



LATVIJAS REPUBLIKAS SATVERSMES TIESAS TIESNESIS

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SEPARATE OPINION

of the Justice of the Constitutional Court

Aldis Laviņš

on 15 March 2016, in Riga,

in Case No. 2015-11-03

“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.”

1. On 2 March 2016 the Constitutional Court passed a judgement in case No. 2015-11-03 “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” (hereinafter – the Judgement) and recognised 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” (hereinafter – the contested norms) as being incompatible with Article 1 and Article 64, as well as the first sentence in Article 91 of the Satversme of the Republic of Latvia and void as of the moment of adoption.

I cannot uphold the arguments included in Para 25 of the Judgement with respect to recognising the contested norms as being void from the moment of adoption thereof.

In providing reasoning for my opinion, I shall make use of the abbreviations used in the Judgement.

2. It has been validly recognised in Para 23.2. of the Judgement that Regulation No. 141 of the Bank of Latvia was drafted to attain the aim of authorisation granted by the legislator. Pursuant to the findings provided in this paragraph, the aim of the authorising norm (Section 47(3) of Law on Prevention) is to define such requirements for capital companies engaged in trading cash, with respect to prevention of money laundering and financing of terrorism, that would be based upon assessing risks in their operations. The Constitutional Court in its Judgement drew attention to the fact that the Bank of Latvia, in issuing the contested norms, had taken as the basis risks inherent to transactions of trading cash in capital companies that are engaged in trading cash, and the risk assessment mentioned above was included in the written reply by the Bank of Latvia.

However, it is noted in Para 25 of the Judgement that the Constitutional Court has not found confirmation regarding the existence of such essential circumstances, which could justify an exemption from the presumption that the norms that have been issued *ultra vires* are void as of the moment of their adoption.

3. The Constitutional Court, by exercising the right granted to it in Section 32(3) of the Constitutional Court Law must ensure, to the extent possible, that the situation, which might develop as of the moment when the contested norm becomes invalid, would not cause infringement upon persons' fundamental rights guaranteed in the *Satversme* and would not significantly harm interests of the State and society (see *Judgement of 16 December 2005 by the Constitutional Court in Case No. 2005-12-0103, Para 25, and Judgement of 16 April 2015 in Case No. 2014-13-01, Para 22*). The Constitutional Court Law

not only grants authorisation to the Constitutional Court, but also imposes responsibility to ensure that its judgements ensure legal stability, clarity and peace in social reality (*see Judgement of 21 December 2009 by the Constitutional Court in Case No. 2009-43-01, Para 35.1.*). In those instances, where immediate revoking of a contested norm that had been issued *ultra vires* would be even more incompatible with the *Satversme* than leaving it in force, it is possible to provide that the contested norm would become invalid as of a particular future date (*see, for example, Judgement of 22 October 2002 by the Constitutional Court in Case No. 2002-04-03, Para 3 of the Findings, and Judgement of 23 September 2008 in Case No. 2008-01-03, Para 20*).

3.1. The Constitutional Court has recognised in its case law that measures envisaged for prevention of money laundering and financing of terrorism serve to protect public safety. The State has an obligation to protect public safety and to control flow of finances, to prevent legalisation of criminally acquired assets and financing of terrorism, as well as tax evasion. Such an obligation of the State is envisaged not only by the *Satversme*, but also by commitments assumed by Latvia as a Member State of the European Union and by a series of Latvia's international commitments (*compare: Judgement of 28 May 2009 by the Constitutional Court in Case No. 2008-47-01, Para 11*).

Participants of the case under review share the opinion that in the field of trading cash the risks of legalising criminally obtained assets and financing of terrorism are particularly high. The Constitutional Court also upheld this opinion of the case participants, recognising in Para 23.2. of the Judgement that the contested norms had been adopted by assessing the operational risks of capital companies engaged in trading cash that might be linked to possibilities of legalising criminally obtained assets and financing of terrorism. Therefore I am of the opinion that the contested norms were adopted with the aim of protecting public safety. Although the contested norms had been issued *ultra vires*, they facilitated protection of public safety in a particular part of the market, i.e., with respect to subjects that are under the supervision of the Bank of Latvia – capital companies engaged in trading cash. By recognising the contested norms as being invalid, the scope of supervising and controlling these capital companies in the

field of preventing legalisation of criminally obtained assets and financing of terrorism is decreased.

It had to be assessed in Para 25 of the Judgement, whether recognising the contested norms as being void from the moment of their adoption would not decrease the level of public safety and, thus, would be even less compatible with the *Satversme* compared to leaving them in force for a certain period of time.

3.2. In adopting legal regulation, pursuant to which capital companies engaged in trading cash are supervised and controlled, it must be taken into consideration that the system of regulatory enactments should be internally coherent. The legislator is obliged to ensure that the regulation on public administration included in regulatory enactments complies with the principle of good governance (*see, for example, Judgement of 19 May 2009 by the Constitutional Court in Case No. 2008-40-01, Para 17*). Supervision and control over transactions of trading in cash are regulated not only by the contested norms, but also by an extensive and united system of legal norms. The recommendation included in MONEYVAL Report, noted in Sub-para 3.2.8 of 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 on 28 March 2013, which is referred to also in Para 23.2. of the Judgement and which has been taken into account in defining the aim of Section 47(5) of the Law on Prevention, applies not solely to the Bank of Latvia, but to the Republic of Latvia in general.

The Bank of Latvia, in accordance with authorisation granted by the legislator, acts within the field of competence established for it; i.e., develops requirements to perform the obligations defined in Law on Prevention only with respect to capital companies, which are engaged in trading cash. Whereas pursuant to Section 47(2) of the Law on Prevention, FCMC has the right to issue legal regulations for supervising and controlling prevention of money laundering and financing of terrorism with respect to credit institutions; however, Regulation of FCMC in accordance with the aforementioned norm of Law on Prevention has not been issued.

I believe that in the particular situation a decision had to be taken on whether the legislator and state institutions should not be given a certain period of time for assessing meticulously, in the framework of cooperation, taking into consideration the system of regulatory enactments as a whole, the best way for protecting public safety, *inter alia*, abiding by the principle of legal equality.

4. There have been a number of instances in the case law of the Constitutional Court, where a legal norm (act) that had been adopted *ultra vires* was recognised as being invalid as of a certain future date. The Constitutional Court has provided substantiation for such findings, by assessing various circumstances.

In one of these cases the Constitutional Court took into consideration that the legal norms that were incompatible with the *Satversme* were aimed at protecting persons' fundamental rights and security and that the situation that would occur if no legal act would regulate the particular field would be even more incompatible with the *Satversme*. Therefore the Constitutional Court allowed that these legal norms, which formally had been issued *ultra vires*, remained into force until another legal regulation entered into force (*see Judgement of 22 October 2002 by the Constitutional Court in Case No. 2002-04-03, Para 3 of the Findings*). In another case the Constitutional Court found that by recognising regulation that was incompatible with authorisation granted by the legislator as of the moment of its adoption it would place persons in a more unfavourable situation. Due to this the respective institution of public administration was given sufficient time for drafting and issuing regulation complying with norms of higher legal force (*see Judgement of 23 September 2008 by the Constitutional Court in Case No. 2008-01-03, Para 20*). Whereas regarding the issue of legal norms on granting scholarships that had been adopted *ultra vires*, the Constitutional Court recognised that a situation, where after the contested norm had been recognised as being void institutions of higher education would have to re-examine issues of granting scholarships during the study term, would be contrary to the principle of legal stability (*see Judgement of 5 May 2011 by the Constitutional Court in Case No. 2010-57-03, Para 16*). Yet

in another case the Constitutional Court concluded that it was impossible to eliminate an infringement of fundamental rights without actions taken by the Cabinet of Ministers. I.e., the Cabinet had to establish a procedure appropriate for the task set by the legislator. This required time, therefore the most appropriate solution was to recognise the contested norms as being invalid as of a specific future date (*see Judgement of 27 June 2013 by the Constitutional Court in Case No. 2012-22-0103, Para 19*).

Abiding by, *inter alia*, the principle of equality, similar cases must be resolved similarly. Therefore the Constitutional Court in its Judgement had to take into account also the findings included in the rulings referred to above and had to assess, whether the State's obligation to protect public security in a field as important as preventing money laundering and financing of terrorism did not point all the more to the need of recognising the contested norms as being void from a certain future date.

In view of the above, I am of the opinion that it had to be assessed in the Judgement, whether the need to protect public safety should not be considered as being sufficiently essential circumstance for not recognising the contested norms void as of the moment of their adoption and giving time to the legislator and state institutions for systemic assessment of the best way for protecting public security, by abiding, *inter alia*, with the principle of legal equality.

Justice of the Constitutional Court

A. Laviņš