THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF LATVIA

J U D G E M E N T

On Behalf of the Republic of Latvia

Riga, 30 March 2011

Case No. 2010-60-01

The Constitutional Court of the Republic of Latvia composed of the Chairman of the Court session Gunārs Kūtris, and justices Kaspars Balodis, Aija Branta, Kristīne Krūma, Vineta Muiņiece, and Viktors Skudra,

having regard to an application of twenty members of the 9th Saeima, Valērijs Agešins, Jānis Urbanovičs, Aleksejs Holostovs, Boriss Cilevičs, Martijans Bekasovs, Sergejs Fjodorovs, Igors Pimenovs, Sergejs Mirskis, Oļegs Deņisovs, Nikolajs Kabanovs, Aleksejs Vidavskis, Ivans Klementjevs, Mihails Zemļinskis, Ivans Ribakovs, Vitālijs Orlovs, Jānis Tutins, Andrejs Klementjevs, Valērijs Buhvalovs, Vladimirs Buzajevs and Miroslavs Mitrofanovs (hereinafter – the Applicants),

with the participation of Juris Kaksītis, an attorney at law representing the Applicants, and

Mārtiņš Paparinskis, an attorney at law representing the Saeima, i.e. the institution that adopted the contested act,

with court hearing secretary Līva Rozentāle,

according to Article 85 of the Satversme [Constitution] of the Republic of Latvia, Article 16 1st indent and Article 17 (1) indent 3 of the Constitutional Court Law,

in Riga, on 23 February and 2 March 2011, in an open court hearing examined the case

"On Compliance of Section 59.^{2}, Section 59.^{3}, Section 59.^{4}, Section 117 (4) Indent 3, Section 173 (4) and Section 185 (1) Prim of the Credit Institutions Law with Article 1, Article 90, Article 91, Article 92 and Article 105 of the Satversme of the Republic of Latvia".

The Facts

1. On 19 February 2009, 29 October 2009 and 1 April 12010, amendments to the Credit Institutions Law came into force. A regulatory framework regarding transition of credit institution undertaking to ownership or use of another person (hereinafter – transition of a credit institution undertaking). The aim of the above mentioned regulatory framework is to include those norms into the Credit Institutions Law that would regulate transition of a failing credit institution undertaking according to the procedure compliant to its work specificity.

The Contested Norm provides:

Section 59^{2}.

(1) Transition to ownership or use of a another person (hereinafter – transition of a credit institution undertaking) of a credit institution undertaking or a part thereof, including affiliates, body of divisible property or body of standard contracts concluded

with clients of the credit institution (hereinafter – credit institution undertaking) shall require permission of the Financial and Capital Market Commission [*Finanš u un kapitāla tirgus komisija*]. To receive the permission, the credit institution shall submit to the Financial and Capital Market Commission a proposal to transfer the credit institution, assessment of value of assets and liabilities pertaining to the credit institution undertaking under circumstances of a functioning market attached thereto and performed, 30 days prior to submission of the proposal, by a person that is not included into the list of auditors of property investments. Such transition of a credit institution undertaking that hot been granted permission of the Financial and Capital Market Commission shall be regarded as null and void.

(1^1) The provision of Section 20 (1) of the Commercial Law regarding joint responsibility of person transferring or obtaining the undertaking shall not be applicable to transition of financial service agreements of a credit institution undertaking.

(2) For transition of a credit institution undertaking after receipt of permission of the Financial and Capital Market Commission, it is not necessary to obtain permission of creditors of a credit institution involved in transfer of a credit institution undertaking and other persons, including permission regarding validity of liabilities of the credit institution undertaking or a part thereof between these persons and obtainer of the credit institution undertaking, as well as permission regarding existence of related liabilities at the moment of transfer of the credit institution undertaking unless the proposal of transfer of a credit institution undertaking establishes otherwise.

(2^1) In case of transfer of a credit institution undertaking, provision of information to obtainer of the credit institution undertaking on creditors, debtors of the credit institutions and other persons, whose agreements pertain to the transferable credit institution or a part thereof shall not be regarded as non-observance of requirements of law.

(3) Transfer of a credit institution undertaking in respect to property of the credit institution located outside the territory of the Republic of Latvia shall be valid

disregarding any other national law applicable to such property or certain articles, rights or liabilities thereof.

(4) Appal against an administrative act issued by the Financial and Capital Market Committee regarding permission for the transfer of a credit institution undertaking shall not suspend its execution.

Section 59[3].

(1) If pursuant to Section 111 (1) indent 6 of this Law, the Financial and Capital Market Committee has appointed an attorney who has been granted the authority referred to in Section 117 (1) indent 3 of this law, the attorney shall decide on submission of the proposal regarding transfer of a credit institution undertaking to the Financial and Capital Market Commission. The provision of Section 20 (1) of the Commercial Law regarding joint responsibility of the transferor and the obtained of the undertaking shall not be applicable to the obtainer of a credit institution undertaking. In case of such transition, the Financial and Capital Market Commission shall permit executing transfer of a credit institution undertaking provided that the transaction is performed in the interest of security and stability of credit institutions sector or that of credit institution depositors, and Provisions of Section 170 of the Commercial Law regarding brining an action in favour of the society is not applied to such transfer.

(2) Transfer of a credit institution undertaking based on a decision of the attorney appointed by the Financial and Capital Market Commission shall not be regarded as null and void.

Section 59[4].

(1) A decision regarding transfer of a credit institution undertaking in the frameworks of the procedure of liquidation of the credit institution shall be adopted by the liquidator.

(2) A decision regarding transfer of a credit institution undertaking in the frameworks of the procedure of liquidation of the credit institution shall be adopted by

the administrator, and the provision of Section 20 (1) of the Commercial Law regarding joint responsibility of the transferor and the obtained of the undertaking shall not be applicable to the obtainer of a credit institution undertaking.

Section 117.

(4) The attorney shall have the right to the following to execute his or her duties:

1) to issue binding orders to all structural units and employees of the credit institution;

2) not to observe restrictions established in articles of associations, bylaws and regulations of the credit institution (in policy, procedure descriptions and other functioning instruments);

3) to submit a proposal to the Financial and Capital Market Commission regarding transfer of a credit institution undertaking, to perform expropriation or transfer of property, tangible or intangible property, agreements and liabilities of the credit institution, provided that the purpose of the above mentioned actions is to ensure repayment of investments made into the credit institution;

4) on behalf of the credit institution administration, to draw and confirm financial accounts of the credit institution.

Section 173.

(4) Transition of the credit institution undertaking performed based Section 59^{3} or the second pa of Section $59.^{4}$ of this Law cannot be regarded as null and void.

Section 185.

1) The basic purpose of the bankruptcy procedure is to gain maximum income from sale of assets and property of the credit institution by thus ensuring utter satisfaction of claims of creditors.

(1[1]) The purpose of this section can be reached by the administrator by performing transfer of a credit institution undertaking pursuant to the procedure established in the present Law.

2. The Applicants – twenty members of the 9th Saeima hold that norms regulating legal status of the credit institution undertaking transfer institution and characteristic features of application thereof fail to comply with norms of the Satversme of the Republic of Latvia (hereinafter – the Satversme).

The Applicants indicate that the Contested Norms have been adopted in haste; therefore the consequences were not property assessed. The sole aim of the norms was to give an opportunity to the credit institution to avoid fulfilment of a part of its liabilities and avoid the principle *pacta sunt servanda*. Haste and insufficient involvement of experts has prohibited the legislator to property assess alternative solutions and establish a more lenient transition to the new regulatory framework.

By introducing the institution of transfer of a credit institution undertaking, the legislator has overtook the terms "undertaking" and "transfer"; however, it has conferred the terms another content that differs from the one mentioned in the Commercial Law. Neither has the legislator applied the principle of joint responsibility to this transfer period.

Introduction of such regulatory framework that can be applied only to the process of transfer of a credit institution undertaking contradicts Article 1 of the Satversme because all share owners, creditors and clients of credit institutions had reasonable ground to trust into the fact that, in a democratic state, the general legal principles would be applied when introducing a new regulatory framework. The legal regulatory framework (Section 59[2] (1[2]), Section 59[3] (1) and Section 59[4] (2) of the Credit Institutions Law) that prohibits applying, to transfer of a credit institution undertaking, the provision of Section 20 of the Commercial Law regarding joint liability of the transferor and the obtained of

the business, fails to comply with the principle of legitimate expectations that follows from Article 1 of the Satversme.

In the norms of Section 59^3 (2) and Section 173 (4) of the Credit Institutions Law, the irreversible character of the administrative decision has been enshrined. The above mentioned norms do not provide a possibility either to appeal or contest the decision adopted by the attorney. Such procedure fails to comply with Article 92 of the Satversme because persons have no possibility to defend their rights and legal interests by applying effective legal remedies.

The Applicants hold that the Contested Norms do not provide the possibility for shareholders or creditors of the credit institution to participate in preparatory and decision-making process of the transfer of the credit institution; they neither require informing of the creditors and the third parties (bank clients included). This denies the right of the above mentioned persons to receive information on administration of their property and liabilities in respect to the new owner of the credit institution undertaking. Being unaware of their rights, bank clients cannot effectively defend their rights and apply mechanisms of consumer right protection. Mr. J. Kaksītis, representative of the Applicants also indicated that the Contested Norms are not clear. It is impossible to understand what persons have the right to appeal against the permission of the Commission and what is meant by the term "financial service agreement". Therefore the Contested Norms neither comply with Article 90 of the Satversme.

The Applicant indicates that the Contested Norms provide a possibility, by implementing transfer of a credit institution undertaking in a procedure of one or several stages, to reduce the actual value of assets and cause losses to persons. Consequently, the right of person to own property is also infringed, this right being established in Article 105 of the Satversme. The Contested Norms permit a situation when a part of liabilities of the credit institutions are ignored. This can be applied to such liabilities that are included into the structure of the obtaining credit institution, and such liabilities that are left in the structure of the transferring credit institution. Thus certain groups of creditors

are deliberately deprived of the possibility to satisfy their claims, namely, alienation of property does not take place. As a result of the contested regulatory framework, shareholders of the business to be divided would suffer, share capital of who can be subject to liquidation or insolvency in the doomed bank.

According to the Applicant, the Contested Norms fail to establish clear criteria for inclusion of assets and liabilities into a credit institution undertaking. Selection of the model of transfer of a credit institution undertaking is to be decided by officials only. Admissibility of several models manifests legal and economic inequality. Consequently, the Contested Norms contradict the principle of equal treatment included in Article 91 of the Satversme.

The Applicants hold that the Contested Norm (Section 59^2 (3) of the Credit Institutions Law) establishes validity of an administrative act on transfer of a credit institution undertaking issued by Latvian officials in respect to foreign property of the credit institution irrespective of legal acts of another state applicable to the rights or liabilities pertaining to the property or parts thereof, which is at variance with the principle of democracy following from Article 1 of the Satversme. The duty of any state is to observe and respect normative acts of another state.

3. The institution that adopted the contested act, the Saeima does not agree with the abovementioned opinion and holds that the Contested Norms do comply with Article 1, Article 90, Article 91, Article 92 and Article 105 of the Satversme.

By means of transfer of a credit institution undertaking, it is possible, by transferring liabilities of one bank towards depositors to another bank, to timely prevent payment crisis in respect to the above mentioned depositors in a short term, to preserve positive balance of payments in the long term, as well as facilitate development and stability of financial and capital market. Consequently, the restriction included in the

Contested Norm does have a legitimate aim – protection of the rights of other person and assurance of welfare of the society.

The Contested Norms do not introduce a new definition of an undertaking; they only concretize it according to the specific features of functioning of credit institutions. In each separate kind of economic activities, the definition of possible transaction can never include an excluding enumeration, and the term "undertaking" can be freely defined in each particular situation.

The Saeima emphasizes that the new regulatory framework establishes certain assessment criteria to be applied to persons involved in the procedure of transfer of a credit institution undertaking. One of the criteria is the ability to fulfil liabilities of the credit institution in respect to its depositors. The legislator has committed a control institution to monitor protection of interests of depositors by including a norm into the Credit Institutions Law stating that transfer of a credit institution undertaking shall require permission of a control institution. Consequently, the basic methods and a control mechanism have been established for transfer of a credit institution undertaking.

According to the Saeima, its opinion being opposite to the one of the Applicants, before the Contested Norms came into effect, it was theoretically possible that a credit institution transfers a considerable part of valuable assets or long-term liabilities to another person, and after the transfer an involved business becomes insolvent and the respective liabilities are not fulfilled. The control of a monitoring institution introduced in the Contested Norms is aimed at reduction of the above mentioned risk by establishing responsibility to an obtaining institution. Consequently, the Contested Norms cannot be regarded as a tool permitting credit institutions avoiding fulfilling their liabilities and avoid the principle of fulfilment of agreements; quite on contrary – they ensure feasibility of fulfilment of liabilities.

The Saeima indicates that, when assessing the restriction of the property right of shareholders, it is necessary to take into account the fact that usually shareholders themselves and their attorneys (for instance, board or council) would adopt a decision

regarding application of the Contested Norms. Consequently, in many cases no rights would be restricted because the decision is taken by owners themselves. However, the Applicant does not contest the right of the monitoring institution to appoint an attorney that would adopt respective decisions in favour of depositors on behalf of the above mentioned persons. Likewise, the appointing of an attorney can be appealed against like any other administrative act, whilst unlawful and inexpedient decisions adopted by the attorney are subject to the duty of compensating losses.

The Contested Norms permit restructuring of a credit institution without prohibiting shareholders to implement their rights following from shares owned by them. Reduction in value or failure to regain their property (for instance, shares or sold capital) follows from the fact that the credit institution has certain financial difficulties. The likelihood that their investments would not be recovered logically follows from the term of commercial activities. However, an alternative to the Contested Norms, namely, liquidation procedure is evidently ineffective and disadvantageous for shareholders. Consequently, the Contested Norms do not contradict Article 105 of the Satversme.

According to the Saeima, before the amendments to the Credit Institutions Law were adopted, creditors did not have the right to interfere with transfer of a credit institution undertaking or to suspend it. Namely, previously transfer of a credit institution was also possible, and as a result of such transfer a credit institution undertaking could transfer all client and creditor agreements to another person, whilst clients and creditors would have got aware of it only after completion of the transfer. Therefore the opinion of the Applicants that the new regulatory framework prohibits creditors to obtain information and considerably deteriorates their situation if compared with the previous regulatory framework is ungrounded. Consequently, the Contested Norms in this respect do not restrict the rights established in Article 90 of the Satversme.

Although the law does not confer creditors the right to appeal or interfere with receipt of permission to execute transfer of a credit institution undertaking, the Saeima still holds that it neither deprives persons of the right to address the court according to

claim procedure and ask assuring or recovery of losses in case if their legal interests are threatened and liabilities are not performed. Consequently, the Contested Norms do not contradict Article 92 of the Satversme.

The Contested Norms establish validity of transfer of a credit institution undertaking disregarding application of other norms of national law to property, goods or rights falling within jurisdiction of respective states. In the particular regulatory framework, the Saeima does not see any infringement of Article 1 of the Satversme, namely, interference with jurisdiction of another stat. The purpose of the above mentioned regulatory framework was to establish that transfer of a credit institution undertaking (a precise and terminated transaction in a particular timeframe) takes place and is in force disregarding the fact that another regulatory framework could be applied to ensure assets in other national laws (corroboration, pernacy, reregistration of liabilities). If any foreign asset or liability pertaining to transfer of a credit institution undertaking cannot be transferred, based on what follows from foreign legislation, it is excluded from the property of the obtainer after transfer of the credit institution undertaking. This ensures observing the principle regarding application of foreign law to assets located in foreign states.

The Saeima rejects the argument of the Applicant regarding non-compliance of the Contested Norms with the principle of legitimate expectations. Article 1 of the Satversme does not prohibit the legislator to introduce a new legal regulatory framework and the institution to apply it to new legal relations in order to ensure adoption of decisions substantial for welfare of the society. In the particular case, the principle of legitimate expectations cannot be interpreted in a way that the Contested Norms would be applicable only to those credit institutions that are founded after coming into force of the norms.

The Saeima indicates that the Contested Norms do not breach the principle of legal equality because distribution of a credit institution is based on assessment of assets and perspective of further functioning of the credit institution, as well as common interests of

depositors and the financial system. In each case, compliance with the above mentioned criteria is assessed taking into account particular circumstances. Consequently, the Contested Norms do comply with Article 91 of the Satversme.

At the hearing, the Saeima representative Mr. M. Paparinskis maintained the opinion expressed by the Saeima.

He also indicated that, in the application, no justification of non-compliance of the Contested Norms with Article 1, Article 90, Article 91 and Article 105 has been provided. He asked to terminate legal proceedings in this respect.

As to compliance of the Contested Norms with Article 92 of the Satversme, Mr. M. Paparinskis was of the view that they do not restrict the right to a fair court. In case of a grounded infringement, persons have the right to address the court and require compensation of losses. The right to a fair court does not include the right to a certain form of court ruling. Mr. M. Paparinskis also indicated: if the Constitutionals Court does recognize that the Contested Norms restrict the right to a fair court, then the particular restriction is proportional. It has a legitimate aim – finitude of transfer of a credit institution undertaking. Measures selected by the legislator to reach the aim are appropriate, and no other more lenient measures exist. Control mechanism is also ensured; therefore detriment caused to the rights of a person is insignificant if compared to benefit gained by the society.

4. The summoned person, the Cabinet of Ministers indicates that the regulatory framework of transfer of a credit institution undertaking is included into the Credit Institutions Law with the purpose to regulate transfer of failing credit institution undertakings in a way appropriate to specific character of its functioning. Normative regulatory framework clearly establishes not only the right and duties of particular persons (those of the Financial and Capital Market Commission, liquidators and administrators) in the procedure of transfer of a credit institution undertaking, but also

clearly defines criteria for assessment necessity of such procedure, them being security and stability of the national economy or credit institutions sector and interests of credit institution depositors. Moreover, the transfer procedure included into the Commercial Law is very general and it is implemented by observing only will and interests of the transferor or obtainer of the undertaking.

At the hearing, the opinion of the Cabinet of Ministers was expressed by **Mr. Mārtiņš Brencis, Head of the Legal Acts Department of the Ministry of Finance representing the Cabinet of Ministers.**

Mr. M. Brencis indicated that the general aim of legal norms regulating insolvency of merchants is to assure maximum preservation of value of the undertaking; however, the purpose of norms regulating functioning and insolvency of credit institutions is to reduce losses in the financial sector, those of depositors and deposit guarantee fund, though the will of the company to continue working is not a priority. Taking into account the above mentioned purposes, normative acts regulating functioning of credit institutions provide several principles that are different from the general insolvency solutions.

Transfer of an undertaking is regarded as an instrument that can be applied by credit institutions to increase their financial situation. Under the above mentioned circumstances, the legislator had the grounds to elaborate, in more detail, the procedure for monitoring functioning of credit institutions in the frameworks of the existent legal system.

Exclusion of joint responsibility of two credit institutions in case of transfer of financial service agreements follows from the common monitoring system of credit institutions. The statement of the Applicant that Section 20 of the Commercial Law includes a guarantee that responsibility emerged before transfer of the undertaking are joint in respect to the transferor and the obtainer is ungrounded. Section 20 of the Commercial Law provides: If an undertaking or its independent part is transferred to the ownership or use of another person, the acquirer of the undertaking shall be liable for all the obligations of the undertaking or its independent part. Consequently, the Law

establishes on prior basis that the obtainer would overtake all liabilities of the undertaking and shall be responsible for them.

Transfer of a credit institution undertaking does not influence share capital owned by shareholders. The argument of the Applicant that shareholders, in a general case, cannot decide on transfer of the undertaking is ungrounded. The Commercial Law permits to include, into articles of association of a credit institution, regulatory framework establishing that the council, on behalf of shareholders, would confirm particularly important transactions performed by the board of a credit institution. This may also concern transfer of the undertaking. However, if the attorney appointed by the monitoring institution decides to perform transfer of the company on behalf of the credit institution, this means that in a particular situation protection of the financial system, Latvian national economy and interests is prior if compared to protection of interests of shareholders.

The Cabinet of Ministers indicates that the reference of the Applicant to different titles of models for division of a credit institution in relation to the definition of an undertaking is ungrounded because these models are based on asset assessment (best asserts or worst assets) rather than on division of creditor claims. Therefore the argumentation regarding breach of the principle of equality in this aspect is not grounded. The argumentation regarding unequal attitude towards shareholders of a credit institution and lenders of subordinate liabilities can neither be regarded as grounded because lenders of subordinate liabilities and shareholders of a credit institution are protected less than depositors. When concluding agreements on subordinate liabilities, owners of assets should be aware of the fact that interest payments based on subordinate liabilities are directly subject to successful functioning of the bank. Shareholders of a credit institution, too, when making investments into the credit institution, undertake certain risk.

The Contested Norms do not contract Article 92 of the Satversme. The fact that the Law does not confer creditors the right to appeal or interfere in respect to issuance of permission for transfer of a credit institution undertaking does not deprive these persons

of the right to address the court according to claim procedure or ask compensation or recovery of losses in case if their legal interests are threatened or liabilities are not fulfilled.

The purpose of Section 59^2 (3) of the Credit Institutions Law is to establish that transfer of a credit institution undertaking is a precise and terminated transaction in a particular timeframe (date, precise time), within which one credit institution excludes particular assets and liabilities from its financial statements and accounts, whilst another person recognize them as belonging to it and include it into its accountancy. Therefore such transition is valid irrespective of the fact that, in the laws of other states, another regulatory framework could be applied to transfer of assets, corroboration, pernacy, reregistration of liabilities. If any foreign asset or liability in from of foreign persons involved in transfer of a credit institution undertaking cannot be transferred, then it is excluded from property of the obtainer after the transfer.

The Cabinet of Ministers emphasizes that, before introduction of the Contested Norms, only such solutions, in fact, were possible as insolvency and liquidation, which would result in satisfaction of claims of other depositors at the amount of guaranteed compensation. Since the bank liquidation quota in such a case would be equal to zero, claims of lenders of subordinate liabilities and shareholders would not be satisfied. Consequently, when executing transfer of a credit institution undertaking, it is possible to cover a greater amount of claims of creditors.

5. The summoned person – the Financial and Capital Market Commission (hereinafter – the Commission) informs that the Saeima reply was based on the documents prepared by the first. Therefore it would not provide a separate opinion and would fully agree with the argumentation of the Saeima reply.

At the Court hearing, **Mr. Gvido Romeiko, Head of the Legal and Licencing Department of the Financial and Capital Market Commission representing the**

Commission characterized the procedure of bank transfer and jurisdiction of the Commission in the frameworks of the present legal proceedings. Although the Credit Institutions Law does not provide a detailed regulatory framework to appoint an attorney or allocate assets and liabilities in case of bank transfer, the Commission adopts its decisions based on the purpose of its establishment.

It is important to differentiate between credit institutions and other associations since their functioning principles are different. It is necessary to ensure protection of interests of depositors and those of the State because the State provides guarantee for fulfilment of liabilities of credit institutions. Establishment of a special regulatory framework in the Credit Institutions Law is substantiated by suggestions of experts from the International Monetary Fund.

Application of joint responsibility in case of a bank transfer cannot be executed due to peculiar features of functioning of the sector. Joint responsibility is also related with the duty of a credit institution to foresee resources to cover possible costs in case of insolvency of the other credit institution. Consequently, ensuring of such requirement is problematic. Solving of similar situation in the insurance sector, though joint responsibility not being established, has caused no practical problems up to now.

When issuing permission to transfer of a bank, the Commission makes sure whether both credit institutions are able to fulfil their liabilities. Consequently, it is not possible to transfer a bank with the purpose to cause a disadvantageous situation to creditors of a particular credit institution.

However, the prohibition to recognition of transfer of a credit institution undertaking as null and void is related to assurance of terminated character of the transfer procedure. Moreover, it is applicable only to crisis instances; therefore it has a legitimate aim and it is proportional because person can bring an action before the Commission and credit institutions implementing the transfer and request compensation of losses.

6. The summoned person – association "Association of Latvian Commercial Banks" ("Latvijas Komercbanku asociācija") (hereinafter – the Association of Commercial Banks) indicates that, implementing norms of Section 59^2 of the Credit Institution Law, a considerable tool for implementing strategic goals of a credit institution and assuring of operative flow of financial means has been created. However, Section 59^4 of the Credit Institutions Law provides a possibility to reduce credit institution liquidation process in situation when a credit institution has lost its licence. Therefore the legal norms establishing possible composition of a credit institution undertaking, criteria for its assessment, procedure for adoption of a decision regarding the transfer of it and liability of participants of the transaction in respect to the third parties, a universal norm applicable to functioning of all credit institutions have been developed. They are included into a special legal act of the field, i.e. the Credit Institutions Law, and they can be applied in any instance whenever a credit institution, its liquidator, administrator or an attorney appointed by the Commission regard transfer of a part of the undertaking to another legal successor as useful.

The Association of Commercial Banks emphasizes that the institute of transfer of a credit institution undertaking is closely related with the effective legal system and, in fact, does not establish new and conceptually different legal solutions; it has been established with the view to respect the specific character of a particular branch of entrepreneurship.

Section 20 (1) of the Commercial Law provides for a duty of an obtainer of an undertaking to be responsible for all liabilities undertaken. In addition to this, the Law also provides a general joint responsibility, for a certain timeframe, of the transferor and the obtained of an undertaking for all liabilities undertaken and created before the transfer of the undertaking. Consequently, disregarding the liability duty of the obtainer established in the first sentence of Section 20 (1) of the Commercial Law, creditors of the undertaking are provided additional guarantees, namely, it permits requiring satisfaction of a claim even from the transferor of an undertaking. According to the Association of Commercial Banks, the Commercial Law does not presume that the obtaining company would be

jointly responsible for liabilities of the transferring undertaking that have not been transferred to the obtained as a constituent part of the undertaking. If compared to what has been established in Section 20 of the Commercial Law, Section 59^2 (1) of the Credit Institutions Law provides for an exception in respect to responsibility of participants of the transaction for those liabilities of a credit institution undertaking (or a part thereof) that are established in financial service agreements. As a result, this is the obtainer of a credit institution undertaking that is responsible before the clients for all liabilities that have been transferred to ownership of the obtainer in the frameworks of the undertaking based on a financial service agreement; however, transferor of an undertaking is released from joint responsibility.

The Association of Commercial Banks holds that the Contested Norms do not directly establish restrictions of property right. Namely, they do not clearly establish that an individual to whom a particular legal norm is applied, would lose certain property (or a part thereof) owned by him or her along with coming into force of the norm and would cease gaining a particular income previously guaranteed in legal acts.

The Association of Commercial Banks recognizes that Section 59^3 (2) of the Credit Institutions Law prohibits concerned parties contesting decision regarding transfer of a credit institution undertaking and thus restricts the right to protect one's rights and interests before the court as guaranteed in the Satversme. Although transfer of a credit institution undertaking is permitted only in case if it is done for the sake of security and stability of national economy and credit institutions sector or in the interests of depositors of the credit institution, this enumeration should not serve as basis for a person to prohibit the right to legal protect guaranteed in the Satversme.

The Association of Commercial Banks draws attention to the fact that the Contested Norms do not presume alienation or shares owned by shareholders as a tool testifying their property right. However, shares is a specific kind of property right, namely, their owner has undertaken risk related with a particular commercial association knowing that share value and other property benefits are related with financial success of the association.

Share value, insofar as it is established by the body of assets and liabilities of an undertaking, working perspectives, successful business management and other factors is changing and can be differently interpreted. Therefore the conclusion of the Applicant that the possibility to apply the Contested Norm or transfer of a credit institution undertaking would surely cause reduction of share value is ungrounded. When analysing the right to execution of a debtor as the property right guaranteed in Article 105 of the Satversme, it is possible to conclude that, in fact, no legal norm guarantees observance of such requirement.

The Association of Commercial Banks does not deny that certain nuances of the Contested Norms could be more elaborate in respect to rights and duties of participants of the transaction, including the procedure of informing clients of a particular credit institution.

At the court hearing, when maintaining the opinion of the Association of Commercial Banks, **Ms. Ketija Tola, attorney at law representing the Association of the Commercial Banks** was of the viewpoint that the Contested Norms also restrict the right to a fair court. The Association of Commercial Banks agrees to the opinion of the Saeima that the restriction is proportional and assures welfare of the society.

7. The summoned person, *Dr. iur.* Jānis Kārkliņš , an associate professor of the Faculty of the University of Latvia [Latvijas Univesrsitāte] indicated: the fact that the Contested Norms do not establish criteria to determine the composition of the credit institution undertaking to be alienated do not make them anticonstitutional. This issue has been left to be decided by a certain person subject to law (legal manager of the undertaking).

Mr. J. Kārkliņš does not agree with the statement of the Applicant that the prohibition to recognize the transaction as null and void means the denial of the right to court. The claim to recognize the transaction as null and void is one of legal remedies that can be applied by a participant of the transaction to protect his or her legal interests. It is

not always the case that the law permits application of legal remedies in all cases of infringement of rights. Restriction of application of a legal remedy established by law cannot as such be regarded as anticonstitutional. However, in the particular case, it is necessary to assess whether the restriction is proportional. The prohibition to request recognition of a transaction as null and void applies only to certain cases, namely, when actions of a credit institution fails to comply with legal requirements (infringe interests of the society) and when a credit institution becomes insolvent. Alienation of an undertaking in the interests of a capital society cannot cause property losses to the capital association because equivalent property remuneration is disbursed. If not, then the law establishes certain protection mechanisms for concerned persons that give the right to call to justice those persons who have performed alienation of an undertaking contrary to interest of the capital association. The Credit Institutions Law does not exclude responsibility of administrators for transfer of a credit institution undertaking to another person because interested parties preserve the right to protect their interests by litigation and require compensation of detriment. The law does not prohibit such legal remedy. Therefore the restriction shall be regarded as proportional.

Mr. J. Kārkliņš also draws attention to the fact that, in the Credit Institutions Law, the legislator could include such legal regulatory framework prohibiting concerned persons to contest a particular transaction; however, such right is are reserved to direct participants of transfer of a credit institution undertaking, them being the transferor and the obtainer.

Mr. J. Kārkliņš indicates that release from joint responsibility in case of insolvency and liquidation is ungrounded because, by applying the particular regulatory framework, a credit institution can artificially initiate insolvency or liquidation procedure to separate the most valuable assets from creditor claims. Such procedure should be permitted only in exceptional cases when the State invests its budget resources to rescue a bank (by overtaking the bank to secure the financial system).

The Contested Norms do not contradict Article 90 of the Satversme. A similar regulatory framework is also included into the Commercial Law. Transfer of an undertaking is executed by the board, and it is also entitled to execute it without prior consent of participants of the procedure (shareholders). Moreover, the Credit Institutions Law establishes a control mechanism because a permission of the Commission is needed before transfer of a credit institution undertaking (Section 59^3). However, before issuing such permission, the Commission assesses the transfer of a credit institution undertaking. Since one of the duties of the Commission is monitoring of credit institutions, there is reasonable ground to establish that the Commission is also responsible for lawfulness of the transfer of a credit institution undertaking. If an administration executes transfer of a credit institution undertaking at variance with interests of the capital association, he or she would be held liable pursuant to the general norms of the Civil Law regulating responsibility of an administrator.

Mr. J. Kārkliņš indicates that the regulatory framework of Section 59^2 (2) of the Credit Institutions Law would be anticonstitutional only in case if renewal of an agreement without consent of participants of the procedure would not have been permitted. Taking into account the fact that transfer of a credit institution undertaking is closely related with liabilities of the undertaking, namely, the fact that in case of transfer of the credit institution undertaking these are basically financial service agreements that are transferred, the legal regulatory framework establishing that contractual partners also transfer their liabilities is grounded. Otherwise, transfer of a credit institution undertaking would be hampered because it would require consent of each contractual partner. Such procedure could be permitted only in an exceptional situation whenever a state rescues a failing bank. In such a case, the right of contractual partners to trust into the fact that only a particular person would be their contractual partner can be restricted to ensure interests of the society. Moreover, as contractual partners changed based on a lawful agreement renewal, the extent of protection of depositors does no change because the State is still committed to guarantee deposits at the stipulated amount.

It is not possible to agree with opinion of the Applicant, namely, that the regulatory framework of transfer of a credit institution undertaking establishes denial of property right, namely, denial of the right to claim. Of course there is a risk that a creditor would not be able to exercise his or her right to claim because the debtor would have not enough financial means; however, it does not serve as sufficient grounds to suggest that the legal regulatory framework would contradict Article 105 of the Satversme. None of the laws guarantee that a merchant could always implement its claims because there are different circumstances influencing it.

The legal regulatory framework regarding validity of the transaction outside the territory of Latvia does not contradict Article 1 of the Satversme. Such procedure does not threaten sovereignty of Latvia or any other state because the respective norm regulates only the moment of transfer of property rights of the undertaking, namely, the fact that the undertaking would be regarded as transferred disregarding the what laws of other states established at the moment of the transfer. In case of transfer of a Latvian credit institution undertaking, Latvian normative acts are applied thereto as from the moment of the transfer.

8. The summoned person, Mr. Kārlis Leiš kals, former Head of the Saeima Budget and Financial (Tax) Committee at the period of the 9th Saeima characterized the procedure of adoption of the Contested Norms at the meetings of the Saeima and the Committee.

As to urgency of adoption of the Contested Norms, Mr. L. Leiš kalns indicated that it was based on the necessity to establish legal regulatory framework for solving of possible problems in the banking sector. Representatives of the Financial and Capital Market Commission, those of the Association of Commercial Banks and the Saeima Legal Office have also participated at the meetings. Meetings of the Committee are open, and the agenda is notified in advance; therefore all interested parties had the possibility to participate in the meetings and express their opinion. The Committee heard opinions of

persons present at the meeting, including objections regarding anticonstitutionality of certain norms, which resulted in introduction corrections into particular norms for them to make compliant with the Satversme; therefore they had no doubts regarding constitutionality of the Contested Norms. Moreover, Mr. K. Leiš kalns shared the opinion of the Saeima representative, namely, that the Contested Norms do not prohibit persons brining an action regarding possible infringement of their property interests.

The Contested Norms prohibit recognizing transfer of a bank as null and void because otherwise bank transfer could be impossible. In such a case, stability of the State financial system and the banking sector, as well as protection of interests of depositors would be endangered.

Mr. K. Leiš kalns indicated that it is not necessary to establish more precise bank transfer criteria because the functions should be granted to monitoring institutions, namely, the Financial and Capital Market Commission, which would ensure selection of the most appropriate solution for each situation.

The Findings

9. At the court hearing, by referring to Article 29 (1) indent 3 and 6, Article 20 (5) and Article 18 (1) indent 4 of the Constitutional Court Law, the Saeima representative asked to terminate proceedings regarding compliance of the Contested Norms with Article 1, Article 90, Article 91 and Article 105 of the Satversme because the application contains no legal justification in this respect or it is evidently insufficient. The majority of argumentation applies to private relations between a credit institution and its shareholders and creditors and they do not apply to the duty of the legislator to observe human rights.

In the frameworks of its jurisdiction, the Constitutional Court performs control of legal norms. Based on suggestion of the members of the parliament, abstract control of norms shall be performed. In such a case, the Applicants do not need substantiating infringement of fundamental rights of any particular person, which is the case in the frameworks of the particular control (constitutional complaint). Consequently, legal substantiation can be general and based mainly on non-compliance of norms with legal norms of a higher legal force without proving infringement of fundamental rights of any particular person. However, legal argumentation of the infringement should be substantiated. Therefore, to decide the question regarding termination of legal proceedings, the Constitutional Court shall first of all verify whether, in the application and at the court hearing, the Applicant has indicated to particular norms of the Satversme that the Contested Norms do not comply with and provided an appropriate legal substantiation.

The claim of the Applicant will be assessed by verifying compliance of the Contested Norms with Article 1, Article 90, Article 91, Article 105 and Article 92 of the Satversme.

10. The Applicant has contested several norms of the Credit Institutions Law regulating transfer of a credit institution undertaking. It is emphasized in the application that the Contested Norms cannot be regarded separately because they contain mutual references, as well as apply definitions and terms, the content of which is revealed only in one of the Contested Norms. Anticonstitutionality can be observed in all Contested Norms taken together, them regulating transfer of a credit institution undertaking, rather than in certain aspects of the norms. When adopting such norms, the legislator has considerably changed the transitional regulation on transfer of a credit institution undertaking.

Therefore it should first of all be investigated what means transfer of a credit institution undertaking, what is the extent of rights of creditors, and whether it differs considerably from transfer of another kind of undertakings.

10.1. Pursuant to Section 20 of the Commercial Law, if an undertaking or its independent part is transferred to the ownership or use of another person, the acquirer of the undertaking shall be liable for all the obligations of the undertaking or its independent part. However, in respect of those obligations which arose prior to the transfer of the undertaking or its independent part to the ownership or use of another person, and the terms or conditions for the fulfilment of which come into effect five years after the transfer of the undertaking, the transferor of the undertaking and the acquirer of the undertaking shall be jointly liable. Moreover, in the case of the transfer of ownership or use of an undertaking or its independent part, claims and other rights included in the undertaking or its part shall be transferred to the acquirer of the undertaking.

The Contested Norms regulate application of a commercial law institute – transfer of an undertaking to credit institutions. Section 59^2 of the Credit Institutions Law includes a general regulatory framework on transfer of a credit institution undertaking that shall be applicable to any transfer of a credit institution undertaking. Transfer of a credit institution undertaking is a civil law transaction that is concluded between a transferring credit institution and an obtaining credit institution. However, to execute the transaction, it is necessary to receive consent of the Commission to transfer the credit institution undertaking. The above mentioned administrative act can be appealed against, though the appeal does not suspend fulfilment of the administrative act.

Transfer of a credit institution undertaking and its financial service agreements cannot be executed pursuant to provision of Section 20 (1) of the Commercial Law regarding joint responsibility of the transferor and the obtainer. The regulatory framework also establishes that it is not necessary to receive consent of creditors or other persons involved in transfer of a credit institution transfer, as well as the extent, at which

the Credit Institutions Law can be applied to property (objects and liabilities) pertaining to the credit institution undertaking.

However, Section 59^3 and Section 59^4 of the Credit institutions Law establish provisions of transfer of a credit institution undertaking in an exceptional case. Section 59^3 of the Law provides transfer of a credit institution undertaking in case when, observing certain criteria, it is decided by an attorney appointed by the Commission rather than the board of the credit institution. In such a case, obtainer of the undertaking is not subject to the joint responsibility established in the Commercial Law. Section 59^4 of the Credit Institutions Law provides for transfer of a credit institution undertaking in case of insolvency or liquidation by concretizing that liquidator or administrator of a credit institution also has the right to adopt decision regarding transfer of the credit institution undertaking. Also in cases established in Section 59^3 and 59^4 Section of the Law, it is necessary to obtain permission of the Commission. Moreover, such transfer of a credit institution undertaking cannot be recognized as null and void.

The regulatory framework included into the Commercial Law compared with the contested transfer of a credit institution undertaking, the following can be established: the main difference is the fact that transfer of a credit institution undertaking requires receipt of consent of the Commission, exceptions from the joint responsibility principle in respect to obtaining undertaking have been established, and in certain cases the transaction of transfer of a credit institution undertaking cannot be recognized as null and void.

The Applicants indicate that the new regulatory framework differs considerably from the previous one and contradicts the legal regulatory framework of the Commercial Law and understanding of terms.

10.2. Transfer of an undertaking has already existed as an institute of commercial law. However, transfer of a credit institution undertaking is a special institute of commercial law. Therefore possible collision between the Commercial Law and the Civil

Law can be regarded as special relations of legal norms with a general legal norm, as well as relations of a later legal norm with an older one.

Article 16 of the Constitutional Court Law provides that the Constitutional Court shall adjudicate matters on compliance of other regulatory enactments or parts thereof with the norms (acts) of a higher legal force. Assessment of mutual conflicts between norms of equal legal force does not fall within jurisdiction of the Court. Consequently, the argumentation of the Applicants regarding non-compliance of the Contested Norms with the Commercial Law or the Civil Law shall not be assessed. In the frameworks of the present case, the Constitutional Court shall assess compliance of the Contested Norms with legal norms of a higher force only, namely, with norms of the Satversme.

11. The Applicants hold that the Contested Norms fail to comply with the following principles of a law-governed state following from Article 1 of the Satversme: the principle of proportionality, the principle of legitimate expectations, the principle of good administration and that of an independent state.

It is indicated in the application that the Contested Norms fail to comply with the principle of proportionality that follows from Article 1 of the Satversme because its legitimate aim is not clear; therefore the measures selected are not targeted at reaching of the aim. Moreover, more lenient measures for reaching of the legitimate aim also exist.

The proportionality principle determines that – if the public power limits person's rights and lawful interests – a reasonable balance between the interests of the person and the state or public interests has to be taken into account (*see: Judgment of 19 March 2002 by the Constitutional Court in the case No. 2001-12-01, Para 3.1 of the findings*). It follows from the aforesaid that assessment of the principle of proportionality is aimed at norms including restrictions of rights. Consequently, restriction of the particular rights is subject to assessment of proportionality thereof.

The Applicant draws attention to non-compliance of the Contested Norms with the principle of proportionality by providing a general substantiation and without identifying and analysing any particular restrictions of fundamental rights.

The Contested Norms contain several provisions regulating transfer of a credit institution undertaking in different situations wherein several restrictions can be established. Admissibility of such restrictions in the particular situation is different. It is not possible to simultaneously assess proportionality of all Contested Norms taken together because each of the restriction of rights has its own legitimate aim and measures to reach the aim.

The Constitutional Court has already concluded in its case-law that when assessing the conformity of the impugned norm with the first sentence of the Satversme Section 91, one shall take into consideration the fact that manifestation of these principles in different fields of law may differ. The nature of the impugned norm, inter alia, also its connection with other norms of the Satversme and their place in the system of fundamental rights, inevitably influence the scope of the control, realized by the Constitutional Court. Namely, the legislator has a certain freedom of action in regulating a particular issue, and the duty of the Constitutional Court is to assess whether the margin of appreciation enjoyed by the Saeima complies with what has been established in the Satversme (*see: Judgment of 8 November 2006 by the Constitutional Court in the case No. 2006-04-01, Para 15.2 and 15.3*).

Consequently, the Constitutional Court shall assess compliance with the Contested Norms with the principle of proportionality in conjunction with Article 90, Article 91, Article 92 and Article 105 of the Satversme should the Court establish infringement of rights established in the above mentioned articles.

12. The Applicants indicate that, when introducing the new regulatory framework, liabilities of credit institution creditors are impacted at a considerable extent. When

establishing transitional period for introduction of the new regulatory framework, the principle of legitimate expectations established in Article 1 of the Satversme is not breached.

Section 59^2 (1) Indent 1 Prim provides that the provision of Section 20 (1) of the Commercial Law regarding joint responsibility of person transferring or obtaining the undertaking shall not be applicable to transition of financial service agreements of a credit institution undertaking. However, Section 59^3 and Section 59^4 of the Credit Institutions Law provides that provisions of Section 20(1) of the Commercial Law regarding joint responsibility of a transferor and an obtainer of an undertaking shall not be applied to obtainer of a credit institution undertaking.

12.1. The principle of legitimate expectations also determines that – as regards the issued normative acts - the state institutions shall be consistent in their activities and observe trust in law, which may arise to persons in accordance with a certain legal norm. In his/her turn the individual – in conformity with this principle – may rely on constancy and immutability of the legal norm, passed in accordance with the law. The main duty of the principle of legitimate trust is to protect the rights of a person in cases, when – as the result of amendments to legal regulation – the legal status of an individual is or may be worsened (*see: Judgment of 8 November 2006 by the Constitutional Court in the case No. 2006-04-01, Para 21*). However, the principle of legitimate expectations does not exclude the right of the State to amend legal regulatory framework (*see: Judgment of 1 December 2010 by the Constitutional Court in the case No. 2010-21-01, Para 19*).

In order to assess whether the legal act that provided for deviation from the rights conferred to a person comply with the principle of legal security, the following should be investigated:

1) whether a person has been conferred legal security to safeguarding or implementation of any particular rights; and

2) whether a reasonable balance between protection of legal security of a person and ensuring of interests of the society has been observed (*see: Judgment of 26 November 2009 by the Constitutional Court in the case No. 2009-08-01, Para 23*).

12.2. In order to establish whether persons may legitimately trust into preservation of implementation of certain rights, it is necessary to establish whether the trust of the person to the rights determined by earlier legal regulation is legitimate, reasonable and whether the legal regulation in its essence is sufficiently well determined and unchangeable so that one may rely on it (*see: Judgment of 19 March 2002 by the Constitutional Court in the case No. 2001-12-01, Para 3.2 of the findings, Judgment of 25 October 2004 in the case No. 2004-03-01, Para 7 and Judgment of 8 November 2006 in the case No. 2006-04-01, Par 21*).

Before the Contested Norms were adopted, transfer of a credit institution undertaking was not particularly regulated in normative acts, though the regulatory framework established in the Commercial Law was applied thereto, the principle of joint responsibility in case of transfer of an undertaking established in Section 20 of the Commercial Law included. Norms included into the above mentioned section are aimed at protection of creditors. They protect interests of creditors and reduce their risk by establishing that a creditor would obtain the right to claim in respect to the obtainer by also preserving the right to claim in respect to the alienator (*see: Strupiš s A. Komerclikuma komentāri. Rīga: SIA „A. Strupi□a Juridiskais birojs", 2003, 263 § and 267 §).* The above mentioned regulatory framework was in force since 2002, and transfer of all credit institutions (including credit institution undertakings) took place based on it.

Consequently, legal regulatory framework was, in fact, stable enough.

12.3. When assessing the extent at which legal security of persons should be safeguarded, it should be taken into consideration whether the legal norm that has conferred the particular rights has already been applied to the persons. The extent of safeguarding of legal security differs depending on the fact whether a person has trusted

into already conferred rights or those to be conferred (*see: Judgment of 26 November 2009 by the Constitutional Court in the case No. 2009-08-01, Para 25*).

Transitional regulatory framework of the Credit Institutions Law was introduced in 19 February 2009 and amended on 29 October of this year. It follows from the case materials that, during adoption and coming into force of the Contested Norms, none of credit institution undertakings were in the transfer process. Likewise, none of the creditors exercised the right to claim, based on the second sentence of Section 20 (1) of the Commercial Law, in respect to a credit institution undertaking that would have already been overtook. Consequently, the Contested Norms are not appropriate for such transfer of credit institution undertaking that would have taken place or initiated based on Section 20 of the Commercial Law.

However, an unapplied legal norm can create a protected legitimate trust in case if it establishes expected rights, namely, particular rights have been established in a legal act though not all preconditions of the exercise have set in. Such legitimate expectations occur if a legal norm applies to legal relations already initiated. Consequently, the fact that no transfer of a credit institution undertaking took place at the time of adoption of a contested norm influences the level of protection of legitimate expectations rather than decides whether persons could have legitimate trust into the fact.

The new regulatory framework permits deviating from joint responsibility regulated in the Commercial Law and other rights of creditors before a credit institution undertaking is transferred. Persons had legitimate trust into anticipated right rather than already acquired one. Such expectations shall be protected; however, the extent of protection is lesser than the one in case if the right would have already been acquired, namely, in case if transfer of a credit institution undertaking would have already been executed.

Consequently, persons could trust into the fact that transfer of a credit institution undertaking would have been executed pursuant to the transitional regulatory framework of the Commercial Law.

12.4. The Constitutional Court has already indicated that the principle of legitimate expectations shall be related with the necessity to create circumstances for an individual, guided by legal norms, to be able to adopt not only short-term decisions, but also make long-term plans for future (*see: Judgment of 25 October 2004 by the Constitutional Court in the case No. 2004-03-01, Para 9.2*). Since a person, having trusted into a particular normative regulatory framework and rights included therein, has planned his or her life, undertook liabilities etc., it is necessary to have a transitional period for a person to be able to adapt to procedure established in the new regulatory framework.

Establishment of a reasonable term or provision of compensation is generally applicable to cases when a person is deprived of or restricted rights already granted or anticipated. If exercise of the rights of a person depends on a certain precondition that cannot be fulfilled in the nearest future or it is likely that it would never be fulfilled, no lenient transition is necessary and it can be substituted by other mechanisms. Consequently, in such a case protection of substantial interests of the society and margin of appreciation of the legislation becomes the prior criterion of legitimate expectations since the new regulatory framework can neither infringe fundamental rights of persons.

A transitional period was established for introduction of the Contested Norms. However, at the time of their adoption, no transfer of a credit institution undertaking took place, neither the conditions for exercise of the right to claim of creditors had set in as a result of transfer of a credit institution undertaking. Consequently, the legislator did not have the necessity to establish a transitional period for persons to be able to get adapted to the new situation. At the court hearing it was established that the first transfer of a credit institution pursuant to the new regulatory framework took place about one year after coming into force of the Contested Norms. Consequently, to regulate already existing legal relations, normative regulatory framework that was in force for a certain timeframe had to be applied. Persons were already aware of the new regulatory framework and they could anticipate that transition of a credit institution undertaking would take place pursuant to normative regulatory framework on transfer of credit

institution undertakings. Consequently, it was not necessary to establish a special transitional period.

12.5. The Saeima and the Association of Commercial Banks maintain that, when the Contested Norms were adopted, namely, at the beginning of 2009, it was necessary to establish such legal instrument that would permit avoiding considerable crashes of the financial system of Latvia that could be caused by possible insolvency of a credit institution and assure fulfilment of bank liabilities. However, credit institutions of Latvia have already faced such a problem when normative regulatory framework in Latvia provided no possibility to credit institution to alienate its assets according to a proper legal procedure, these assets being specific financial services of banks. According to specific character of bank activities, these are the assets that constitute the major part of property owned by a particular credit institution. However, the normative regulatory framework ensured the possibility to ensure activities that would comply with commercial interests of a particular credit institution and its contractual partners, clients included, namely, transfer of rights and liabilities of the bank enshrined in loan agreements to another creditors for remuneration (*see: Case materials, Vol. 2, pp. 162 – 170*).

The necessity to establish a specific regulatory framework regarding transfer of a credit institution undertaking in the Credit Institutions Law that would differ from the one enshrined in Section 20 of the Commercial Law followed, at the beginning of 2009, from two factors that could be characterized as not typical to the financial system of Latvia, as extraordinary conditions and issues identified in practice of credit institutions in the long term. By introducing the institute of transfer of a credit institution undertaking into the Credit Institutions Law, an important instrument for implementing strategic aims of a credit institution was created that facilitated, amongst the rest, cooperativeness of financial flow.

Consequently, change of the normative regulatory framework was necessary in the interests of the entire society. Without performing measures to ensure stability of the financial market, the entire national economy would be impacted.

The Constitutional Court has already indicated in its case law that protection of material interests of the society are prior to observance of the principle of legitimate expectations (*see: Judgment of 26 November 2009 by the Constitutional Court in the case No. 009-08-01, Para 25*).

Consequently, the Contested Norm constitutes no infringement of the principle of legitimate expectations and therefore complies with Article 1 of the Satversme.

13. It has been indicated in the application that "the non-revocable character of administrative decision established in Section 59^3 (2) and Section 173 (4) of the Credit Institutions Law fails to comply with the principle of good administration included into the term of democracy, which is unthinkable without the presence of institutes of appeal and restitution. Likewise, each person should be guaranteed the right to appeal against real administrative decision with the purpose to ensure cancelling of unlawful and useful decisions" (*see: Case materials, Vol. 1, pp. 8*). The Applicant holds that, without establishing protection of the rights of a person during court proceedings, the principle of good administration is infringed.

The Constitutional Court, in its judgments, has already referred to the principle of good administration by indicating among the rest that this principle follows from Article 1 of the Satversme (*see: Judgment of 25 March 2003 by the Constitutional Court in the case No. 2002-12-01, Para 6 of the findings*) and the State is obligated to facilitate and improve State administration and to organize in the most efficient way possible (*see: Judgment of 6 April 2005 by the Constitutional Court in the case No. 2004-21-01, Para 6*), to guarantee implementation of the procedure within a reasonable time and other provisions, the objective of which is to ensure observation of human rights in State

administration (*see: Judgment of 25 March 2003 by the Constitutional Court in the case No. 2002-12-01, Para 6 of the findings*).

The principle of good administration that follows from Article 1 of the Satversme applies mainly to the field of State administration. The principle of good administration means observation of human rights in functioning of executive power, i.e. State administration, however, the legislator, too, which is the Saeima, has the duty to observe this principle (*see: Judgment of 19 May 2009 by the Constitutional Court in the case No. 2008-40-01, Para 16*).

According to the Applicants, the Contested Norms fail to ensure contesting and appeal against an administrative act, in the present case – a permission issued by the Commission; likewise it prohibits recognizing the transaction of transfer of a credit institution undertaking as null and void.

Objections of the Applicants against prohibition to appeal against transfer of a credit institution undertaking, which is an issue of private rights, will be assessed in conjunction with Article 92 of the Satversme ensuring the right to a fair court; however, appeal against an administrative act, which is an issue of public rights pertaining to the field of state administration shall be considered in the context of the principle of good administration.

It has been erroneously stated in the application that the Contested Norms provide a prohibition to appeal against the administrative act adopted by the Commission in case of transfer of a credit institution undertaking is not executed pursuant to provisions of Section 59^3 and Section 59^4 of the Credit Institutions Law. Norms included into the contested Section 59^2 of the Credit Institutions Law regulate general issues of transfer of a credit institution undertaking (*see: Para 10.1 of the present judgment*), including the issue regarding appeal against an administrative act adopted by the Commission, namely, permission to transfer a credit institution undertaking by only establishing that appeal against the administrative act shall not suspend execution thereof. However, the contested Section 59^3 and Section 59^4 of the Credit Institutions Law provide special provisions in case

if the decision regarding transfer of a credit institution undertaking is adopted by an attorney, liquidator or insolvency administrator appointed by the Commission. However, in such cases, the administrative act issued by the Commission shall be appealed against pursuant to provisions of Section 59^2 (4) of the Credit Institutions Law. Consequently, the regulatory framework included into the Credit Institutions Law provides a possibility to appeal against the administrative act, by means of which the Commission would permit transfer of a credit institution undertaking.

Consequently, the Contested Norms does not cause infringement of the principle of good administration.

14. The Applicants hold that Section 59^2 (3) of the Credit Institutions Law that establishes validity of an administrative act issued by Latvian officials on transfer of a credit institution in respect to foreign property of the credit institution irrespective of rights and liabilities related with the property or a part of it applicable pursuant to foreign law infringes the principle of an independent (sovereign) and democratic state that follows from Article 1 of the Satversme. The duty of any state is to observe and respect normative acts and jurisdiction of another sovereign state.

The summoned persons admitted that the above mentioned norm regulates only the moment of transfer of property right of an undertaking and it is not related with the principle of an independent and democratic state following from Article 1 of the Satversme. The aim of the norm is to establish full transfer of an undertaking, namely, as the result of the transfer, the entire undertaking or a part thereof is transferred, which also includes assets (property) abroad. An undertaking would be considered as transferred disregarding of the fact that laws of another state establish in respect to the moment of transfer of the undertaking. In case of transfer of a Latvian credit institution undertaking, Latvian normative acts in respect to establishment of the moment of transfer of the undertaking would be applied.

The argumentation of the Applicants regarding non-compliance of Section 59^2 (3) of the Credit Institutions Law with the principle of a democratic State enshrined in Article 1 of the Satversme is not legally substantiated; therefore proceedings in this respect shall be terminated.

15. The Applicants indicate that the Contested Norm commit participants of the transaction to inform clients of a particular credit institution on prospective transfer of the credit institution undertaking and receive their consent. It contradicts Article 90 of the Satversme because creditors cannot exercise their rights without knowing them.

15.1. Article 90 of the Satversme provides: „Everyone has the right to know about his or her rights."

When analysing content of Article 90 of the Satversme, the Constitutional Court has indicated that it establishes subjective rights of a person to be notified on his or her rights and duties. The State has not only the duty of passing normative acts, which regulate behaviour of persons in diverse legal relations but also – to create a mechanism, which ensures awareness of persons on the contents and changes of the legal regulation. It envisages also the right of a person to receive information of its rights in concrete relations, when entering in publicly legal relations with the institutions of the State power (*see: Judgment of 20 December 2006 by the Constitutional Court in the case No. 2006-12-01, Para 16*).

It can be concluded from the aforesaid that non-compliance with Article 90 of the Satversme would be caused in case if the Contested Norms establishing amendments to normative regulatory framework on transfer of a credit institution undertaking would not be known to persons. However, neither in the application, nor at the court hearing the Applicants maintained their viewpoint that the content of the Contested Norms would not have been known to anyone because of the fact that the State would have failed to timely implement its duty that follows from Article 90 of the Satversme and informed, according

to a proper procedure, persons on the new normative regulatory framework. The Contested Norms have been proclaimed according to the stipulated procedure and are publicly available to everyone.

The right of a creditor to receive information on a civil transaction does not fall within the scope of Article 90 of the Satversme.

15.2. At the court hearing, the representative of the Applicant added that the non-compliance of the Contested Norms with Article 90 of the Satversme is constituted by the unclear nature of the Contested Norms. For instance, it cannot be understood what means the term "financial service agreement" referred to in Section 59^2 (1) Prim of the Credit Institutions Law and what persons have the right to appeal against the consent to execute transfer of a credit institution undertaking issued by the Commission (Section 59^2 (4) of the Credit Institutions Law) (*see: Case materials, Vol. 3, pp. 74*).

When explaining Article 90 of the Satversme, the Constitutional Court has indicated that the right of a person to know about his/her rights determines also the scope of the action of the legislator. The laws and other normative acts shall be publicly accessible, sufficiently clear and understandable (*see: Judgment of 20 December 2006 by the Constitutional Court in the case No. 2006-12-01, Para 16*).

The European Court of Human Rights (hereinafter – the ECHR) has reiterated that laws and legal norms restricting the fundamental rights of a person should be clear and foreseeable enough. Namely, a norm should have a precise wording for a person to be able to understand, in the case of necessity, to regulate its activities by making appropriate consultations (*see, e.g.: Judgment of 26 April 1979 by the European Court of Human Rights in the case „The Sunday Times v. The United Kingdom" Para 49, judgment of 24 February 1998 in the case "Larrisis & others v. Greece" Para 40, judgment of 25 November 1999 in the case "Hashman and Harrup v. The United Kingdom" Para 31*). A norm should have such a wording that would permit persons to foresee a precise field of application of the norm and the meaning thereof. This ensures a material safeguard to individuals. However, the level of precision required of domestic

legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (*see, e.g.: Judgment of 25 November 1999 in the case „Hashman and Harrup v. The United Kingdom" Para 31, judgment of 25 August 1993 in the case "Chorherr c. Autriche" Para 25, judgment of 17 February 2004 in the case "Maestri v. Italy" Para 25 and judgment of 27 March 1990 in the case "Kruslin v. France" Para 30*).

The norm shall be regarded as unclear if, by applying the method of interpretation, it is not possible to establish its true meaning. The contested Section 59^2 (1) Prim establishes that the provision of Section 20 (1) of the Commercial Law regarding joint responsibility of person transferring or obtaining the undertaking shall not be applicable to transition of financial service agreements of a credit institution undertaking. The Applicants indicate that the norm restricts additional protection of creditors, it fails to apply joint responsibility of the transferor and the obtainer to financial service agreements; moreover, the content of the term "financial service agreements" cannot be understood.

Observing definitions of a general character in a law, it would be necessary to explain their content. Doubt about the limits of a definition does not *per se* make the respective notion non-understandable and unclear (*see: Judgment of 16 December 2008 by the Constitutional Court in the case No. 2008-09-0106, Para 7.2*).

Section 1 (4) of the Credit Institutions Law provides a definition of "financial services". Consequently, the legislator has revealed the content of the term "financial service". However, the content of the term "a financial services agreement" can be found out by applying grammatical and systematic interpretation methods, namely, a financial services agreement is an agreement, the subject of which is a financial service.

Consequently, the norm of the contested Section 59^2 (1) Prim shall not be recognized as unclear.

15.3. However, the possibility to appeal against an administrative act issued in the frameworks of the process of transfer of a credit institution undertaking, including a permission of the Commission to transfer a credit institution undertaking shall be established by applying the systematic interpretation method of norms and analysing general provisions of the Administrative Procedure Law. Chapter 3 of Section "A" of the Administrative Procedure Law (Section 24 – 40) establishes those groups of persons who can act as participants or applicants of an administrative procedure. Since the legislator has established that it is not necessary to establish in the Credit Institutions Law an exception regarding these persons, provisions of the Administrative Procedure Law shall be applicable. The contested Section 59^2 (4) establishes as an exception only the fact that appealing against the administrative act would not suspend execution thereof. Consequently, an administrative act issued by the Commission can be appealed against by the addressee of the administrative act and the third parties, the rights and legal interests of whom the act infringes.

Consequently, the contested Section 59^2 (4) shall not be regarded as unclear.

15.4. The Contested Norms establish clearly enough what is a financial services agreement and determines the procedure for appeal against the Commission decision. Grammatical and systematic interpretation of norms fully reveal their content.

Consequently, the Contested Norms comply with Article 90 of the Satversme.

16. The Applicants hold that, in the process of transfer of a credit institution undertaking, breach of Article 91 of the Satversme may occur. Selection of the model of transfer of a credit institution undertaking and motivation thereof is left to be decided by officials only. When executing transfer of a credit institution undertaking, it is possible to divide assets pertaining to the credit institution without observing the principle of equality. Consequently, the Contested Norms come in conflict with Article 91 of the Satversme.

16.1. When interpreting the first sentence of Article 91 of the Satversme, the Constitutional Court has recognized that the principle of equality forbids the state institutions to pass norms that without a reasonable ground permits different attitude to persons who find themselves in similar and comparable conditions. The principle of equality allows and even demands different attitude to persons who are in different circumstances, as well as allows different attitude to persons who are in equal circumstances, if there is an objective and reasonable ground (*see: Judgment of 3 April 2001 by the Constitutional Court in the case No. 2000-07-0409, Para 1 of the findings and judgment of 29 December 2008 in the case No. 2008-37-03, Para 7*). A differentiated attitude is not objective and well-grounded if it does not have a legitimate aim or if the chosen means and the advanced objectives are not proportionate (*see: Judgment of 23 December 2002 by the Constitutional Court in the case No. 2002-15-01, Para 3 of the findings*).

When assessing whether the Contested Norms comply with the first sentence of Article 91 of the Satversme, the Constitutional Court shall investigate whether the Contested Norms contain regulatory framework establishing a different attitude towards persons enjoying similar and comparable conditions, namely: 1) whether persons (groups of person) enjoy similar and, according to certain criteria, comparable conditions; 2) whether the Contested Norms establish a similar or a different attitude towards these persons; 3) whether such an attitude has an objective and reasonable grounds, namely, whether it has a legitimate aim and whether the principle of proportionality has been observed.

16.2. Only one of the models for transfer of a credit institution undertaking establishes transfer of a part of the undertaking to another owner. In such cases, division of a credit institution undertaking is based on assessment of assets and that of further development perspectives of the credit institution, as well as common interests of depositors and the financial system. In each case, division criteria can be different and are assessed based on particular circumstances.

It follows from the application and opinion of the summoned persons of the proceedings that an unequal situation is the most likely to occur in the frameworks of the process of division of a credit institution. Consequently, unequal situation may occur due to actions taken by persons applying the Contested Norms rather than in the result of application of them. Moreover, at the court hearing, the representative of the Applicant admitted that the Law does not provide a different attitude; it rather emerges as a result of applications of the law (*see: Case materials, Vol. 3, pp. 21*).

The scope of competence of the Constitutional Court permits assessing compliance of legal norms rather than that of actions of persons applying them with Article 91 of the Satversme. Consequently, the particular claim is not consistent with jurisdiction of the constitutional Court.

Consequently, proceedings regarding compliance of the Contested Norms with Article 91 of the Satversme shall be terminated.

17. The Applicants indicate that the Contested Norms provide a possibility to reduce actual value of assets when performing transfer of a credit institution undertaking in one or several stages and thus cause losses to persons since it would not be possible to satisfy creditors' claims regarding fulfilment of liabilities. Consequently their right to own property is infringed, it being enshrined in Article 105 of the Satversme.

17.1. Article 105 of the Satversme provides: "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."

Article 105 of the Satversme establishes a comprehensive guarantee of property right without restricting only to the above mentioned. "Property right" means all rights of property character that a competent person can exercise in his or her own benefit and that

a person can exercise based on his or her own will, it being, for instance, property (in the meaning of Section 927 of the Civil Law); pledge right, servitude right, copyright, right to inventions and trademarks; the right that follows from shares (and other securities) owned; liability claims based on an agreement or an offence; concession right; the right to perform economic activities (based on a licence), a.o. (*see: Grūtups A., Kalniņš E. Civillikuma komentāri. Tre□ā daļa. Lietu tiesības. Īpa□ums. Otrais papildinātais izdevums. Rīga: Tiesu namu aģentūra, 2002, pp. 14□15).*

Case-law of the ECHR also shows that different claims can be regarded as property in the meaning of the Convention for the Protection of Human Rights and Fundamental Freedoms. However, there should exist at least something that could be regarded as legal claim (*see: Jacobs and White. The European Convention on Human Rights, Fourth edition, Oxford: Oxford University Press, 2006, p. 355).*

Consequently, the right to claim fulfilment of liabilities pertains to the content of the term "property".

17.2. It has been indicated in the application that, in case of division of a credit institution undertaking, the possibility of creditors to regain their capital would reduce, which would lower the value of their property (capital to be regained) and thus also infringe Article 105 of the Satversme.

The Applicants hold that the Contested Norms "deny the property right without compensation (expropriation)"; they admit, however, that the property right is also denied in case if claims of creditors of a credit institution undertaking to be transferred would not be satisfied (*see: Case materials, Vol. 1, pp. 9*).

Taking into account the fact that the Contested Norms are assessed in the frameworks of an abstract control, the constitutional Court shall also investigate the above mentioned theoretical situation. Consequently, it has to investigate whether the Contested Norms cause restriction of the rights established in Article 105 of the Satversme.

17.3. To assess compliance of the Contested Norms with Article 105 of the Satversme, it is necessary to establish causal relationship between the Contested Norms and negative property consequences to a person.

The general regulatory framework for satisfying claims of creditors establishes that creditors and shareholders of subordinate liabilities of a credit institution are protected at a lesser extent if compared to depositors. When concluding agreements on subordinate liabilities, owners of resources should be aware that interest payments from subordinate liabilities are directly dependent on successful functioning of the bank. As shareholders make investments into a credit institution, they should be aware of possible risks. Moreover, if no transfer of a credit institution is performed, then the failing bank may become insolvent, and creditors and shareholders of subordinate liabilities are most likely to lose all their resources.

Possible reduction of property value of shareholders or creditors of subordinate liabilities follows from the fact that a credit institution undergoes financial difficulties, and the likelihood of loss of all invested resources is directly related with commercial risk. However, the State does not guarantee the right of a person involved in a risky business activity to be protected from commercial risk. This principle is reflected in Section 195 of the Credit Institutions Law, according to which claims of shareholders of a failing credit institution are satisfied the last. Consequently, the State is not committed to undertake responsibility for such relationship.

Consequently, it is probable that a creditor cannot exercise his or her right to claim because the debtor would be in short of financial resources. The property right does not guarantee the right to be protected from commercial risk. Such conclusion is enshrined in case-law of the ECHR. The State is not committed to eliminate all losses resulting for market factors (*see: Harris, O'Boyle and Warbrick. Law of the European Convention on Human Rights, 2nd edn, Oxford: Oxford University Press, 2009, p. 665).*

None of the laws guarantee that a merchant would always be able to implement his or her claims because different risks exist that may influence such likelihood. For

instance, the Commercial Law establishes regulatory framework on limited liability companies; however, at the same time it admits that the company might become insolvent and therefore does not guarantee that all creditors would be able to implement their claims. Moreover, the fact that a creditor cannot regain its debts by means of claims does not mean that the creditor has lost property as a result of annulment of the claim, thought he claim in respect to the debtor is preserved. Also in a case if the debtor goes bankrupt, the claim can be implemented in the interests of the creditor pursuant to the Law "On Enterprise Income Tax". Section 9 of the above mentioned law provides the possibility to apply lost debts to expenses of a merchant, which reduces amount of tax payable. Accordingly, failure to satisfy the claim does not mean that a person is deprived of the property right in respect to a particular property claim.

17.4. The Contested Norms does not provide for denial of property right without compensation or deprivation of any guaranteed income from any of category of persons subject to law referred to in the application. Likewise, the above mentioned legal norms do not establish that any of participants of the transaction – the transferor or the obtainer would be legally authorized not to fulfil any of his or her liabilities. Quite on contrary – the Contested Norms establish responsibility of each credit institution undertaking. Consequently, the situation that claims of creditors are not satisfied in case of transfer of a credit institution undertaking is only theoretical. However, it is possible that, in the result of the transfer of a credit institution undertaking, all claims of creditors are satisfied.

The Constitutional Court has already concluded that reduction of property of shareholders and creditors of subordinate liabilities follows from the fact that a credit institution undergoes financial difficulties. Consequently, it is not possible to establish causal relationship between the Contested Norms and possible negative property consequences of an individual.

Consequently, the Contested Norms do not restrict the property right and do not contradict Article 105 of the Satversme.

18. The Applicants hold that the Contested Norms fail to comply with Article 92 of the Satversme because clients of a credit institution do not have the right to address the court and appeal against a permission issued by the Commission to transfer a credit institution undertaking (Section 59^2 (4)), and transaction of transfer of a credit institution undertaking cannot be recognized as null and void (Section 59^3 (2) and Section 173 (4)).

Consequently, the Constitutional Court shall investigate whether the Contested Norms infringe, on the one hand, the right to a fair court in the frameworks of an administrative procedure (the right to appeal against a permission issued by the Commission, which is an administrative act) and, on the other hand, the right to a fair court in the frameworks of a civil procedure (the prohibition to recognize the transaction as null and void).

In order to assess compliance of the Contested Norms with Article 92 of the Satversme, the Constitutional Court shall first of all investigate whether the Contested Norms infringe the fundamental rights included in the above mentioned article.

19. 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."

It has been established in case-law of the constitutional Court that the notion "a fair court", mentioned in Section 92 of the Satversme, includes two aspects, namely, "a fair court" as an independent institution of the judicial power, which reviews a case and "a fair court" as an adequate process, complying with the law-governed state, under which the case is being adjudicated (*see, e.g.: Judgment of 5 March 2002 by the Constitutional Court in the case No. 2001-10-01, Para 3 of the findings and judgment of 20 December 2006 in the case No. 2006-12-01, Para 9.3*).

A fair court as a judicial procedure adequate for a law-governed State includes several mutually related rights It includes, for instance, the right to access to courts, the principle of equality and competition of parties, the right to be heard, the right to a motivated court judgment, the right to appeal (*see: Judgment of 5 November 2008 by the*

Constitutional Court in the case No. 2008-04-01, Para 8.2 and judgment of 17 May 2010 in the case No. *2009-93-01, Para 8.3*).

However it does not mean that the person is guaranteed the right of adjudicating any important to it issue in a court. Article 92 of the Satversme guarantees that the person has the right of protecting only its "rights and lawful interests" in a fair court (*see: Judgment of 23 April 2003 by the Constitutional Court in the case No. 2002-20-0103, Para 1 of the findings*).

Therefore the Constitutional Court shall investigate whether the Contested Norms infringe the rights and legal interests of a person.

It follows from Section 59^2 (4) of the Credit Institutions Law that an administrative act issued by the Commission, namely, permission to transfer a credit institution undertaking can be appealed against. The Constitutional Court has already indicated that appealing of such administrative act takes place pursuant to the general provisions of the administrative procedure (*see: Para 1.53 of the present judgment*). Section 31 (2) of the Administrative Procedure Law provides that a private person whose rights or legal interests have been infringed or may be infringed may submit an application. The above mentioned norm also provides an exception, namely, persons shall not have the above mentioned right except for cases prescribed by law. Neither the contested Section 59^2 (4), nor any other norm of the Credit Institutions Law establishes any exception.

Consequently, a private person has the right to address an administrative court in case if the administrative act (in the case under consideration – permission of the Commission) addressed to a credit institution infringe rights or legal interests of a particular private person. Establishment of infringement of rights or legal interests of a person falls within the scope of competence of the administrative court.

The contested Section 59^2 (4) of the Credit Institutions Law does not prohibit to persons, whose rights and legal interests have been infringed by an administrative act issued by the Commission, addressing the court.

20. In order to assess whether the Contested Norms (Section 59^3 (2) and Section 173 (4)) prohibiting recognition of transaction as null and void complies with Article 92 of the Satversme, the Constitutional Court shall first establish whether this prohibition pertains to the scope of Article 92 of the Satversme.

The claim to recognize the transaction as null and void is one of legal remedies that a participant of the transaction can apply to protect his or her legal interests. The aim of the remedy is to restore legal and property status of a concerned person up to the level before the infringement; consequently, they are aimed at prevention of infringement or elimination of its consequences (*see: Torgāns K. Saistību tiesības. 1. daļa. Rīga: Tiesu namu aģentūra, 2006, pp. 215)*. The above mentioned legal remedy shall be implemented by litigation.

The Contested Norms prohibit recognizing transaction as null and void. Namely, they prohibit the right to a certain legal remedy, namely, restoration of legal status of a concerned person by litigation by means of recognizing transaction as null and void.

Consequently, the Contested Norms restrict the right of persons to a fair court.

21. When assessing whether such procedure has been justly established and whether the effective regulatory framework is fair, the Constitutional Court shall investigate whether it has been established with a view to reach a legitimate aim and whether interests of an individual and the society are reasonably balanced.

The Contested Norms are included into the Credit Institutions Law. When adjudicating the present matter, the Constitutional Court has established no violations of legislation procedure: the law has been adopted and proclaimed according to the procedure established in the Satversme and laws. Consequently, the restriction has been established by law.

22. Restriction of the fundamental rights is justifiable in case if it has a legitimate aim.

The Saeima and the Cabinet of Ministers indicate that, in the case under consideration, the legitimate aim is protection of the rights of other persons.

In the field of financial services, which is substantial for functioning of market economy and that publicly attracts investments, the State has introduced restriction for launching and performing of commercial activities, it being licencing. Moreover, the State has established strict criteria for functioning of credit institutions. The State has undertaken responsibility for licenced credit institutions by introducing deposit guarantee mechanism. It has been introduced with the purpose to ensure disbursement of indemnity to depositors for deposits made at a party to the deposit guarantee system (a credit institution) though having become inaccessible, namely, in case if a party to the deposit guarantee system is no more able to disburse the deposit to the depositor due to the fact that the Commission has annulled licence of the party to the deposit guarantee system in relation to launching of bankruptcy procedure by the party.

Unlike the general principles of insolvency that establish that primarily a failing undertaking would be protected, solutions of insolvency of credit institution are aimed at protection of deposits, which is a special kind of creditors. The aforesaid explain the different attitude of the legislator to insolvency procedures, concerned organizations, creditors, judicial control and other important elements. In a crisis situation, interference with the banking system should be ensured as timely as possible in order to assure stability of the financial sector and protection of interests of depositors. Functioning of a credit institution undertaking is always assessed in conjunction with the possible impact on the entire financial sector and the national economy in general.

However, transfer of a failing credit institution undertaking is important not only for protection of interests of depositors of the credit institution but also stability of the financial market, which might influence national economy in general. In order to assure all these interests, it is necessary to establish finitude of transfer of a failing credit institution

undertaking. Finitude of transfer of a credit institution undertaking increases trust into the financial market by the obtainer of the undertaking and stability of the banking system on the one hand and protection interests of depositors of the credit institution and the entire society on the other hand because it ensures functioning of the deposit guarantee fund.

Consequently, the restriction does have a legitimate aim, i.e. finitude of transfer of a failing credit institution undertaking, which protects rights of other persons and welfare of the society.

23. In order to assess proportionality of the restriction of the fundamental rights, the following shall be investigated: 1) whether the measures selected for reaching of the legitimate aim are appropriate for reaching of it; 2) whether less restricting (more lenient) measures exist; 3) whether the benefit gained by the society is greater that detriment caused to the rights and legal interests of an individual.

23.1. A decision regarding transfer of a failing credit institution undertaking is taken by an attorney appointed by the Commission, though, in the frameworks of an insolvency procedure – an administrator appointed by the court. The above mentioned persons work on behalf of the credit institution to ensure stability of the financial market. An attorney is appointed only in case if the Commission establishes that the credit institution fails to observe requirements of the Credit Institutions Law, directly applicable normative acts of the European Union and regulation or decisions issued by the Commission or if actions of the credit institution threaten its stability or solvency, stability of the credit institution sector of Latvia, it causes risk to the national economy of Latvia or if excessive flow of deposits or other attracter resources from the bank occurs. However, the administrator is appointed in the frameworks of credit institution insolvency procedure.

Jurisdiction and experience of the appointed persons in the respective field permit them assessing situation of the credit institution and adopt an appropriate decision regarding transfer, to prepare the proposition of transfer, to find a credit institution that would overtake

the failing credit institution undertaking and conclude transaction. Moreover, to execute the respective transaction, permission is received from the institution that is legally authorized to monitor functioning of credit institutions. Such permission can be issued only in case if the transaction is executed in the interests of security and stability of the credit institutions sector and those of investors of the credit institution. However, the Contested Norms prohibit recognizing such transaction as null and void disregarding any circumstances. This ensures that a failing credit institution undertaking is transferred to another functioning credit institution that would be able to ensure solvency of a failing credit institution and prevent it returning to its previous status. The prohibition to cancel the transaction established in the Contested Norms reaches the legitimate aim, i.e. it assures finitude of transfer of an undertaking.

Consequently, the measure selected by the State is appropriate for reaching of the legitimate aim, which is protection of the rights of other persons and assurance of welfare of the society.

23.2. When assessing whether the legitimate aim can be reached otherwise, the Constitutional Court emphasizes that a more lenient means are not any means, but only such by which the aim may be reached in the same quality (*see: Judgment of 13 May 2005 by the Constitutional Court in the case No. 2004-18-0106, Para 19 of the findings*).

The Saeima, the Cabinet of Ministers and the Commission emphasize that the legitimate aim could not be reached by measures that would restrict the rights of person at a lesser extent. Neither the Applicant has indicated that finitude of transfer of a credit institution undertaking could be ensured by applying other more lenient measures.

The Constitutional Court agrees that finitude of transfer of a credit institution cannot be assured by applying alternative solution, it being equally effective and permitting reaching of the legitimate aim at the same quality.

Consequently, adoption of the Contested Norms was indispensable.

23.3. When assessing compliance of the restriction of the fundamental right with the legitimate aim, it is also necessary to investigate whether unfavourable consequences caused to a person as a result of restriction of his or her fundamental rights are or not greater that benefit gained by the society in general.

The prohibition to cancel transfer of an undertaking does not apply to the general transfer of undertaking according to the procedure of Section 59^2 of the Credit Institutions Law. It applies only to crisis situations as it is established in Section 59^3 and Section 59^4 (2) of the Law. Before the date of announcing of the present judgment, no transfer of a credit institution undertaking has been executed based on the above mentioned norm. Consequently, in the present case it is presumed that finitude of transfer of a credit institution undertaking could cause a hypothetical detriment to an individual.

23.3.1. The restriction prohibiting recognizing the transaction as null and void applies only to such transfer of a credit institution undertaking that is executed by an attorney appointed by the Commission or an administrator of the credit institution in the frameworks of credit institution insolvency procedure, and it applies to particular cases: whenever actions of the credit institution fails to comply with requirements of the Credit Institutions Law and threatens interests of the society, or the credit institution has become insolvent.

It should be taken into account that these are participants of the transaction that has the right to contest transaction, them being the failing credit institution represented by an attorney appointed by the Commission on the one hand, and the obtainer of the credit institution undertaking on the other hand. Only in certain cases such rights can be conferred to other persons.

A credit institution obtaining another credit institution or a part thereof has thoroughly prepared for the transaction by verifying the undertaking to be obtained and showing diligence due in the civil turnover (*see: Loš manis A. Uzņēmuma analīzes (due diligence) procedūras problēmu risinājumi Vācijas un Latvijas tiesībās. Tiesību harmonizācija Baltijas jūras reģionā 20. – 21. gadsimta mijā. Rīga: Latvijas Universitātes Juridiskā fakultāte, 2006, pp. 63).* The transfer of a credit institution undertaking is also assessed by

the Commission when issuing permission to execute the transaction. When concluding the transaction, the parties are notified on the fact that the transaction cannot be recognized as null and void. Moreover, they have the right to include, into the agreement, legal remedies to protect their legal interests when transferring a credit institution undertaking.

23.3.2. Both, the attorney and the administrator are responsible for their actions. Actions of the attorney in a credit institution are equal to those of the board because the attorney has broad rights, which in certain cases are broader than those of the board (for instance (Section 117 (4) indent 2 of the Credit Institutions Law). Consequently, the status of the attorney is special model that is not typical to commercial rights that is applied in extraordinary cases. In case if the attorney would execute transfer of a credit institute undertaking contrary to interests of the company, he or she would be held liable pursuant to norms of the Civil Law regulating liability of an attorney (*see: Case materials, Vol. 2, pp. 172 – 175*).

However, in case if the insolvency administrator would decide to alienate a part of the undertaking, then all resources obtained as a result of such transfer would be transferred to the transferor of the undertaking and thus interests of creditors would not be threatened. Alienation of an undertaking in the interest of the company could not cause property losses to the company because an equivalent indemnity would be received for the transferred undertaking. Otherwise, the stipulated safeguards of interested persons give the right to hold liable those persons who have executed alienation of an undertaking contrary to interest of a particular company. In such cases, too, the interested persons preserve their right to protect their interests by litigation and requesting compensation of detriment because the law does not prohibit such remedy.

Transfer of a credit institution undertaking initiated by an attorney or an administrator could not be recognized as null and void even if the permission issued by the Commission would be unlawful. However, recognition of the permission of the Commission as unlawful (its annulment) would give the concerned party the right to request compensation from the State. Consequently, in such a case legal remedy is established.

Consequently, the Contested Norms do not prohibit persons to address the court in case of an unlawful infringement and do not restrict the rights of person to compensation and recovery of losses in case of proven unlawful infringement of rights in respect to credit institution of transferor of an undertaking, credit institution of obtainer of an undertaking and the Commission.

23.3.3. Moreover, to ensure fair balance between interests of an individual and those of the society, a procedural mechanism has also been established. If transfer of an undertaking is executed pursuant to the procedure of Section 59^3 of the Credit Institutions Law, first, the decision regarding the transfer can be issued only in crisis situations referred to in Section 113 (1) of the Credit Institutions Law; second, the decision is adopted by an attorney of the Commission; third, proposition of the attorney regarding transfer of an undertaking is accepted by the Commission; fourth, the Commission approves the proposition only if the transaction is performed in the interests of security and stability of the credit institutions sectors or those of depositors of the credit institution.

However, if the transfer of the undertaking takes place pursuant to the procedure of Section 59^4 of the Credit Institutions Law, first, decision regarding the transfer is adopted in case of insolvency of the credit institution; second, the decision is adopted by an administrator complying with requirements set forth in the Credit Institutions Law and whose actions are controlled by the Commission; third, the Commission has issued permission to execute the transfer; fourth, the transfer would be executed if it facilitates protection of interests of depositors, as well as development and stability of the financial and capital market.

When comparing possible detriment that could be caused to an individual in case of transfer of a credit institution undertaking to ensure finitude with the benefit gained by the entire society by particularly taking into account the right of persons to request compensation of losses, as well as their material and procedural guarantees, it is possible

to conclude that the benefit gained by the society is greater than the detriment caused to an individual.

Finitude of transfer of an undertaking ensures stability of the financial market and succession of a credit institution undertaking that plays an important social role in such situations as insolvency or threat to the credit institutions sector.

Consequently, the restriction included into the Contested Norms is proportional and compliant with Article 92 of the Satversme.

The Ruling

Based on Article 29 (1) indent 2 and Article 30 – 32 of the Constitutional Court Law, the constitutional Court

h o l d s :

1) proceedings in respect to compliance of Section 59^2 (3) of the Credit Institutions Law with Article 1 of the Satversme of the Republic of Latvia regarding the principle of an independent democratic state shall be terminated;

2) proceedings in respect to compliance of Section 59^2, Section 59^3, Section 59^4, Section 117 (4) indent 3, Section 173 (4) and Section 185 (1) Prim of the Credit Institutions Law with Article 91 of the Satversme of the Republic of Latvia shall be terminated;

3) Section 59^2, Section 59^3, Section 59^4, Section 117 (4) indent 3, Section 173 (4) and Section 185 (1) Prim of the Credit Institutions Law do comply with Article 1, Article 90, Article 92 and Article 105 of the Satversme of the Republic of Latvia.

The Judgment is final and not subject to appeal.

The Judgment shall come into force on the date of announcing it.

Presiding Judge G. Kūtris

Translated by E. Labanovksa, translator of the Constitutional Court