to such cases that an anti-constitutional legal norm has never been in force, because it has not been adopted in due procedure, and therefore it cannot cause legal consequences (*see Judgement of 12 December 2014 by the Constitutional Court in Case No. 2013-21-03, Para 13*).

The Constitutional Court has found that in exceptional cases derogations from this presumption could be admissible. However, in such cases the Constitutional Court should identify those substantial circumstances that would provide grounds for establishing such an exception (*see Judgement of 12 December 2014 by the Constitutional Court in Case No. 2013-21-03, Para 13, and Judgement of 12 February 2016 in Case No. 2015-13-03, Para 17*).

The contested norms have been adopted *ultra vires*. The Constitutional Court has not found confirmation in the case under review of the presence of such circumstances that could provide grounds for exemption from the presumption of invalidity of the contested norms as of the moment of their adoption.

The Substantive Part

On the basis of Section 30 –32 of the Constitutional Court Law, the Constitutional Court

held :

to recognize Paragraph 19 and Paragraph 20 of the Bank of Latvia Regulation No. 141 "Requirements Regarding Prevention of Money

Laundering and Financing of Terrorism in Buying and Selling Foreign Currency Cash" as being incompatible with Article 1 and Article 64, as well as the first sentence of Article 91 of the Satversme of the Republic of Latvia as of the moment of adoption thereof.

The Judgement is final and not subject to appeal

The Judgement shall enter into force at the moment it is promulgated.

Chairman of the court sitting A. Laviņš