THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF LATVIA

JUDGEMENT
ON BEHALF OF THE REPUBLIC OF LATVIA
in Case No. 2012-07-01
1 March 2013, Riga

The Constitutional Court of the Republic of Latvia composed of: Chairperson of the court hearing Gunārs Kūtris, Justices Kaspars Balodis, Aija Branta, Kristīne Krūma, Uldis Ķinis and Sanita Osipova,

having regard to the constitutional complaint submitted by Santa Anča, Jevgeņija Dimpere, Ina Inkēna and Raimonds Pauls (hereinafter – the Applicants),

with the participation of the representative of the Applicants, sworn attorney at law Egīls Radziņš, and

the representative of the institution, which adopted the contested act – the Saeima, Gunārs Kusiņš, the Head of the Saeima Legal Bureau,

secretary of the court hearing Elīna Kursiša,

on the basis of Article 85 of the Satversme of the Republic of Latvia, Para 1 of Section 16 and Para 11 of Section 17(1) of the Constitutional Court Law,

on 22 and 29 January 2013 in Riga examined at an open court hearing the case

"On Compliance of Section 179(1) of the Credit Institution Law with Article 105 of the Satversme of the Republic of Latvia and Section 179 (2) of the Credit Institution Law with the first sentence of Article 92 of the Satversme of the Republic of Latvia".

The Facts

1. The insolvency proceedings of the joint stock company "Latvijas Krājbanka" is being implemented in accordance with the Credit Institution Law, which was adopted on 10 October 1995 and came into force on 24 October 1995.

With the law of 11 April 2002 "Amendments to the Credit Institution Law", Section 179 was expressed in new wording, and it was amended once again with the law of 11 December 2003 "Amendments to the Credit Institution Law". It provides:

"(1) The decision on the implementation of restoration shall be taken by the administrator. The decision on the implementation of restoration and the restoration plan shall come into effect after its approval by the Financial and Capital Market Commission and the meeting of creditors. The restoration of the credit institution shall be managed by the administrator in accordance with the restoration plan adopted and approved by the Financial and Capital Market Commission and the meeting of creditors.

(2) A court may revoke a decision on the implementation of a restoration plan on the basis of an application by an administrator, meeting of creditors or the Financial and Capital Market Commission if the adoption of such decision has been achieved by fraud or duress, or a misleading influence has occurred." (hereinafter – also the contested norms).

2. The Applicants – Santa Anča, Jevgeņija Dimpere, Ina Inkēna and Raimonds Pauls – hold that the contested norms are incompatible with Article 105 and the first sentence of Article 92 of the Satversme of the Republic of Latvia (hereinafter – Satversme).

The Applicants express the opinion that Section 179(1) of the Credit Institution Law is incompatible with Article 105 of the Satversme, since it violates the Applicants' right to decide on the issues related to their property, i.e., the creditors of the credit institution are unable to influence the decisions on the solution to the insolvency of the credit institution.

The Applicants object to the fact that the decision on the fate of the credit institution is adopted solely by the administrator. If the administrator opts for bankruptcy procedure as the solution for the insolvency, the creditors' meeting has no rights whatsoever to participate in the taking of the decision. The approval by the Financial and Capital Market Commission (hereinafter – the Commission), however, is mandatory. This significantly restricts the rights envisaged by Article 105 of the Satversme.

The Applicants' representative, sworn attorney at law Egīls Radziņš, noted during the court hearing that the administrator of the credit institution, in fact, has been granted the sole right to exclude the implementation of restoration and to commence the bankruptcy procedure of the credit institution, without examining this issue at the creditors' meeting. In such a case the creditors' meeting is not convened. Thus, the creditors of the credit institution are not at all involved in deciding upon the possible restoration of the credit institution, and thus the creditors are deprived of any possibility to influence the procedure, which should be aimed at providing maximum protection to the creditors' lawful interests. More mitigating means for reaching the legitimate aim would be if the creditors' meeting together with the administrator decided upon the solution of the credit institution's insolvency. If a credit institution becomes insolvent, the primary aim is to restore solvency, and the implementation of restoration offers greater chances of satisfying the lawful claims of all creditors compared to the implementation of the bankruptcy procedure, the convening of the creditors' meeting prior receiving the opinion by the Commission would allow the creditors to participate in the adoption of a decision pertaining to their property, to discuss and, if necessary, improve the submitted restoration plans.

The Applicants note that the Commission, in difference to other creditors, might be interested in implementing exactly the bankruptcy procedure, since the Credit Institution Law envisages priority right to the Commission to recover the funds from the Deposit Guarantee Fund. In the case of the bankruptcy of a credit institution, the Commission retains real possibility to achieve that its claim is satisfied, moreover, even faster compared to the comparatively more complicated restoration procedure.

The Applicants also express the opinion that they have been deprived of the right to appeal against the decision on the chosen solution for the credit institution's

insolvency and, thus, also the right to a fair court, which is enshrined in the first sentence of Article 92 of the Satversme.

It follows from Section 179(2) of the Credit Institution Law that the control by a court over the legality of the decision adopted by the administrator can be exercised only in those cases, when a decision on implementing restoration has been adopted. The possibility for the creditors' meeting to appeal against the decision not implement restoration is not envisaged, since the creditors' meeting is not convened at all. Likewise, it is impossible to appeal in court against the decision on implementing restoration, if this decision has been adopted without fraud or duress or misleading influence, but is erroneous or unlawful due to other circumstances.

The Applicants hold that this regulation ungroundedly deprives the creditors of a credit institution of access to a fair court, since it significantly restricts the verification of the legality of the decision to implement restoration and fully excludes court control over such a decision, by which implementation of restoration is rejected.

3. The institution, which adopted the contested act – the Saeima – does not uphold the Applicants' opinion and holds that Section 179(1) of the Credit Institution Law complies with Article 105 of the Satversme, but the second part of this Section – with Article 92 of the Satversme.

3.1. The Saeima holds that in this case the Applicants' right to own property is protected by guaranteeing to them disbursement of a certain amount of deposit. The obligation of the State to disburse to the depositor his deposit in full amount, if it exceeds the amount stipulated by law, cannot follow from Article 105 of the Satversme. Moreover, the contested norm does not restrict the right to own property, since it is retained in the same scope as before initiating the insolvency proceedings of the credit institution.

The representative of the Saeima – Gunārs Kusiņš, Head of the Saeima Legal Bureau, during the court hearing emphasised that in difference to the general principles of insolvency, in accordance to which the insolvent merchant is primarily protected, the insolvency procedures of credit institutions are aimed at the protection of depositors – special kind of creditors. This principal difference also explains the

legislator's approach to insolvency procedures of credit institutions, the involved institutions, creditors, court control and other significant elements.

G. Kusiņš notes: if, however, it is recognised that the contested norm restricts the creditors' right to own property, this restriction has a legitimate aim – financial stability, i.e., the protection of the interests of the whole society. Since the operations of a credit institution influence numerous persons, who use the services of the credit institution, as well as the respective sector of economy in general, the regulation on the operations of credit institutions must ensure fast and clear decisions on some issues, when the credit institution is experiencing financial difficulties.

An administrator and the Commission are involved in the insolvency proceedings of a credit institution; they are able to adopt a competent, unbiased decision, appropriate for the actual circumstances. Moreover, a bankruptcy procedure can be initiated only with a court's approval. If creditors, whose deposits at the credit institution significantly exceed the amount of compensation guaranteed by the state, were involved in the decision taking, it could be envisaged that the persons would be ready to agree to any restoration plans, not to admit their financial losses. However, this could create significant losses to other persons, the whole financial sector and the economy in general. Therefore, the Applicants' wish to participate in the decision taking themselves and to achieve restoration of the credit institution is understandable, however, it is doubtful, whether a procedure like this would allow reaching the legitimate aim in the same quality as ensured by Section 179(1) of the Credit Institution Law currently in force.

Moreover, it is important to ensure the legal stability of the restored credit institution, in order not to subject its clients to ungrounded risk. Therefore, the legislator has restricted both the circle of persons, who have the right to request cancellation of the restoration and, essentially, "return" of the credit institution to bankruptcy, as well as envisaged restricted grounds for submitting the respective claim, in order to balance the interests of the private persons involved in the restoration of a credit institution with the interests of society. Uncertainty or prolonged legal proceedings in connection with the insolvency or restoration of a credit

institution can infringe the rights of persons connected to this credit institution, as well as influence the sector of credit institutions and economy in general.

The Saeima notes that convening of creditors' meeting is useful only if the administrator recognises that restoration is feasible and if the Commission also agrees to this. In this case the creditors' meeting is unnecessary, since restoration is connected with the infringement of creditors' rights – contrary to the bankruptcy and liquidation cases, when the creditors' rights remain unchanged. In the case of restoration, the creditors usually have to relinquish their essential rights of claim against the credit institution. Thus, the Applicants have been ensured sufficiently extensive protection of their right to own property. Therefore the Saeima holds that the restriction to fundamental rights included in Section 179(1) of the Credit Institution Law in interconnection with the Financial Collateral Law, is proportional, since it protects both the depositors of the credit institutions and public welfare, as well as ensures the protection of the Applicants' rights.

3.2. The Saeima doubts the Applicants' argument that they are not ensured access to court and, thus, possibility to influence the decision on the solution for the insolvency of the credit institution. In accordance with Section 184(1) of the Credit Institution Law the decision on initiating bankruptcy procedure, upon the receipt of respective application, is adopted by a court. Thus, in the case that is of interest to the Applicants, when the issue on initiating the bankruptcy procedure of a concrete credit institution is decided upon, judicial control is ensured, i.e., the final decision on commencing the bankruptcy procedure is adopted by court, not by the administrator or the Commission. Moreover, in accordance with the regulation of the Civil Procedure Law, it is possible to appeal against the legality of the administrator's actions, *inter alia*, the decision not to implement the restoration procedure. This is also proven by the case law in the case of insolvent joint stock company (hereinafter – IJSC) "Latvijas Krājbanka".

At the court hearing G. Kusiņš also noted that Section 179(2) of the Credit Institution Law had not been applied to the Applicants and, hence, cannot violate their fundamental rights. The aforementioned norm is applicable only to those cases, when a decision on the restoration of a credit institution has been adopted and the respective plan has come into effect. A decision of this kind has not been adopted in the

framework of the concrete case, and, thus, the Applicants have no right to appeal against it.

4. The representative of the summoned person – the administrator of IJSC "Latvijas Krājbanka" – Stephen Young (*Young Stephen Murchell Martin)*, the chairperson of board of the limited company "KPMG Baltics", noted at the court hearing that both the framework of the insolvency proceedings and upon his own initiative he had met and negotiated with a number of persons: the shareholders of the bank, the members of the former board and council, the representatives of the bank's major creditors, the representatives of the association for the protection of the depositors and creditors of credit institutions, as well as with other stakeholders. Seven proposals regarding the possible restoration had been submitted within the term set out in law. The proposals on restoration were assessed on the basis of a number of criteria, *inter alia*: whether the offered solutions ensured the minimum solvency indicators for the credit institution, whether restructuring of creditors' claims was envisaged and whether the offered solutions ensured long-term development of the credit institution, etc. However, none of the proposals complied with the criteria defined for the restoration plan, none of these had been viable. Therefore, on 30 January 2013 the administrator submitted to the Commission the decision on bankruptcy as the possible solution to insolvency. Following the assessment of this proposal, the Commission had decided to support it. Riga Regional Court received a complaint of a number of creditors regarding the offered solution to insolvency. Riga Regional Court, having examined and rejected them, on 8 May 2012 adopted the decision on commencing the bankruptcy procedure of the joint stock company "Latvijas Krājbanka".

S.Young emphasized that the during the insolvency proceedings the administrator approached many creditors and heard their opinion, as well as the opinions of other stakeholders. The decision to propose bankruptcy as the solution the banks insolvency was adopted as the result of analysing this communication and the opinions expressed.

5. The summoned person – the Financial and Capital Market Commission – holds that Section 179(1) of the Credit Institution Law complies with Article 105 of the Satversme, but Section 179(2) – with the first sentence of Article 92 of the Satversme.

5.1. The representative of the Commission – **Inga Pētersone, the Chief Legal Advisor of the Legal Unit at the Legal and Licencing Department** – emphasised at the court hearing that the procedure for adopting and approving the decision on implementing restoration ensured balance between the interests of the public and those of the creditors, by ensuring a mechanism of checks-and-balances between the involved institutions and creditors, thus ensuring that an unfeasible restoration plan was not adopted, which could threated the stability of the financial system and unfoundedly restrict the creditors' rights.

The insolvency administrator's competence covers the initial assessment and furthering of the restoration plan, since the administrator, being a person with expert knowledge and experience, is responsible for successful implementation and completion of the insolvency proceedings as the chosen solution to insolvency. The Commission regulates and supervises the operations of a credit institution on behalf of the State. Its competence comprises the approval of the decision adopted by the administrator on the implementation of restoration, i.e., to ensure that the implementation of a restoration plan, in the framework of which the requirements set for credit institutions were not met and which could threaten the stability of the financial system, is not commenced. The requirement that the creditors' meeting approves the decision on implementing restoration, in its turn, is needed to safeguard the interests of the creditors themselves, since in the majority of cases, restoration envisages decreasing the creditors' claims, or postponing the term of debt settlement or capitalization of debt. To prevent the possibility that the creditors' interests might be infringed, the legislator has envisaged the right for the creditors to express their agreement to the restoration proposed by the administrator or to reject the restoration, if it would lead to cancelling of claims in unacceptable amount or if access to resources were denied for an excessively long period of time. Therefore, this procedure ensures to the creditors the rights set out in Article 105 of the Satversme.

The Commission notes that the application regarding commencement of bankruptcy procedure can be submitted to court by the administrator of the credit institution upon his own initiative or in cases, when the Commission or the creditors' meeting does not approve the restoration solution offered by the administrator or if the restoration is cancelled or suspended.

As regards bankruptcy, the legislator has established additional control over the necessity and validity of the respective solution, i.e., the decision on commencing the bankruptcy proceedings is adopted by the court, after the administrator has submitted an appropriate application and the Commission's approval. Therefore, if restoration is implemented, all persons involved in the insolvency proceedings can rely upon the judicial control and the adoption of a lawful decision.

5.2. The Commission holds that the court control, within the framework of insolvency procedure, over the decision on restoration is ensured in both the case, if the administrator adopts a decision to implement restoration, and in the case, if the administrator adopts the decision not to implement restoration and to commence bankruptcy procedure.

If the administrator adopts a decision on implementing restoration, the creditors' meeting, pursuant to Section 179(2) of the Credit Institution Law, has the right to request the court to cancel restoration. The claim, which has been brought on the basis of the aforementioned norm, must be based upon proof that the adoption of the decision on restoration was achieved by fraud, duress or a misleading influence. However, in those cases, when the decision on implementing restoration was not adopted under such influence, the creditors meeting has the right to turn to court for the protection of their interests, on the basis of the right established in the Civil Procedure Law to submit a complaint regarding the administrator's actions (Section 379(2) of the Civil Procedure Law) and to submit application on dismissing the administrator (Section 387(3) of the Civil Procedure Law).

The aforementioned norms of the Civil Procedure Law grant to creditors the right to turn to court for the protection of their interests also in those cases, when the administrator adopts a decision not to conduct restoration of the credit institution and opts for bankruptcy as the solution to insolvency. In such cases, pursuant to Section 379(2) of the Civil Procedure Law, the court, upon the creditors' application, may

assess, whether the administrator's action – i.e., not to commence restoration of a credit institution – is legal. If the court establishes that the administrator's decision not to commence restoration is illegal, it may impose the obligation upon the administrator to assess the possibility of restoration repeatedly. Likewise, in a situation like this, creditors have the right to submit an application regarding dismissal of the administrator in accordance with Section 387(3) of the Civil Procedure Law and to request the court to assess, whether the administrator in his activities, *inter alia*, by adopting the decision on bankruptcy, has abided by the regulations of the Credit Institution Law and other regulatory enactments, whether the administrator is competent and whether he is not abusing his powers. If the court recognises such an application by the creditors as founded, it may decide on dismissing the administrator and impose the obligation upon the Commission to recommend another administrator for the credit institution.

6. The summoned person – the Ministry of Justice – holds that the contested norms comply with Article 105 and Article 92 of the Satversme.

6.1. The Ministry of Justice holds that the contested norm comprises a restriction to the creditors' right to own property, since primarily the administrator is granted the right to decide upon accepting or rejecting restoration, i.e., to take a decision on an issue, which is related to creditors' property.

The Credit Institution Law, by defining the administrator as the main person ensuring the insolvency procedure, i.e., a professional and independent person, whose main task is to ensure that the lawful interests and rights of all persons involved in the insolvency proceedings of a credit institution are ensured in a balanced way. Moreover, one of the most important duties of the administrator, aimed at protecting the interests of all creditors, is assessing the financial status of the credit institution in order to adopt the most appropriate decision on the solution to insolvency (restoration or bankruptcy). The Commission, in its turn, is appointed by the Credit Institution Law as the main person supervising the insolvency proceedings of a credit institution. The Commission is responsible for the stability and development of the financial market. The Credit Institution Law envisages concrete rights and obligations to the Commission in the case if a credit institution becomes insolvent, *inter alia*, the

obligation set out in Section 179(1) of the Credit Institution Law to assess the implementation of restoration procedure.

The representative of the Ministry of Justice – **Laila Medina, Deputy State Secretary in issues of legal policy of the Ministry of Justice** – emphasized that the restriction to the creditors' rights that the contested norm contains has a legitimate aim: to ensure the legality and effectiveness of the insolvency proceedings of a credit institution, as well as the stability of the financial market, by imposing concrete obligations upon the administrator and the Commission.

The contested norm envisages a three-stage procedure for adopting the decision: if the administrator proposes to implement the restoration procedure and the Commission has supported it, the approval by the creditors' meeting is necessary for implementing restoration. Thus, the creditors are given the possibility to decide on an issue pertaining to their right to own property. However, if the administrator or the Commission does not support the decision on restoring the credit institution, convening of the creditors' meeting is not useful. Moreover, the restoration of solvency cannot be regarded as the priority aim. This aim is to be implemented only in the case, if all necessary pre-conditions for it are present.

The Ministry of Justice holds that the contested norm ensures protection of the interests of all persons involved in the insolvency proceedings of a credit institution and of the financial system. The Ministry of Justice holds that the restriction included in the contested norm is proportional.

6.2. The Ministry of Justice notes that the Applicants are contesting a non-existent regulation, i.e., they want to appeal against the decision not to implement restoration, i.e., the initiation of bankruptcy proceedings. The verification of the legality of implementing or not implementing restoration is to be ensured on the basis of Section 379 (2) of the Civil procedure Law, which envisages that the court also examines complaints regarding the actions by the administrator and also adopts decisions on other issues pertaining to the insolvency proceedings. Thus, the aforementioned norm ensures creditors' access to court, if the creditors hold that the administrator's or the Commission's actions, in adopting a decision on refusing restoration and initiating bankruptcy proceedings, have been unsubstantiated.

The Ministry of Justice draws attention to the fact that Section 179(2) of the Credit Institution Law defines the procedure for revoking restoration, i.e., the aforementioned norms are to be applied only in the case if a decision on implementing restorations has been adopted. In the particular case, a decision like this had not been adopted.

7. The summoned person – the state agency "The Insolvency Administration" (hereinafter – the Insolvency Administration) – notes that the credit institution, because of the specificity of its operations, differs from other subjects of the insolvency proceedings. Considering the meaning and the purpose of the Commission's actions, it has a special role in the insolvency proceedings of a credit institution, which is well-founded, since the creditors' might have insufficient understanding of the true financial situation of the credit institution, as well as the most effective insolvency solution. Moreover, the adoption of the decision on the possibility of restoration, affects not only the right of the depositors of the credit institution to regain the deposited monetary resources, but also the interests of the society as whole, for example, to regain the guaranteed compensations paid by the Deposit Guarantee Fund. The legislator has authorised the administrator as a qualified specialist to asses the financial situation of the credit institution that has been declared insolvent and, on the basis of his assessment, adopt a decision on the best and most appropriate solution, which is then submitted to the Commission, which assesses it and adopts a decision.

8. The summoned person – association "The Association of the Commercial Banks of Latvia" (hereinafter – the Association of Commercial Banks) **–** holds that the scope of authorisation defined for the administrator and the Commission in the contested norms is well-founded and necessary. There are no grounds to require that creditors' were granted unlimited and absolute right to decide upon the solution for the insolvency of the credit institution.

At the court hearing the representative of the Association of Commercial Banks – **sworn attorney Ketija Tola** – emphasized that Section 179(1) of the Credit Institution Law does not envisage restrictions to property right and that the application

of the contested norm does not decrease the amount of creditors' claims. Neither does it directly envisage "deprivation of property without compensation (expropriation)" or depriving a creditor of any guaranteed income.

The Association of Commercial Banks expressed the opinion that the possibility to appeal against the decision on restoration only in those cases, when the adoption of such decision has been achieved by fraud or duress, or a misleading influence has occurred, was proportional. If the law did not contain the aforementioned restriction, the adopted decision on implementing restoration and approving the restoration plan, would have a legally unclear status. This would cause great uncertainty and this would be inadmissible in a situation, when the subject of the insolvency proceedings is a credit institution, which keeps clients' deposits.

9. The summoned person – the Ombudsman of the Republic of Latvia (hereinafter – the Ombudsman) – holds that the contested norm complies with the Satversme.

9.1. The Ombudsman notes that Section 179(1) of the Credit Institution Law includes restriction to the creditors' right to own property, because, essentially, the decision on the further insolvency proceedings of the credit institution is controlled by the Commission. This restriction has a legitimate aim, since the actions of the Commission are aimed at safeguarding the financial safety and welfare of society. In view of the purpose for which the Commission was established and the objectives of the Commission, the provision on the mandatory control by the Commission over the insolvency proceedings of a credit institution is aimed at the protection of the interests of all creditors and, thus, proportional.

The Ombudsman draws attention to the fact that the Commission, as the administrator of the deposit guarantee fund, which has overtaken part of the creditors' right to claim, might be interested in regaining the disbursed resources faster, which is ensured by the bankruptcy procedure. However, the scope of commitments taken over by the Commission does not ensure the majority vote at the creditors' meeting and the adoption of a decision preferable to it. Therefore, there are no grounds to consider that the Commission might be directly interested in the bankruptcy procedure of a credit institution.

9.2. The representative of the Ombudsman – **acting head of the Department od Social, Economic and Cultural Rights Ineta Rezevska** – noted: the Credit Institution Law does not envisage a direct possibility to contest the Commission's action, when it does not approve the decision on restoration, however, the legislator has envisaged the obligation of the court to decide on initiation of the bankruptcy procedure. I.e., by not approving the decision on restoration, the Commission, in fact, transfers the issue on the solution to the insolvency of the credit institution for the court to decide. Thus, there are no grounds to consider that the right to have the court assess the case had been essentially deprived. Moreover, the legislator has ensured sufficient protection of the creditors' interests against the administrator's erroneous or incompetent actions.

10. The summoned person – docent of the Faculty of Law of the University of Latvia, *Dr.iur.* Aivars Lošmanis – holds that the right to decide upon the insolvency solution should be considered inalienable right of creditors and that it is covered by the scope of Article 105 of the Satversme. In the case of general insolvency, the creditors themselves decide upon the solution for the company's insolvency. However, in the case of the insolvency of a credit institution, deciding upon this issue has been placed only within the administrator's competence. Thus, the contested norm restricts the creditors' right to own property. The contested norm allows two situations: 1) the administrator decides that restoration cannot be implemented, or 2) the administrator decides to implement restoration. In the first situation the restriction to the creditors' rights, which prohibits them to decide upon the solution for the insolvency, is not proportional. The legislator, by excluding the creditors' right to decide upon the solution for the insolvency, could have chose more lenient measures, allowing to reach the legitimate aim in the same quality, i.e., the measures envisaged by the general legal regulation of insolvency. Therefore in this situation the contested norm is alleged to be incompatible with Section 105 of the Satversme. In the second situation, however, the restriction to the creditors' rights should be considered as proportional. The restriction has a legitimate aim – ensuring

financial stability, *inter alia*, not allowing coming into force of a financially unfounded and "unviable" restoration plan.

A. Lošmanis holds: the Applicant's statement that the Commission always will be interested in bankruptcy procedure is ungrounded, since the Commission, as any other creditor, may be interested in full coverage of the claim and implementation of a financially substantiated and successful restoration plan. The Commission, as the administrator of the deposit guarantees fund, should take into consideration that bankruptcy poses the risk of not regaining all resources.

A. Lošmanis also expresses the opinion that Section 179(2) of the Credit Institution Law does not restrict the Applicants' right to a fair court in the understanding of Article 92 of the Satversme. Pursuant to Section 379(2) of the Civil Procedure Law, the court examines complaints regarding the administrator's actions and other issues connected with the insolvency procedure. Also in the case, if a decision has been adopted on implementing restoration, the creditors of the credit institution can submit a complaint regarding the administrator's actions in accordance with the procedure set out in the norm of the Civil Procedure Law referred to above.

However, if the creditors as a matter of principle do not support the administrator's decision on implementing restoration and regard it as being illegal or incompatible with the creditors' interests, they can prevent the coming into effect of the respective decision by simply not approving it. In the latter case, the involvement of the court is altogether unnecessary.

Thus, Section 179(2) of the Credit Institution Law is compatible with Article 92 of the Satversme.

11. The invited person – associate professor of the BA School of Business and Finance – holds that the contested norm comprises a restriction to the fundamental rights defined by Article 105 of the Satversme. This restriction has a legitimate aim – financial stability, since a credit institution is not an ordinary subject of law, but a participant of the financial market

The legislator has envisaged an adequate role for the creditors' meeting during the restoration procedure of a credit institution. For example, the creditors' opinion on implementing the restoration plan is sought. Likewise, any amendments to the adopted

plan need to be approved by the creditors. In a number of countries decisions like these are adopted without the creditors' involvement.

However, the restrictions to the creditors' right in the case of initiating bankruptcy proceedings are disproportional. The rule that the creditors' meeting must be involved also in the adoption of such a decision would be more proportional, i.e., if consultations with the creditors on the possible solution to the insolvency were held. Then the feasibility of restoration could be evaluated in this stage.

J. Grasis notes that the norms of the Credit Institution Law in interconnection with the norms of the Civil Procedure Law ensure the right to a fair court in the framework of a credit institution's insolvency procedure.

The Findings

I

On the Compliance of Section 179(1) of the Credit Institution Law (hereinafter– the contested norm) with Article 105 of the Satversme

12. The parties to the case and the summoned persons have expressed different opinions on whether the contested norm violates the fundamental rights enshrined in Article 105 of the Satversme.

The Applicants hold that the contested norm restricts their right to own property, which is enshrined in Article 105 of the Satversme, since it prohibits the creditors themselves from deciding upon the solution for the credit institution's insolvency. The summoned persons A. Lošmanis, J. Grasis and the Ombudsman uphold this opinion. However, the Saeima and the Association of Commercial Banks believe that the contested norm does not restrict the right to own property since, as the result of its application, the amount of the creditors' claim, which falls within the content of the term "property", is not decreased and the contested norm does not directly stipulate "alienation of property without remuneration (expropriation)" or depriving any creditor of another kind of guaranteed income.

Thus, the Constitutional Court will first of all establish the content of the fundamental right included in Article 105 of the Satversme and will assess, whether the contested norm restricts this fundamental right.

13. The right to own property is enshrined in Article 105 of the Satversme, which stipulates: "Everyone has the right to own property. Property shall not be used contrary to the interests of the public. Property rights may be restricted only in accordance with law. Expropriation of property for public purposes shall be allowed only in exceptional cases on the basis of a specific law and in return for fair compensation".

The substantiation of the constitutional complaint does to touch upon forced expropriation of property; thus only the compatibility of the contested norm with the three first sentences of Article 105 of the Satversme must be assessed.

Article 105 of the Satversme envisages that, one the one hand, the State has the obligation to promote and to support the right to own property, i.e., to adopt laws that ensure the protection of this right, but, on the other hand, – the State also has the right to interfere in the exercise of the right to own property, within a defined scope and in accordance with a defined procedure *(see Judgement of 16 December 2005 by the Constitutional Court in Case No. 2005-12-0103, Para 21).*

The Constitutional Court has repeatedly interpreted Article 105 of the Satversme and has elaborated methodology for its interpretation and revealed its content (*see, for example, Judgement of 19 October 2011 in Case No. 2010-71-01, Para 12.1).*

Article 105 of the Satversme envisages comprehensive guarantees to the rights of material nature. "The right to own property" should be understood as all rights of material nature, which a person has the right to exercise for his own good or to deal with according to his own will, it also includes different claims, the fulfilment of which can be requested in the presence of clear legal grounds (*see, Judgement of 27 October 2010 by the Constitutional Court in Case No. 2010-12-01, Para 7).* The Constitutional Court has already previously concluded that "the right to claim fulfilment of liabilities pertains to the content of the term "property"" *(Judgement of*

30 March 2011 by the Constitutional Court in Case No. 2010-60-01, Para 17), as well as that "the right to own property includes also the right to decide upon issues related to one's property" (*Judgement of 4 February 2009 by the Constitutional Court in Case No. 2008-12-01, Para 8).*

In the case of a debtor's insolvency, the risk that the creditor will not be able to exercise his right to claim, because the debtor might lack monetary resources, must be taken into consideration. Everyone has the right to handle one's property, *inter alia,* to invest one's financial resources in a company or a credit institution. This is the right and, simultaneously, the risk of the owner, since the company or the credit institution might end up in a situation of insolvency. The State does not have the obligation to prevent the loss of the value of property caused by market factors *(see Harris, O'Boyle and Warbrick. Law of the European Convention on Human Rights, 2nd ed., Oxford: Oxford University Press, 2009, p. 665),* nor to assume responsibility for the liabilities of a credit institution towards its creditor, which the institution is unable to fulfil *(see Judgement of 3 April 2012 by the Grand Chamber of the European Court of Human Rights in the Case "Kotov v Russian Federation", Application No. 54522/00,Para 90).*

However, the State has undertaken to meet the commitments of the credit institution towards its depositors within a set amount, if the credit institution becomes insolvent. The activities of credit institutions is regulated and supervised by an independent state institution – the Commission. Through this control the State has established a special scheme for the protection of the credit institutions' depositors (creditors), i.e., a deposit guarantee scheme, in the framework of which the depositor receives guaranteed compensation, if he is entitled to it. The legal basis for the aforementioned scheme is the Deposit Guarantee Law, Section 3(1) of which provides that the guaranteed compensation to one depositor for a deposit made into the credit institution shall be in the amount of the guaranteed deposit, but not exceeding EUR 100,000 translated into Latvian lats at the Latvian Central Bank's exchange rate effective on the day when the event of non-availability of deposits occurred. In accordance with the aforementioned regulation, each client's deposit in the credit institituion up to 100 000 *euro* is protected against its insolvency, and the repayment of the deposit in this amount is guaranteed to the depositor. Thus, the legislator, in defining the right to receive the guaranteed compensation, has ensured additional

protection to the depositor's – the creditors of the bank – right to own property.

In accordance with Section 26(1) of the Credit Institution Law insolvency of a credit institution is a status of the credit institution, when its inability to fulfil its commitments has been established by a court's judgement. Decreasing the possibility to satisfy the claim or even impossibility to do it means that a person is deprived of the property right to particular material claim, and this would restrict the right guaranteed by Article 105 of the Satversme (*see Judgement of 30 March 2011 by the Constitutional Court in Case No. 2010-60-01, Para 17).* In the case of a credit institution's insolvency, the creditor's right to claim is maintained in full, however, the creditors claims cannot be satisfied by enforcing recovery against the debtor according to the general procedure. Therefore, the State has the obligation in such cases to envisage and to regulate a procedure, in the framework of which the creditors could exercise their rights as effectively as possible.

The Credit Institution Law contains the regulation on the insolvency proceedings of a credit institution. It envisages solutions to the insolvency of a credit institution: restoration and bankruptcy. Restoration is a solution to insolvency, which manifests itself as a planned totality of legal measures, the aim of which is to prevent the possible bankruptcy of the credit institution, to restore its solvency and satisfy the creditors' legal claims. Bankruptcy, in its turn, is a solution, in which the credit institution is liquidated and the resources, gained in the insolvency procedure, by alienating the property of the credit institution in the procedure envisaged by law, is used to satisfy the creditors' legal claims.

During the insolvency proceedings of a credit institution the credit institution itself, to which the depositors had entrusted this money, no longer decides on its future activities and operations with deposits (financial resources). In accordance with the Credit Institution Law third persons become involved in this – the Commission and the administrator. The aim of activities undertaken by these subjects is not only to protect the depositors' interests, but also the stability of finance and capital market. Thus, third persons take decisions on the depositors' claims and these decisions may have a significant impact upon the amount of property regained by the creditors.

Thus, the creditors' right to decide on the issue of the solution for the credit institutions' insolvency, i.e., to adopt a decision on the fulfilment of one's claim, is

to be considered "a right to decide upon issues pertaining to property" and falling within the scope of Article 105 of the Satversme.

14. The contested norm defines the sequence of decisions to be adopted in the insolvency proceedings of a credit institution and the competence of involved institutions. First of all the decision on implementing restoration is adopted by the administrator. The decision on implementing restoration and the restoration plan comes into effect only following approval by the Commission and the creditors' meeting. The procedure for adopting decisions set out by the contested norm envisages the creditors' right to decide upon their own property only if the restoration of the credit institution is possible (approval of the restoration plan by the creditors' meeting), however, the choice of the solution to insolvency has been placed in the exclusive competence of the administrator. Section 179^2 of the Credit Institution Law provides that the creditors' meeting is convened only in the case if a decision on implementing restoration to the credit institution has been adopted. However, if the administrator has arrived at the conclusion that the restoration of a credit institution is impossible, and if this is approved by the Commission, then the contested norm prohibits the creditors' meeting to express their opinion on this solution to insolvency; i.e., the issue of initiating bankruptcy proceedings falls within the exclusive competence of the administrator.

Thus, the choice of solution to insolvency primarily has been transferred into the competence of one person – the administrator, without envisaging the creditors' right to decide on issues related to their property (or at least express their opinion about this choice).

Thus, the contested norm contains a restriction to fundamental rights envisaged in Article 105 of the Satversme.

15. Article 105 of the Satversme envisages not only a person's right to own property, but also the right of the State to restrict the use of property in the interests of society (*see, for example, Judgement of 20 May 2002 by the Constitutional Court in Case No. 2002-01-03, Findings).* To assess the constitutionality of the restriction to the fundamental rights defined by Article 105 of the Satversme, it must be established,

whether it has been defined by law, whether it has been defined for a legitimate purpose and whether it complies with the principle of proportionality (*see, for example, Judgement of 8 June 2007 by the Constitutional Court in Case No. 2007-01-01, Para 22).*

15.1. Section 179(1) of Credit Institution Law has been adopted and promulgated in compliance with the procedure set out in the Satversme and the Saeima Rules of Procedure, i.e., the regulation it comprises has been defined by law, adopted in due procedure. Neither have the Applicants pointed to conditions proving the contrary, thus, the case contains no dispute, whether the restriction to fundamental rights has been defined by law.

Thus, the restriction to the fundamental rights, which follows from the contested norm, has been defined by law, adopted and promulgated in due procedure.

15.2. Any restriction to the fundamental rights must be based upon conditions and arguments, proving its need, i.e., the restriction is defined in important interests – for a legitimate aim (*see, Judgement of 22 December 2005 by the Constitutional Court in Case No. 2005-19-01, Para 9).*

If rights are restricted, then the institution, which has adopted the contested act, has the obligation to present and prove the legitimate aim of this restriction in during proceedings at the Constitutional Court. The Saeima emphasises that the contested norms have the legitimate aim to protect other persons' rights and public welfare. The particularities of the credit institutions' operations require fast and clear decisions on various issues in situations, when a credit institution encounters financial difficulties, since the insolvency of a credit institution may significantly impact the financial stability of the State and the economy in general.

In the field of financial services, which is important for the functioning of market economy and which publicly attracts investments, the State has introduced a restriction to starting and engaging in commercial activities – licensing. Moreover, the State has also defined strict criteria for the operations of a credit institution. The State has assumed responsibility for the licensed credit institutions, by introducing the mechanism of deposit guarantees.

In difference to the general principles of insolvency, which define that the insolvent company itself receives the primary protection, so that it would be able to meet its commitments vis-à-vis its creditors, the insolvency solutions of credit institutions are aimed at the protection of depositors – thus, a special type of creditors. This also explains the legislator's different approach to insolvency procedures, involved organisations, creditors, judicial control and other important elements. The operations of a credit institution are always assessed in interconnection with its possible impact upon the whole of financial sector and economy. Therefore the most effective and timely solution must be envisaged for the case of insolvency of a credit institution, simultaneously envisaging the stability of financial sector and the protection of depositors' interests.

The legislator has defined in the contested norm the procedure for adopting the decisions needed for the solution to the credit institution's insolvency, as well as the competence of institutions involved in this procedure. The competence of the administrator and the Commission, defined in Section 179 (1) of the Credit Institution Law, as well as the restrictions to the creditors' rights that follow from it, has a legitimate aim: first, to ensure legal and effective insolvency proceedings of the credit institution, by entrusting organisation of it to a professional and independent expert – administrator, and, secondly, to ensure the stability of financial market, by imposing concrete obligations and granting rights to the supervisor of the financial and capital market – the Commission.

Hence, the restriction has a legitimate aim – speedy and effective insolvency proceedings of a credit institution and stability of the financial market, aimed at the protection of other persons' rights and public welfare.

15.3. In identifying the legitimate aim of the restriction, its compliance with the principle of proportionality must be assessed. To establish, whether the respective restriction is proportional, the Constitutional Court in its case-law has assessed: first, whether the chosen measures are appropriate for reaching the legitimate aim; secondly, whether it is possible to reach the aim with other means, less restrictive to the rights and legal interests of an individual; thirdly, whether the benefit gained by society

exceeds the loss incurred by the individual. If the assessment of the legal norms leads to the recognition that it is incompatible with even one these criteria, then it is incompatible with the principle of proportionality and is unlawful (*see, for example, Judgement of 19 March 2002 by the Constitutional Court in Case No. 2001–12–01, Para 3.1 of Findings, and Judgement of 27 June 2004 in Case No. 2003–04–01, Para 3 of Findings).*

16. The legislator has set out in the contested norm the procedure for adopting and approving the decision on implementing restoration, *inter alia*, the role and competence of persons taking the decision. Initially the restoration plan is evaluated by the administrator of the credit institution and, on the basis of the assessed plan, he adopts a decision on implementing restoration and submits it for approval to the Commission, and only after that – for approval to the creditors' meeting. This procedure is aimed at speedy and effective solution to insolvency.

The insolvency administrator of the credit institution is a person recommended by the Commission and appointed and approved by the court, who, in order to take the administrator's position, must comply with the requirements set in Credit Institution Law and to whom the restrictions referred to in this Law do not apply. The administrator is responsible for successful implementation and completion of the insolvency proceedings and the chosen solution to insolvency. Both the Commission and the court verify the competence of the administrator and his ability to implement the insolvency procedure.

Section 5 of Law on the Financial and Capital Market Commission defines the goal of the Commission's activities – to protect the interests of investors, depositors and the insured, and to promote the development and the stability of the financial and capital market. Pursuant to this goal, the Commission regulates the operations of financial and capital market, *inter alia*, of the credit institutions, defines conformity requirements for the market participants, as well as procedure for licencing the market participants. The approval of the decision adopted by the administrator on implementing restoration also falls with the Commission's competence, i.e., the Commission must ensure that an implementation of a restoration plan, that would not

comply with all requirements set for a credit institution and might threaten the stability of the financial system, is not initiated. In view of this aforementioned role and competence of the supervisor of financial market, the Commission is the one that is able to assess, whether the administrator's decision to implement restoration of the credit institution will, indeed, ensure the possibility to restore the operations of the credit institution in compliance with the requirements of regulatory enactments.

If restoration is applied, the decrease of creditors' claims, postponing of the term of debt settlement or capitalisation of debt are possible. To prevent possible infringement to the creditor's rights, the legislator has envisaged the right to the creditors to express agreement to the restoration proposed by the administrator or rejecting restoration, if this would lead to unacceptable amount extinguished claims or if access to resources would be denied for exceedingly long period of time. Thus, the means chosen by the legislator for reaching the legitimate aim envisages both effective and speedy selection of solution to the credit institution's insolvency, as well as the creditors' right to accept or reject restoration of the credit institution.

Thus, the measure chosen by the legislator is appropriate for reaching the legitimate aim – the protection of other persons' rights and public welfare.

17. The restriction established by the contested norm is recognised as being necessary, if no other means exist that would be as effective and the choice of which would restrict the fundamental rights to a lesser extent. In assessing, whether the legitimate aim could be reached by other means, the Constitutional Court emphasizes that a more lenient measure is not just any other measure, but a measure, which allows reaching the legitimate aim in at least the same quality (*see Judgement of 13 May 2005 by the Constitutional Court in Case No. 2004-18-0106, Para 19 of Findings).*

The Applicants note that a more lenient measure, simultaneously less restrictive to rights, for reaching the legitimate aim is the creditors' right to choose the solution to the insolvency of the credit institution, by consulting the administrator, i.e., prior the Commission grants its agreement. Thus the creditors would be involved from the very beginning in taking the decision on implementing or not implementing restoration. *Dr.iur.* A. Lošmanis and *Dr.iur.* J. Grasis also uphold this opinion, noting that the legislator could have chosen the mechanisms, which are included in the general legal

regulation of insolvency, at the same time envisaging also supervision by the Commission. The Saeima, however, notes, that the involvement of creditors into the decision taking prior the approval by the Commission would not be efficient and would require additional time for organising creditors' meeting and coordination of creditors' opinions.

During the hearing of the case, the parties to the case and a number of summoned persons referred to the legal regulation of other countries, pursuant to which the creditors' meeting has various roles in choosing the solution to the insolvency of the credit institution. The Constitutional Court emphasizes that the legal regulation of other countries cannot be applied directly, when dealing with particular issues of Latvian legal system, except for cases stipulated in law. Comparative law analysis should always take into consideration the functional context. This follows from the essential legal, social, political, historical and systemic differences between the legal systems of various countries. However, a functionally similar legal regulation of other countries can be indirectly applied to solving a particular legal problem, for instance, as guidelines or as an indicator for the solution of the particular problem, always keeping in mind the possibly different context (*see Judgement of 8 June 2007 by the Constitutional Court in Case No. 2007-01-01, Para 24.1).*

The Guidelines issued by the United Nations Commission on International Trade Law (UNCITRAL) for insolvency policy makers *(UNCITRAL Legislative Guide on Insolvency Law, New York, 2005; available at http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf.)* collects the experience of a number of countries in regulating the most important insolvency institutions. As regards the creditors' participation in insolvency proceedings, it is noted that creditors may participate in it, by becoming involved in decision taking on various levels, depending upon the functions that the creditors must fulfil in accordance with regulatory enactments. Therefore, creditors may have different role in insolvency proceedings; it follows from the procedure and particularities of implementing insolvency proceedings *(ibid, p. 191).*

The legislator, in choosing one of the potentially appropriate means for reaching the legitimate aim, enjoys the privilege of assessing and deciding. Likewise, in determining the regulation on the insolvency proceedings of credit institutions, the

legislator has broad discretion, if the protection of persons' fundamental rights is ensured. The Constitutional Court upholds the Applicant's opinion that another mechanism for choosing the solution to insolvency of credit institutions is possible (for example, one, which would grant greater role to the creditors' meeting in these proceedings), however, in accordance with Section19^2 (1) of the Constitutional Court Law, in this case the task of the Constitutional Court is to assess the compliance of the contested norms with the Satversme, not to substitute the legislators' discretion regarding an issue of law policy with its opinion on the possible most rational legal regulation (*compare, Judgement of 1 November 2012 by the Constitutional Court in Case No. 2012-06-01, Para 13.2).* Thus, in the framework of the case under examination, in assessing the compatibility of the restriction to fundamental rights with the legitimate aim, it must be verified, whether the adverse consequences, which a person incurs as the result of this restriction to fundamental rights, do not exceed the benefit that this restriction gives to the society in general.

Thus, the Constitutional Court must identify the interests that need to be balanced and determine, which of these should be granted priority.

18. To ensure the stability of the financial system, the legislator has envisaged the involvement of both administrator and the Commission in the insolvency proceedings of credit institutions.

The fact that the Commission's agreement is a mandatory condition for selecting the solution to the credit institution's insolvency is not disputed in the case. The Applicants object to the fact that the decision on the solution to the credit institution's insolvency is adopted solely by the administrator, i.e., without involving the creditors, as well as against the fact the Commission is both the supervisor of the finance and capital market and the holder (administrator) of the deposit guarantee fund, and that its is decision might be influences by the wish to recover financial resources as fast as possible in the interests of this fund.

In accordance with the contested norm the administrator has been granted an exclusive competence to decide on the possibility of implementing restoration of the credit institution. Thus, if the administrator considers that restoration can be implemented, then in accordance with the second sentence of Section 179(1) of Credit

Institution Law, the submitted restoration plan must be approved by the Commission and the creditors' meeting. However, if the administrator has adopted the decision to reject the implementation of restoration, then this decision is approved by the Commission, but the creditors' meeting is not convened.

18.1. Since the creditors of the credit institution may not have sufficiently broad and deep knowledge to assess objectively the feasibility of restoration under the particular legal and factual circumstances, then the administrator, being an official with specialised knowledge and experience, is responsible for successful implementation and completion of insolvency proceedings. The administrator of the credit institution is appointed by a court, but the Commission supervises and controls his work. The assessment and advancement of the initial restoration plan is within the administrator's competence. The creditors, in their turn, in this stage of insolvency proceedings have the right to submit their restoration plans to the administrator.

Simultaneously the legislator has provided that the administrator carries full responsibility for the losses that the creditors' might incur due to his fault, as well as has security for such cases, when he has caused harm, through his activities, to other persons, i.e., Section 155(2) of the Credit Institution Law sets out that this security shall be civil liability insurance for the activities of the administrator.

The Commission also has the right to express its distrust in the administrator and request that the administrator is dismissed from duties. Moreover, the creditors have the right to submit a complaint regarding the actions of the administrator, as well as submit a claim to court for compensation of losses caused by the administrator and an application to court regarding dismissal of the administrator in accordance with the procedure set out in Section 387 of the Civil Procedure Law, if the creditors consider that the administrator is incompetent or has abused his powers. Thus, when decision on the solution to the insolvency of a credit institution was placed into the administrator's competence, the mechanism for creditors' participation and control was also established.

In addition to this, the feasibility of restoration is also assessed by the Commission. Pursuant to Section 2(1) of the Law on Financial and Capital Market Commission, the Commission is a competent, autonomous state institution, which, in accordance with the aim and objectives of its activities, regulates and controls the

finance and capital market and the actions of its participants. The legislator, by defining the Commission's obligation to decide on the approval of the administrator's decision, has envisaged that the Commission will assess, whether the proposed restoration plan will facilitate the solvency of the credit institution, i.e., whether the chosen solutions will ensure appropriate indicators of equity and capital adequacy, appropriate solvency of the credit institution, so that it would be able to satisfy legally substantiated claims of its creditors at any moment, whether the restoration plan comprises substantiated calculations, vision of activities and concrete business plans, which create the conviction that the credit institution will be able to continue its operations and of the possibilities for its sustainable development. Moreover, the Commission has access both to information about the financial indicators of the particular credit institution, and the general situation of financial market; thus, the Commission can objectively assess the feasibility of implementing the proposed restoration plan.

A failed restoration attempt could have an impact not only upon the creditors' interests, but also the stability of the financial system and the shared interests of the whole of society; therefore the approval by the Commission is a pre-condition for the restoration of a credit institution.

The creditors also have the right to decide about the restoration plan. It can come into effect only if it has received the support of the creditors' meeting. Thus, the creditors may not only approve of the restoration plan, but also reject it and select another solution to insolvency – bankruptcy.

Thus, the procedure for adopting and approving the implementation of restoration balances the interests of society and the creditors, by envisaging a mechanism of checks and balances of the involved institutions and creditors, as well as ensures that unfeasible restoration plan, which threatens the stability of the financial system, is not adopted and that the creditors' rights are not unfoundedly restricted.

18.2. However, if the restoration of a credit institution is not feasible, it is the duty of the administration to submit to court an application on commencing bankruptcy procedure. The administrator may submit this application upon his own initiative, as well as in those cases, when the Commission or the creditors' meeting does not approve of the restoration solution proposed by the administrator, or if the

restoration is revoked or suspended. Moreover, this application also must be approved by the Commission. Before the Commission approves the administrator's decision on the solution to the insolvency of a credit institution, it must verify, whether the adopted decision is compatible with the creditors' interest. Thus, a situation should not occur, in which the Commission approves of the decision on initiating bankruptcy proceedings without having previously assessed, whether restoration of the credit institution is not feasible.

If a decision on the bankruptcy of a credit institution as an appropriate solution for insolvency has been adopted and the bankruptcy proceedings have been initiated, then, most probably, its consequences will be irreversible, since the alienations of the credit institution's assets will start and employees will be dismissed. In view of the abovementioned, the legislator has introduced additional control over the need and grounds for adopting such a decision, i.e., the decision on initiating bankruptcy proceedings is adopted by court, after the administrator has submitted appropriate application and the Commission's approval. The court, pursuant to Section 184(1) of the Credit Institution Law and Para 2 of Section 379(1) of the Civil procedure Law, in deciding on the initiation of bankruptcy proceedings of a credit institution, assess, whether the administrator has fulfilled the obligations defined by the Credit Institution Law (has assessed the financial condition of the insolvent credit institution and restoration proposals, if such have been submitted, etc.) and whether the administrator has adopted a substantiated decision, compatible with the financial situation of the insolvent credit institution and the provisions of the Credit Institution Law.

If restoration is not feasible and it has been recognised by both the administrator and the Commission, involving the creditors into the insolvency proceedings would not be effective and might only prolong this process. Moreover, if restoration is not implemented, then the subjects involved in the insolvency proceedings of a credit institution, *inter alia*, the creditors' meeting, can rely upon the judicial control and the adoption of a lawful decision.

Hence, the procedure for adopting and approving the decision on initiating bankruptcy proceedings ensures balance between the society's and the creditors' interests, envisaging judicial control over the legality of the aforementioned procedure.

18.3. The Applicants hold that a conflict of interests occurs in the insolvency proceedings of a credit institution, since the Commission is simultaneously the supervisor of finance and capital market and the administrator of deposit guarantee fund, and, thus, is interested in bankruptcy proceedings.

At the court hearing the representative of the Commission and also A. Lošmanis and J. Grasis noted that the Commission first and foremost acted as a supervisory institution. The Commission participates in the insolvency proceedings as a creditors' representative only when the restoration plan has been approved. As all other creditors, the Commission is interested in full settlement of the claim and successful implementation of a financially substantiated restoration plan. Law does not envisage the term for recovering the resources to be disbursed from the deposit guarantee fund, thus, the Commission has not been imposed the obligation to recover them "immediately". Moreover, also in the case of initiating bankruptcy proceedings, it must be taken into consideration that all resources will not be recovered.

The rights of the Commission to exercise creditor's rights vis-à-vis the insolvent credit institution in the amount of disbursed guaranteed compensation are defined in Section 4 and Section 16 of the Deposit Guarantee Law. The procedure, in which the creditors are granted a vote and the decisions are adopted at the creditors' meeting, are defined by Section179^3 and Section 179^5 of the Credit Institution Law. The Applicants have not requested the Constitutional Court to assess the compatibility of these norms with the Satversme.

Thus, this Applicants' opinion is ungrounded.

18.4. By adopting the contested norm, the legislator has balanced the society's and the creditors' interests and has envisaged that in the insolvency proceedings of a credit institution the administrator has the obligation to assess the financial situation of the credit institution and adopt a decision on the solution to insolvency – restoration or bankruptcy, if restoration is possible, receive appropriate approval from the Commission, then involve creditors in this process and receive also the approval of the creditors meeting, or a court's decision on initiating bankruptcy proceedings, if restoration is infeasible.

Thus, Section 179(1) of the Credit Institution Law is compatible with Article 105 of the Satversme.

II

On the compatibility of Section 179(2) (hereinafter – the contested norm) with the first sentence of Article 92 of the Satversme

19. The Applicants contest the compatibility of Section 179(2) of the Credit Institution Law with the first sentence of Article 92 of the Satversme.

The first sentence of Article 92 of the Satversme provides: "Everyone has the right to defend his or her rights and lawful interests in a fair court." The contested norm envisages the procedure in which and the subjects, upon whose application, a court may decide upon revoking the restoration plan.

The opinions expressed by the parties to the case and the summoned persons allow concluding that the opinions, whether the contested norm infringes upon the fundamental rights enshrined in the first sentence of Article 92 of the Satversme, differ. The Applicants note that the contested norm restricts the right to a fair court, since a possibility to appeal against the decision on not implementing restoration has not been envisaged for the creditors' meeting at all, but the decision on implementing restoration may be appealed against only if this decision has been adopted by fraud or duress, or a misleading influence has occurred. At the court hearing, the representative of the Saeima G.Kusiņš noted that the contested norm did not violate the Applicants' fundamental rights, since it had not been applied to them.

Section 19^2 of the Constitutional Court Law provides that an application to the Constitutional Court may be submitted by any person, who considers that his or her fundamental rights enshrined in the Satversme are violated by a legal norm that is incompatible with a norm of higher legal force. The precondition that a person may turn to the Constitutional Court only if direct link exists between the restriction to fundamental rights of this person and the norm contested in the application follows from this Section.

Para 3 of Section 29(1) of the Constitutional Court Law envisages that judicial proceedings may be terminated until the pronouncement of judgement, if the Constitutional Court establishes that a decision regarding initiation of a case does not comply with the requirements of Section 20(5) of the Constitutional Court Law. This Section, *inter alia*, provides that the constitutional complaint must meet the requirements of Section 19^2 of the Constitutional Court Law.

The Constitutional Court has repeatedly noted that a constitutional complaint may be submitted, if, firstly, the violation of fundamental rights is direct, concrete, the contested norms affects the applicant himself, and, secondly, affects at the time of submitting the application, i.e., if the violation of fundamental rights already exists (*see, for example, Judgement of 20 May 2002 by the Constitutional Court in Case No. 2001-01-03 and Decision of 11 November 2002 on terminating judicial proceedings in Case No. 2002-07-03),* or if a totality of circumstances exist that require hearing the case "now" *(see, Judgement of 22 February 2002 by the Constitutional Court in Case No. 2001-06-03, Para 2.4 of Findings).*

A persons right to submit a constitutional complaint to the Constitutional Court is to be linked only with the violation of the rights of this particular person. The violation must be direct and pertain to the fundamental human rights enshrined in the Satversme. On the one hand, a case should be initiated only if the Panel of the Constitutional Court is convinced that such a violation exists. On the other hand, the whole judicial proceedings before the Constitutional Court, including the right granted to the institution, which has issued the contested act, to submit its opinion, are aimed at duly examining, whether the infringement exists and whether the fundamental rights enshrined in the Satversme have been violated. Thus, the assumption that the Panel of the Constitutional Court, examining the constitutional complaint and deciding on initiating a case or refusing to do so, should already establish, whether, indeed, a person's fundamental rights, enshrined in the Satversme, have been violated, would be incompatible with the procedure established in law for the judicial proceedings before the Constitutional Court. The issue, whether, indeed, the applicant's, who has submitted a constitutional complaint, fundamental rights have been violated, must be decided by the Constitutional Court by examining the case on its merits (*see*

Judgement of 22 February 2002 by the Constitutional Court in Case No. 2001-06-03, Para 2.2. of Findings).

Thus, the Constitutional Court must establish, whether the contested norm violates the Applicants' fundamental rights envisaged by Article 92 of the Satversme.

20. The analysis of the contested norm allows concluding that it is applicable only to those cases, when a decision on the restoration of a credit institution has been adopted and the respective plan has come into effect, since the approval by the Commission and the creditors' meeting has been received, but a need has arise to appeal against this decisions. It follow from the actual circumstances of the case that a decision on implementing a restoration plan has not been adopted and approved, thus the contested norm has not been applied in the insolvency proceedings of IJSC "Latvijas Krājbanka" and cannot violate the Applicants' fundamental rights.

Thus, the constitutional complaint in this part does not comply with the provisions of Section 19^2 (1) of the Constitutional Court Law and the judicial proceedings in this part must not be continued.

21. Simultaneously, the Applicants contest Section 179(2) of the Credit Institution Law; insofar it does not envisage creditors' right to appeal against the decision not to implement restoration.

The Constitutional Court has already concluded that the Saeima has broad discretion both in choosing, in which of among several laws it includes the respective regulation *(see Decision of 16 April 2008 by the Constitutional Court on terminating legal proceedings in Case No. 2007-21-01, Para 17),* as well as in deciding on issues linked with legislative technique within the framework of a single law *(see Judgement of 19 June 2010 by the Constitutional Court in Case No. 2010-02-01, Para 9.4.2).* Thus, the Constitutional Court must verify, whether a regulation like this is not included in a provision of the Credit Institution Law or any other regulatory enactment.

Section 184(1) of the Credit Institution Law and Para 2 of Section 379(1) of the Civil Procedure Law stipulate that the decision on initiating bankruptcy proceedings is adopted by a court. If the administrator does not adopt a decision on implementing

restoration, it must adopt a decision on the bankruptcy of a credit institution and, following its approval by the Commission, submit a respective application to court.

Pursuant to Section 379(2) of the Civil Procedure Law, the court also examines complaints regarding the administrator's actions and decides upon other issues linked to insolvency proceedings. Pursuant to Section 386(1) of the Civil Procedure Law, in examining a complaint about the administrator's or liquidator's actions, the court may request a report on the administrator's or liquidator's actions and the Commission's opinion on the administrator's or liquidator's action and decide on dismissing him. The second part of the aforementioned Section, in its turn, envisages: if the court recognises that the action, which has been appealed against, is incompatible with law, it satisfies the complaint and obliges the administrator or the liquidator to rectify the breaches. The term "administrator's action" covers any manifestation of the administrator's will, actions, as well as the failure to act. Thus, in the meaning of the Civil Procedure Law, the administrator's decision not to implement restoration is "action", which can be appealed against in accordance with Section 379 and Section 386 of the Civil Procedure Law (*see, A. Lošmanis' opinion, Case Materials, Vol. 1, pp. 184 – 185).* Thus, for example, if the administrator has not assessed the possibility of implementing restoration, the court, in satisfying the complaint, obliges him to "rectify the breach" (Section 386(2) of the Civil procedure Law), i.e., obliges him to assess this option.

The possibility for appeal, envisaged by law, is implemented in practice. A number of IJSC "Latvijas Krājbanka" creditors, within the framework of proceedings, have exercised the right to turn to court for the protection of their interests in the case of not implementing restoration. Nine complaints by the creditors regarding the administrator's actions, as well applications regarding dismissal of the administrator were submitted to Riga District Court together with the administrator's application on commencing the bankruptcy proceedings. These complaints, *inter alia*, were caused by the creditor's dissatisfaction with the administrator's decisions not to implement restoration, because the creditors were of the opinion that in the particular financial situation the credit institution could have been restored.

On 8 May 20102 Riga Regional Court, in the framework of hearing the case of IJSC "Latvijas Krājbanka" insolvency No. C04523311, first of all examined the

aforementioned complaints, assessed the legality of the administrator's actions and decided that the administrator's actions were legal. The Court did not identify the circumstances referred to in Section 387(3) of the Civil Procedure Law, which could serve as the grounds for dismissing the administrator (*see Case Materials, Vol.2, pp. 7 – 46).* Only after these complaints were rejected, Riga Regional Court started examining the administrator's application regarding the initiation of bankruptcy proceedings, assessing the validity of this application and compatibility with the financial situation of the credit institution (*see Case Materials, Vol.2, pp. 47 –52).* Riga Regional Court first of all assessed the procedural circumstances of the credit institution's insolvency case, and only after that – the application on initiating the bankruptcy proceedings. Thus, if any of the creditors' complaints regarding the administrator's action, i.e., decisions not to accept restoration of the credit institution, were recognised as substantiated and had been satisfied, the court would have had to reject the administrator's application on initiating bankruptcy proceedings and impose an obligation to asses the financial situation of the credit institution repeatedly. Moreover, none of the applicants of the constitutional complaint used this mechanism envisaged by law for the protection of their interests and submitted a complaint to Riga Regional Court regarding the administrator's actions or an application requesting dismissal of the administrator in connection with the decision not to implement restoration.

In addition, it must be noted that the right to request compensation of damages caused by injury is an independent element of the right to a fair court. Section 163(1) of the Credit Institutions Law envisages that the administrator bears full responsibility for the losses to creditors due to his fault. Pursuant to this, the creditors may demand compensation of losses from the administrator, if they hold that the administrator has caused losses to them, by not adopting a decision on initiating restoration. Provisions of Section 155(2) of the Credit Institution Law reinforce the possibility of actual satisfaction of this claim, by envisaging mandatory administrator's civil liability insurance.

Thus, the Applicants' assumption that "creditors have no right to appeal against the decision not to implement restoration" is unfounded. Since the Applicants' arguments concerning the incompatibility of the contested norm with norms of higher

legal force are founded upon the aforementioned assumption, judicial proceedings in the case cannot be continued.

Thus, pursuant to Para 6 of Section29 (1) of the Constitutional Court Law and Section 179(2) of the Credit Institutions Law, judicial proceedings in the case must be terminated.

The Substantive Part

Pursuant to Para 3 and Para 6 of Section 29 and Section 30 – 32 of the Constitutional Court Law the Constitutional Court

held:

1) **to recognise Section 179(1) of the Credit Institution Law as compatible with Article 105 of the Satversme of the Republic of Latvia;**
2) **to terminate legal proceedings in the part of the case regarding the compliance of Section 179(2) of the Credit Institution Law with the first sentence of Article 92 of the Satversme.**

The Judgement is final and not subject to appeal

The Judgement comes into force as of the day of its pronouncement.

The Presiding Judge G. Kūtris