



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, 11 May 2011

Case No. 2010-55-0106

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

having regard to an application of Mr. Mairis Meimanis,

according to Article 85 of the Satversme (Constitution) of the Republic of Latvia and Article 16 (1), Article 17 (1) Indent 11, and Article 28.¹ of the Constitutional Court Law,

on 13 April 2011, in writing examined the case

“On Compliance of Section 7 (5) of the Investigatory Operations Law with Article 96 of the Satversme of the Republic of Latvia, Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well

a compliance of the First Sentence of Section 35 (1) of the Investigatory Operations Law with Article 92 of the Satversme of the Republic of Latvia”.

The Facts

1. On 16 December 1993, the Saeima of the Republic of Latvia (hereinafter – the Saeima) adopted the Investigatory Operations Law that came into force on 13 January 1994. The Investigatory Operations law has been amended several times since the coming into force.

Section 7 (5) of the Investigatory Operations Law provides the following: “In cases where immediate action is required in order to avert terrorism, murder, gangsterism, riots, other serious or especially serious crime, as well as where the lives, health or property of persons are in real danger, the investigatory operations measures referred to in Paragraph four of this Section may be performed without the approval of a judge. The prosecutor shall be notified within 24 hours, and approval of a judge shall be obtained within 72 hours, regarding such measures. Otherwise the conduct of the investigatory operations measures shall be discontinued.”

Section 7 (5) of the Investigatory Operations Law includes a reference to investigatory operations measures mentioned in Section 7 (4) of the Law. The first sentence of Section 7 (4) of the Investigatory Operations Law establishes that investigatory monitoring of correspondence, investigatory acquisition of information expressed or stored by a person by technical means, investigatory covert monitoring of non-public conversations (including by telephone, by electronic or other means of communication) and investigatory entry shall be performed only in accordance with the special method and with the approval of the Chief Justice of the Supreme Court or a Justice of the Supreme Court specially authorized by him or her.

The first sentence of Section 35 (1) of the Investigatory Operations Law provides that monitoring regarding the conformity to law of investigatory operations shall be performed by the Prosecutor General and by prosecutors specially authorized by the Prosecutor General.

2. The applicant **Mr. Mairis Meimanis** (hereinafter – the Applicant) indicates that a body performing investigatory operations has monitored his telephone calls with a person whose telephone calls were bugged in the frameworks of investigatory process initiated by the Corruption Prevention and Combating Bureau (KNAB) [*Korupcijas novēršanas un apkarošanas birojs*]. The interference resulted in ungrounded infringement of the fundamental rights of the Applicant.

2.1. The Applicant indicates that his telephone calls were registered in the frameworks of an investigatory experiment. However, Section 7 (5) of the Investigatory Operations Law can only be applied to prevent offences referred to therein. Investigatory operations mentioned in the above mentioned norm cannot be executed to disclose a crime. It cannot be permitted that actions established in Section 7 (5) of the Investigatory Operations Law are applied to imitate or facilitate any crime.

Pursuant to the procedure established in Section 7 (5) of the Investigatory Operations Law, a body performing investigatory operations has the right to carry out investigatory operations established in the fourth part of the same section without an approval of the Chief Justice for the period of three days. If the telephone monitoring period is less than three days, this shall not be reported to the court. The Applicant holds that such regulatory framework is unlawful because exercise of power cannot be controlled in the result of it.

Section 7 (5) of the Investigatory Operations Law is unclear and ambiguous. This may lead to abuse of this norm by officials. It cannot be established when the stipulated case of immediate action occurs because no proper criteria are established in the

Investigatory Operations Law. The Applicant contested the fact whether the regulatory framework of Section 7 (5) of the Investigatory Operations Law can be recognized as established by law because institutions enjoy too broad margin of appreciation when exercising the norm, and persons are not protected against arbitrary application of the norm.

2.2. The Applicant indicates that, by ignoring the principle of the rule of law and that of justice, his right to effective protection of the rights has been breached. The General Prosecutor's Office of the Republic of Latvia applies the procedure established in the Investigatory Operations Law when fulfilling the function of monitoring, control and authorization of investigatory actions, which excludes provision of an objective and fair opinion in case of infringement of the fundamental rights. The Department of Specially Authorized Public Prosecutors of the General Prosecutor's Office of the Republic of Latvia cannot be regarded as an effective means for protection of the rights of persons in the meaning of Article 8 and Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention).

Implementation of investigatory operations is not followed by a judicial control. Consequently, the effective regulatory framework does not provide that in case if a person cannot protect itself, he or she would be ensured unbiased assessment of launching and performance of secret operations. According to the principle of the rule of law, such assessment would ensure a proper protection of the rights of a person. It follows from the principle of the rule of law that interference with the rights of a person is subject to effective control usually executed by courts. The best mechanism for authorizing monitoring of telephone calls is a court decision because this reduces the possibility that the decision would have been taken arbitrarily by using public power.

The Applicant holds that the first sentence of Section 35 (1) of the Investigatory Operations Law does not have any legitimate aim, and it is not indispensable in a democratic society. The above mentioned norm contains no reference to procedure,

according to which verification and control of implementation of investigatory operations is ensured.

3. The institution that adopted the contested act, **the Saeima** does not share the opinion of the Applicant and holds that Section 7 (5) of the Investigatory Operations Law does comply with Article 96 of the Satversme and Article 13 of the Convention, whilst the first sentence of Section 35 (1) of the Investigatory Operations Law does comply with Article 92 of the Satversme.

3.1. In the present case, there is no dispute that monitoring of telephone calls would be at variance with Article 92 and Article 96 of the Satversme, it would have a legitimate aim, and it would also comply with the principle of proportionality.

The Saeima indicates that monitoring of telephone calls is authorized under the condition that the body performing investigatory operations has substantiated information at its disposal regarding the crime, as well as regarding threats to interests, security or defence of the State. This part of the section cannot be applied in everyday situations; it can only be applied in specific situations and those presenting a particularly dangerous threat.

The exception established in Section 7 (5) of the Investigatory Operations Law can be applied only if it is necessary to act immediately in order to prevent murder, gangsterism, riots, other serious or especially serious crime, as well as where the lives, health or property of persons are in real danger. Consequently, the aim of the Contested Norm is to ensure safety of the society. This legal norm is appropriate for reaching of the legitimate aim because it ensures the possibility of immediate reaction for preventing and disclosing a crime disregarding availability of a judge of the Supreme Court. Performance of measures indicated in the Contested Norm might also be necessary out of working hours of the Court, when even a short delay might determine the course of development of the events.

The Saeima indicates that no more lenient measures that would ensure reaching of the legitimate aim exist because Section 7 (5) of the Investigatory Operations Law gives the possibility to immediately react to any threat. Section 7 (5) of the Investigatory Operations Law does comply with the principle of proportionality because it establishes particular and mandatory criteria of application thereof, as well as commits a body performing investigatory operations to notify the prosecutor within 24 hours, and to obtain an approval of a judge shall 72 hours. Otherwise, all investigatory operations shall be discontinued.

The opinion of the Applicant that prevention and disclosure of a crime are contrary and mutually excluding terms is ungrounded. The Saeima indicate that, as a result of investigatory operations, a crime can be both, prevented and disclosed. For instance, in bribery matters, a corrupt official may be prevented requesting a bribe or performing other offences.

3.2. A Latvian prosecutor's office can be regarded as an effective and accessible preventive means. Prosecutor's office control *expressis verbis* established in the first sentence of Section 35 (1) of the Investigatory Operations Law does not exclude judicial control when dealing with investigatory operations issues.

The Saeima indicates that a court as the person initiating a lawsuit has the right to get acquainted with information obtained during investigatory operations. Consequently, this is the court that assesses credibility, applicability and admissibility of evidence obtained during investigatory operations during adjudication stage by thus controlling compliance of investigatory operations with laws.

The Investigatory Operations Law establishes the right of persons to address a court in case if he or she holds that the body performing investigatory operations has breached his or her rights and freedoms when performing the operations.

4. The summoned person – **the Ministry of Justice of the Republic of Latvia** (hereinafter – the Ministry of Justice) indicates that Section 7 (5) of the Investigatory Operations Law does comply with Article 96 of the Satversme and Article 13 of the Convention, and the first sentence of Section 35 (1) of the Investigatory Operations Law does comply with Article 92 of the Satversme.

4.1. The argument of the Applicant, namely, that Section 7 (1) of the Investigatory Operations Law fails to comply with Article 96 of the Satversme because he has not been notified on monitoring of his telephone calls, neither has he given his permission, is ungrounded. The Ministry of Justice indicates that, in respect to investigatory operations, the criterion must not confer a person the right to precisely prognosticate in what cases his or her telephone call could be monitored. Should a person have such right, he or she would have the possibility to adopt actions and the aim of investigatory operations would not be reached.

The restriction of the fundamental rights has been established by a law properly adopted. The Ministry of Justice indicates that Section 7 (5) of the Investigatory Operations Law *expressis verbis* establishes the legitimate aim thereof, namely, immediate action is required in order to avert terrorism, murder, gangsterism, riots, other serious or especially serious crime, as well as where the lives, health or property of persons are in real danger. Such enumeration cannot be interpreted in a broader sense. The legitimate aim does comply with Article 116 of the Satversme.

Section 7 (5) of the Investigatory Operations Law is appropriate for reaching of the legitimate objective because it permits disclosing and preventing criminal offences even in case when a judge of the Supreme Court is not available, though any delay might determine the course of development of the events. The Ministry of Justice agrees to the argumentation of the Saeima, namely, that no other more lenient means than the particular norm exist.

4.2. A Latvian prosecutor's office can be regarded as the institution that performs independent control of law observation. The Ministry of Justice indicates that a

prosecutor's office can be regarded as an effective and accessible means for protection of the rights of persons because the status and role of a public prosecutor in the frameworks of lawfulness control ensures independent and unbiased examination of complaints pursuant to Article 13 of the Convention. Moreover, legal acts provide the possibility to react in case if the body performing investigatory operations has breached the fundamental principles established in the Investigatory Operations Law.

4.3. According to the Ministry of Justice, Section 7 (5) of the Investigatory Operations Law clearly provides that a prosecutor shall be notified within 24 hours, and approval of a judge shall be obtained within 72 hours, regarding each case when investigatory operations have been launched without an approval of a President of the Supreme Court or another properly authorized judge of the Supreme Court. Such duty shall be applied also to those cases when investigatory operations are terminated before the expiry of the term of 72 hours. Otherwise, investigatory operations measures to be performed in accordance with the special method would not be controlled, and in certain cases this might lead to ungrounded and unlawful infringement of the constitutional rights of persons.

Investigatory operations measures indicated in Section 7 (5) of the Investigatory Operations Law shall be considered in conjunction with the fundamental principle included in the Investigatory Operations Law, namely, that investigatory operations measures to be performed in accordance with the special method can be launched only after receipt of an approval of a President of the Supreme Court or a duty authorized judge of the Supreme Court. Consequently, these investigatory operations measures must be subject to judicial control.

5. The summoned person – **the Corruption Prevention and Combating Bureau** (hereinafter – KNAB) indicates that Section 7 (5) of the Investigatory Operations Law does comply with Article 96 of the Satversme and Article 13 of the Convention, whilst

the first sentence of Section 35 (1) of the Investigatory Operations Law does comply with Article 92 of the Satversme.

5.1. Section 7 (5) of the Investigatory Operations Law establishes cases when it is possible to implement investigatory measures referred to in Section 7 (4) of the Investigatory Operations Law. They are established to protect rights of other persons, democratic regime of the State, as well as security and welfare of the society. Consequently, this legal norm does have a legitimate aim.

The KNAB indicates that Section 7 (5) of the Investigatory Operations Law is appropriate for reaching of the legitimate object because it permits immediate reaction to prevent serious and especially serious crimes and real threat to life, health or property of persons. Consequently, it is possible to effectively ensure protection of legal interests of persons and safety of the society.

Section 7 (5) of the Investigatory Operations Law has been elaborated in the most lenient way possible, and its legitimate aim cannot be reached by other measures that would restrict the rights and legal interests of a person at a lesser extent. The benefit gained by the society from Section 7 (5) of the Investigatory Operations Law is greater than the restriction of the rights and legal interests of a person. Consequently, the restriction of rights included in Section 7 (5) of the Investigatory Operations Law is proportional.

5.2. According to KNAB, Section 7 (5) of the Investigatory Operations Law provides actions to be executed on urgent basis in cases when any delay is impermissible. These are extraordinary cases when investigatory measures can be launched without consent of a judge. KNAB also indicates that this norm provides for judge control because consent of a judge is to be received after investigatory operation is launched. In case if no consent is received, investigatory operation shall be ceased. Before consent of a judge is received, a public prosecutor shall be notified on respective investigatory measures, and the latter performs monitoring of compliance of investigatory operations with law pursuant to Section 35 (1) of the Investigatory Operations Law.

In certain cases, investigatory measures can be launched before obtaining consent of a judge; however, it must be received within 72 hours to be able to continue respective operations. KNAB holds that in cases when an operative operation is terminated before expiry of the term of 72 hours, it is ceased and therefore no consent of a judge is necessary.

KNAB indicates that, when performing investigatory measures referred to in Section 7 (5) of the Investigatory Operations Law, a crime can not only be prevented but also disclosed.

5.3. Notifying of a public prosecutor on investigatory measures and receipt of consent of a judge regarding the above mentioned measures, as requested by Section 7 (5) of the Investigatory Operations Law, ensures effective protection of persons. KNAB indicates that the officials performing control function verify whether measures performed based on the procedure of Section 7 (5) of the Investigatory Operations Law comply with requirements of the Investigatory Operations Law.

This is a public prosecutor that monitors launched investigatory operations, whilst in the frameworks of adjudication of a criminal case court is involved to assess evidence obtained as the result of investigatory operation measures. Consequently, monitoring is ensured in each case disregarding the time of termination of investigatory measures. Legal interests of a person are also protected by Section 5 and Section 29 (3) of the Investigatory Operations Law. Consequently, persons whose rights and freedoms are infringed when performing investigatory operations are ensured effective protection before public institutions.

5.4. KNAB indicates that Section 35 (1) of the Investigatory Operations Law shall be analysed in conjunction with other norms of the Investigatory Operations Law and the Public Prosecutor's Office Law.

Status and authority of a public prosecutor does not ensure an independent and effective monitoring of investigatory operations, including review of complaints of

persons. The Investigatory Operations Law provides not only control performed by a public prosecutor, but also the right of a person to protect his or her legal interests before the court. Section 35 (1) of the Investigatory Operations Law does not contradict the presumption of innocence because the public prosecutor, when fulfilling its monitoring duty established in the Investigatory Operations Law, does not decide on guilt of a person in respect to a criminal offence; instead, it monitors whether the investigatory operation is performed pursuant to requirements of the Investigatory Operations Law.

6. The summoned person, **Ombudsman of the Republic of Latvia** (hereinafter – the Ombudsman) indicates that Section 7 (5) of the Investigatory Operations Law fails to comply with Article 96 of the Satversme and Article 13 of the Convention, whilst the first sentence of Section 35 (1) fails to comply with Article 92 of the Satversme.

6.1. Section 7 (5) of the Investigatory Operations Law regulates an extraordinary procedure, according to which measures established in Paragraph 4 of the same section are to be performed. The purpose of such measures is to obtain public information regarding private life of a person.

The Ombudsman indicates that the Investigatory Operations Law fails to clearly establish the pre-conditions for launching, on urgent basis, investigatory operations measures to be performed in accordance with the special method. It is possible to launch, on urgent basis, investigatory operations measures in respect to group objects of certain criminal delinquencies, them including also criminal offences and less serious crimes. Consequently, the restriction presently included in Section 7 (5) of the Investigatory Operations Law has not been established clear and precisely enough. Therefore it is not possible to conclude that the restriction has been established by law.

Investigatory operations measures to be performed in accordance with the special method can also be performed in the frameworks of initiated criminal proceedings. Consequently, this might cause a situation when the right of a person to inviolability of

private life, domicile and correspondence is breached only by means of investigatory operations measures to be performed in accordance with the special method but also by special investigatory measures. The Ombudsman indicates that this is not proportional.

6.2. What has been established in Section 5 of the Investigatory Operations Law cannot be applied to Section 7 (5) of the same law. To apply the legal remedy established in Section 5 of the law, a person has to submit a complaint because public prosecutor's office would not launch investigation if case of lack of such application. However, notification of a person on investigatory operations measures to be performed in accordance with the special method, even if it such notification was made after the activities are terminated, may have a negative impact on the stipulated purpose of the Investigatory Operations Law. The Ombudsman holds that notification of a person on performance of such measures is not preferable.

According to the Ombudsman, interpretation of Section 5 of the Investigatory Operations Law fails to provide for cases when no consent of a judge is necessary because such interpretation would materially infringe the human rights. Receipt of consent of a judge is necessary disregarding the time of termination of investigatory operations measures.

6.3. The Ombudsman indicates that the Investigatory Operations Law fails to include regulatory framework establishing that a public prosecutor's office is committed to performing investigation in case if measures are performed in accordance with special method and pursuant to Section 7 (5) of the Investigatory Operations Law. Therefore the particular legal norm fails to comply with Article 13 of the Convention.

The Ombudsman emphasizes that it is necessary to assess compliance of the first sentence of Section 35 (1) of the Investigatory Operations Law with Article 13 of the Convention rather than with Article 92 of the Satversme. The Ombudsman also indicates that the mechanism of monitoring of investigatory operations included in the Investigatory Operations Law is ineffective and therefore infringes the rights guaranteed to a person in Article 92 of the Satversme.

7. The summoned person, **the Supreme Court of the Republic of Latvia** indicates that Section 7 (5) of the Investigatory Operations Law does comply with Article 96 of the Satversme and Article 13 of the Convention, whilst the first sentence of Section 35 (1) of the Investigatory Operations Law does comply with Article 92 of the Satversme.

7.1. To perform measures referred to in Section 7 (4) of the Investigatory Operations Law, it is necessary to receive consent of a President of the Supreme Court or another judge authorized by the first. However, paragraph 5 of the same section establishes an exception when investigatory operations measures to be performed in accordance with the special method can be launched before receiving consent of a President of the Supreme Court or another judge authorized by the first.

Section 7 (5) of the Investigatory Operations Law has no legitimate aim because it is aimed at protection of values referred to in Article 116 of the Satversme. Section 7 (5) of the Investigatory Operations Law is applied only in especially dangerous cases when it immediate action is required. This is an exception if compared with other parts of the same section.

The Supreme Court indicates that monitoring performed by a public prosecutor's office does not exclude court control in respect to issues of investigatory operations. It is not possible to receive consent of a judge in case if investigatory operations are terminated before the expiry of the term of 72 hours. A different interpretation of the norm would not comply with the sense and purpose of the Investigatory Operations Law.

7.2. Section 35 of the Investigatory Operations Law regulates the purpose of monitoring of investigatory operations. It is necessary to ensure observance of lawfulness and the Investigatory Operations Law, including internal normative acts elaborated in accordance with the procedure established in Section 3 (2) and confirmed by the General Prosecutor when performing investigatory operations and to timely establish each

deviation from the requirements. Such monitoring is performed pursuant to the Public Prosecutor's Law.

The Supreme Court indicates that prosecutor's office in Latvia shall be regarded as accessible and effective remedy because the status and role of a public prosecutor in monitoring lawfulness ensures independent and unbiased examination of complaints. Namely, in cases when a body performing investigatory operations has breached investigatory operations procedure by failing to observe stipulated principles or permitting infringement of rights, the law permits different reaction, including control performed by a public prosecutor's office and the court, a verdict of not guilty, compensation of losses incurred.

8. The summoned person, **the General Prosecutor's Office of the Republic of Latvia** indicates that Section 7 (5) of the Investigatory Operations Law does comply with Article 96 of the Satversme and Article 13 of the Convention, whilst the first sentence of Section 35 (1) of the Investigatory Operations Law does comply with Article 92 of the Satversme.

8.1. To apply Section 7 (5) of the Investigatory Operations Law, the legislator has set out rather strict provisions. Namely, measures referred to therein can only be performed in cases when immediate reaction is required in order to prevent serious or especially serious crime.

There is no reason to suppose that the norms of Section 7 (5) of the Investigatory Operations Law fail to comply with Article 13 of the Convention. If a person holds that his or her rights have been infringed, he or she can submit a complaint to a public prosecutor pursuant to Section 5 of the Investigatory Operations Law, and the latter would perform investigation and provide opinion regarding lawfulness of activities performed by a body performing investigatory operations.

Data obtained in the result of investigatory operations can be used as proof only if the data can be verified in accordance with the procedure established in the Criminal Procedure Law. During matter adjudication stage, this is the court verifying credibility, applicability and admissibility of evidence obtained in the result of investigatory operations, which ensures judicial control over lawfulness of investigatory operations.

8.2. Measures that might result in infringement of fundamental rights of persons are subject to judicial control. Namely, judges are provided documents substantiating necessity of performance of investigatory operations.

Section 5 of the Investigatory Operations Law establishes mechanism ensuring judicial control over possible unlawful actions of a body performing investigatory operations since this section establishes the right of a person to address the court in case if he or she holds that the body performing investigatory operations has breached legal rights and freedoms.

It is possible to interpret Section 7 (5) of the Investigatory Operations Law in different ways because its construction does not clearly establish whether consent of a judge should also be received in cases when investigatory operations measures are terminated before expiry of the term of 72 hours. Consequently, amendments should be introduced to the above mentioned norm to clearly define the procedure for receipt of consent of a judge.

The General Prosecutor's Office indicates that similarly to the of Section 212 (4) of the Criminal Procedure Law, Section 7 (5) of the Investigatory Operations Law should require receipt of a consent of a public prosecutor rather than only notification of the public prosecutor.

9. The summoned person, **Mr. Jens-Christian Pastille, a lawyer of a Member State of the European Union working in Latvia** refers to non-compliance of Section 7 (5) of the Investigatory Operations Law and the first sentence of Section 35 (1)

of the Investigatory Operations Law with the Constitution and the norms of the Convention.

9.1. Mr. J. Pastille emphasizes that the meaning of the word “otherwise” of Section 7 (5) of the Investigatory Operations Law is not clear. These words can also be understood in a way that no consent of a judge is needed if investigatory operations measures are terminated before expiry of the term of 72 hours. According to Mr. J. Pastille, Section 7 (5) of the Investigatory Operations Law fails to require consent of a judge in respect to investigatory operations measures terminated before expiry of the term of 72 hours. Mr. J. Pastille indicates that such interpretation being unfavourable for the fundamental rights of persons follows pursuant to the internal logic of the norm.

9.2. The European Court of Human Rights has established minimum standards for monitoring telephone calls. It has been recognized in the case-law of the Court that such monitoring is permitted in case if serious crimes are likely to be committed. As to the length of monitoring telephone calls, the European Court of Human Rights has not established any absolute maximum permitted limit.

The European Court of Human Rights emphasizes the necessity to protect rights of the society and persons. However, when performing any investigatory operation measure, public institutions may enjoy only a small margin of appreciation with narrow limits established by law. It is also necessary to establish effective guarantees that permit intervention only at the necessary extent. Mr. J. Pastille indicates that in urgent cases when serious threat is to be prevented, it should be permitted to interfere without prior consent of a judge. Such procedure, however, should be balanced by a particularly effective post-control.

The question regarding the fact whether, in urgent cases, prior co-ordination and post-control should be entirely performed by the court, the European Court of Human Rights has left open. The necessary effective control should not obligatory be performed by the court, though the European Court of Human Rights regard it as preferable. This can also be performed by another institution that does not depend on the institution that

has organized monitoring of telephone calls and that has been granted the authority necessary for performing unbiased and objective control. However, it is important that the controlling institution is an independent one.

9.3. Mr. J. Pastille indicates that, in the meaning of Article 8 of the Convention, secret monitoring of telephone calls is justifiable only in case if a concerned person later can contest such activities according to the procedure of effective control. When no more secrecy is required, public institutions are committed to notify the person on investigatory operations carried out in respect to him or her.

Persons in Latvia do not have the possibility to contest performance of investigatory operations at any time. The guarantee of protection of rights established in Article 5 of the Convention has not been implemented. This deficiency is neither eliminated by the regulatory framework of Section 35 (1) of the Investigatory Operations Law, which is not appropriate for compensating legal protection missing in the wording of Section 7 (5) of the same Law. Pursuant to Section 35 of the Investigatory Operations Law, the appealing institution is the investigatory operations institution. This does not comply with the criteria of independent control. Consequently, the effective regulatory framework fails to provide a sufficiently effective post-control of investigatory operations measures.

Mr. J. Pastille concludes that Section 7 (5) of the Investigatory Operations Law fails to comply with Article 92 of the Satversme in conjunction with Article 8 of the Convention. There are no doubts as to constitutionality of the first sentence of Section 35 (1) of the Investigatory Operations Law because post-control of investigatory operations measures is not only admissible but also preferable. However, the competence of monitoring of investigatory operations established in Section 35 of the Investigatory Operations Law is insufficient to fulfil the criteria of effective control in the meaning of Article 8 and Article 13 of the Convention.

The Findings

10. Article 96 of the Satversme provides: „ Everyone has the right to inviolability of his or her private life, home and correspondence.” The Applicant indicates that Section 7 (5) of the Investigatory Operations Law restrict his right to inviolability private life and correspondence as guaranteed in Article 96 of the Satversme (*see: Case materials, Vol. 1, pp. 19*).

10.1. When establishing the content of the fundamental rights established in the Satversme, it is necessary to take into account liabilities of Latvia in the field of human rights.

The right to inviolability of private life and correspondence are established in Article 8 of the Convention. Pursuant to this article, everyone has the right to respect for his private and family life, his home and his correspondence. The Convention establishes that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Article 13 of the Convention provides, however, that everyone shall have an effective remedy before a national authority.

10.2. First, the term “private life” is often used as a broader denotation comprising inviolability of family life, domicile and correspondence. Second, it has been recognized in the law that the right to private life, the right to family life and the right to inviolability of domicile, as well as that of inviolability of correspondence cannot be precisely separated. These rights supplement each other and overlap (*see: Dijk P., Hoof G. J. H. Theory and Practice of the European Convention on Human Rights. Hague, London, Boston: Kluwer Law International, 1998, p. 489; Kilkelly U. The right to respect for private and family life. A guide to the implementation of Article 8 of the European*

Convention on Human Rights. Council of Europe, 2001, pp. 10 – 11; Reid K. A. Practitioner's Guide to the European Convention on Human Rights. London: Sweet&Maxwell, 2008, pp. 481). Therefore the term “private life” is often used as a broader denotation comprising inviolability of family life, domicile and correspondence.

When defining the right to private life guaranteed in Article 96 of the Satversme, the Constitutional Court has indicated that this right comprises different aspects. It protects the physical and moral integrity, honour and reputation, use of person's name and identity, personal data of a person. The right to private life means that the individual has the right to its private home, the right to live as he likes, in accordance with his nature and wish to develop and improve the personality, tolerating minimum interference of the state or other persons. The right includes the right of an individual to be different, retain and develop virtues and abilities, which distinguish him from other persons and individualizes him (*see: Judgment of 26 January 2005 by the Constitutional Court in the case No. 2004-17-01, Para 10*).

Article 96 of the Satversme *expressis verbis* establishes the right of every person to inviolability of correspondence. The term “correspondence” includes written materials, including materials sent by post, as well as telephone calls (*see: Jackobs and White. The European Convention on Human Rights. Oxford: Oxford University Press, 2002, pp. 225*).

Consequently, the right to inviolability of private life and correspondence is protected by Article 96 of the Satversme.

11. In order to assess compliance of Section 7 (5) of the Investigatory Operations Law with Article 96 of the Satversme, first it is necessary to establish whether it restricts the fundamental rights established to the Applicant by the above mentioned article.

It follows from case materials that, on 27 December 2005, KNAB initiated an investigatory case. Telephone phones of the Applicant were monitored from 29 to

31 December 2005, namely, during three days based on Section 7 (5) of the Investigatory Operations Law (*see: Case materials, Vol. 1, pp. 85 – 86*). In the present case there is no dispute on the fact that such monitoring of telephone calls did take place in respect to the Applicant.

Section 7 (5) of the Investigatory Operations Law does restrict the right to inviolability of private life and correspondence of the Applicant as established in Article 96 of the Satversme.

12. Article 116 of the Satversme provides that the rights of persons to inviolability of private life and correspondence may be subject to restrictions in circumstances provided for by law in order to protect the rights of other people, the democratic structure of the State, and public safety, welfare and morals. Article 8 (2) of the Convention also provides that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country.

Consequently, the fundamental rights established in Article 96 of the Satversme can be restricted if the restriction has been established by a duly adopted law, if it has a legitimate aim and is proportional,

13. The Applicant and the Ombudsman hold that the restriction of rights established in Section 7 (5) of the Investigatory Operations Law is unclear. It is impossible to understand the meaning of the word “to avert”. Likewise, it cannot be understood what preconditions should set in to be able to perform investigatory operations measures to be performed in accordance with the special method. Therefore the restriction of rights established in the above mentioned legal norm has not been adopted by a properly adopted law (*see: Case materials, Vol. 1, pp. 7 – 8, and Vol. 3, pp. 46 – 48*).

13.1. 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 has reiterated that laws and legal norms restricting the fundamental rights must be clear and foreseeable. Namely, the norm should have a precise enough wording for a person to be able to adapt its actions in the case of necessity by making respective 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, and judgment of 25 November 1999 in the case „Hashman and Harrup v. The United Kingdom” Para 31*). A norm must have such a wording that would allow persons to clearly foresee the field and purpose of application of the norm. This ensures an important protective mechanism for persons. However, the level of precision of national regulatory frameworks often depends on the field to be regulated, as well as the number and status of addressees (*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*).

13.2. The Applicant holds that provisions of Section 7 (5) of the Investigatory Operations Law shall be applicable only if it is necessary to prevent serious or especially serious crimes. Consequently, investigatory operations measures mentioned in the above mentioned norm cannot be performed with the purpose to disclose a criminal offence.

The first sentence of Section 7 (5) of the Investigatory Operations Law provides that in cases where immediate action is required in order to avert terrorism, murder, gangsterism, riots, other serious or especially serious crime, as well as where the lives, health or property of persons are in real danger, the investigatory operations measures referred to in Paragraph four of this Section may be performed without the approval of a

judge. The content of the term “to avert” shall be established by taking into account the tasks of investigatory operations measures referred to in the first part of Section 2 of the Investigatory Operations Law. Paragraph 2 of the above mentioned section mentions prevention, elimination and disclosure of criminal offences, investigation of persons having committed the criminal offences and collection of evidence as the purpose of investigatory operations. Consequently, investigatory operations measures mentioned in Section 6 (1) of the Investigatory Operations Law, including monitoring of telephone calls, shall be performed in accordance with the purpose of investigatory operations, namely, prevention and disclosing of criminal offences.

The first sentence of Section 7 (5) of the Investigatory Operations Law provides the right of a body performing investigatory operations to immediately react on threats of criminal offences referred to in the above mentioned section and to perform all necessary investigatory operations measures to prevent implementation of the criminal offences. However, the fact that disclosing of criminal offences has not been *expressis verbis* mentioned in Section 7 (5) of the Investigatory Operations Law, does not exclude the duty to observe the purpose of investigatory operations. It is possible to agree with the argumentation of KNAB, namely, that when performing actions mentioned in Section 7 (5) of the Investigatory Operations Law, a criminal offence can be prevented and disclosed as well. When performing investigatory operations to prevent criminal offences, disclosing of a criminal offence is not excluded. For instance, in case of bribery, investigatory operations measures may prevent a criminal offence, as well as disclose persons involved in bribery. Therefore it can be concluded that the term “to avert” mentioned in Section 7 (5) of the Investigatory Operations Law includes not only prevention of crime, but also disclosing of other criminal offences.

13.3. The European Court of Human Rights has indicated the following: the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary

interference (*see: Judgment of 4 May 2000 by the European Court of Human Rights in the case „Rotaru v. Romania”, Para 55*).

Section 7 (5) of the Investigatory Operations Law establishes cases when a body performing investigatory operations is entitled to perform measures referred to in Paragraph 4 of the same section, including monitoring of non-public conversations. This shall be regarded as an exhaustive enumeration of exceptions. To implement other cases, no consent of the Chief Justice of the Supreme Court or a Justice of the Supreme Court specially authorized by him or her is necessary (*see: Kavalieris A. Operatīvās darbības likuma komentāri. Rīga: Raka, 2002, pp. 24.*).

It is not possible to agree with the opinion of the Ombudsman that Section 7 (5) of the Investigatory Operations Law is unclear because it fails to establish pre-conditions to occur for bodies performing investigatory operations to be able to launch investigatory operations to be performed in accordance with the special method. Section 7 (5) of the Investigatory Operations Law establishes two pre-conditions giving the right to the body performing investigatory operations to launch its activities.

First, Section 7 (5) of the Investigatory Operations Law provides cases when investigatory operations measures referred to in Section 7 (4) of the Investigatory Operations Law shall be launched. Namely, the operations can be launched in case when it is necessary to avert terrorism, murder, gangsterism, riots, other serious or especially serious crime. They are also admissible in cases where the lives, health or property of persons are in real danger. The enumeration included in Section 7 (5) of the Investigatory Operations Law shall be regarded as exhaustive and precise enough. Consequently, this excludes the possibility to perform investigatory operations measures according to a special method in respect to prevention of such criminal offences that are not indicated in the Contested Norm.

Second, measures mentioned in Section 7 (5) of the Investigatory Operations Law can be performed by a body performing investigatory operations only in cases when immediate action is required.

When interpreting the norm in conjunction with Section 17 (3) of the Investigatory Operations Law, it can be concluded that secret monitoring of non-public conversations is permitted only in cases when a body performing investigatory operations is aware of facts regarding involvement of a person in a criminal offence, as well as the above mentioned body has credible information at its disposal regarding threat to material interests of the state, its security or defence. Consequently, a body performing investigatory operations can perform measures referred to in Section 7 (5) of the Investigatory Operations Law only in case if it has credible information at its disposal regarding involvement of a particular person in a criminal offence.

Section 7 (5) of the Investigatory Operations Law provides an exceptional procedure, namely, it permits a body performing investigatory operations to perform investigatory operations measures immediately because might influence the result of investigatory operations measures. Taking into account seriousness of crimes referred to in Section 7 (5) of the Investigatory Operations Law, it is important to react effectively and timely to prevent all threats related with such crimes.

Section 7 (5) of the Investigatory Operations Law precisely establishes the pre-conditions for application thereof; consequently, the restriction of the fundamental rights has been established by law.

14. Pursuant to Article 116 of the Satversme, the fundamental rights established in Article 96 of the Satversme may be restricted only to protect rights of other persons, democratic regime of the State, as well as security and welfare of the society.

The Constitutional Court has concluded that the content of the term “security of the society” in democratic states is aimed at protection of public interests (*see: Judgment of 26 January 2005 by the Constitutional Court in the case No. 2004-17-01, Para 13*). It is possible to agree with what the Saeima has indicated, namely, that the legitimate aim

of Section 7 (5) of the Investigatory Operations Law is assurance of security of the society.

Consequently, the restriction of the right to inviolability of private life and correspondence established in Section 7 (5) of the Investigatory Operations Law does have a legitimate aim.

15. The Constitutional Court has already concluded that the principle of proportionality generally provides that a reasonable balance should be achieved between actions taken by public authorities restricting rights and legal interests of persons and the aim to be reached by such actions (*see: Judgment of 27 February 2007 by the Constitutional Court in the case No. 2006-41-01, Para 11*).

In order to conclude whether the principle of proportionality has been observed, it is necessary to investigate whether measures selected by the legislator are appropriate for reaching of the legitimate aim, whether there exist more lenient measures for reaching of the aim, and whether the action of the legislator is appropriate. Should it be recognized in the result of assessment of the legal norm that it fails to comply with at least one of these criteria, the norm shall be recognized as non-compliant with the principle of proportionality and null and void.

16. Section 7 (5) of the Investigatory Operations Law shall be applicable in cases when immediate actions is required to avert terrorism, murder, gangsterism, riots, other serious or especially serious crime, as well as where the lives, health or property of persons are in real danger. One of investigatory operations measures established by the legislator is secret monitoring of non-public conversations. As a result of such monitoring of conversations, a body performing investigatory operations can obtain data giving the possibility to prevent criminal offences mentioned in Section 7 (5) of the Investigatory Operations Law and also to disclose other criminal offences. The restriction of the rights

established in Section 7 (5) of the Investigatory Operations Law shall therefore be recognized as an appropriate solution for protection of security of the society.

Consequently, the measure selected by the legislator is appropriate for reaching of the legitimate aim.

17. The Applicant indicates that Section 7 (5) of the Investigatory Operations Law establishes the duty of a body performing investigatory operations to receive a consent of a judge in cases when investigatory operations measures are terminated before expiry of the term of 72 hours (*see: Case materials, Vol. 1, pp. 26 – 27*).

17.1. Section 7 (2) and (3) of the Investigatory Operations Law establishes the methods for performing investigatory operations, namely, a general and a special method. Such classification is closely related with the nature of investigatory operations measures and their impact of the fundamental rights of persons. In cases established in Section 7 (5) of the Investigatory Operations Law, investigatory operations shall be performed according to the special method because they infringe the fundamental rights of persons at a considerable extent.

The Constitutional Court recognizes that the grammatical wording of Section 7 (5) of the Investigatory Operations Law fails to provide an clear answer to the question whether in cases when investigatory operations measures are terminated before the expiry of the term of 72 hours it is necessary to obtain consent of the Chief Justice of the Supreme Court or a Justice of the Supreme Court specially authorized by him or her.

17.2. In order to determine the content of Section 7 (5) of the Investigatory Operations Law, it shall be interpreted in conjunction with other norms of the same section regulating performance of investigatory operations measures in accordance with the special method.

Section 7 (5) of the Investigatory Operations Law contains a reference to Paragraph 4 of the same section determining investigatory operations measures to be

performed in accordance with the special method. These measures, including investigatory monitoring of correspondence and , investigatory covert monitoring of non-public conversations, shall be performed with the approval of the Chief Justice of the Supreme Court or a Justice of the Supreme Court specially authorized by him or her.

Although Section 7 (5) of the Investigatory Operations Law provides exceptions when a body performing investigatory operations has the right to take immediate actions, it also establishes the duty of the body performing investigatory operations to receive consent of the Chief Justice of the Supreme Court or a Justice of the Supreme Court specially authorized by him or her to perform investigatory operations measures like it is established in Paragraph 4 of the same section. Already when elaborating the draft Law “Investigatory Operations Law”, the Committee of Defense and the Interior emphasized the role of receipt of consent of a judge in cases when investigatory operations measures are performed in accordance with the special method (*see: Case materials, Vol. 1, pp. 171 and 173*).

The third sentence of Section 7 (5) of the Investigatory Operations Law includes a reference that the conduct of the investigatory operations measures shall be discontinued if no consent of a judge has been received. According to KNAB, this indication confirms that consent of a judge shall be requested only in cases when investigatory operations measures have not been terminated before the expiry of the term of 72 hours (*see: Case materials, Vol. 3, pp. 45*). However, the Ministry of Welfare and the Ombudsman indicate that such interpretation of the norm would not comply with the essence of the Satversme (*see: Case materials, Vol. 3, pp. 48 and 54 – 55*).

Section 7 (5) of the Investigatory Operations Law contains no reference to the fact that no consent of the Chief Justice of the Supreme Court or a Justice of the Supreme Court specially authorized by him or her is necessary for performance of investigatory operations measures mentioned in the above section in case if it is planned to terminate them before the expiry of the term of 72 hours. Consequently, it is not possible to agree with the opinion of KNAB that requesting a judge’s consent should take place in case if

investigatory operations measures are terminated before the expiry of the term of 72 hours.

17.3. The Ombudsman indicates that the right of a person to inviolability of private life, domicile and correspondence can be infringed by both, investigatory operations measures to be performed in accordance with the special method and special investigatory operations (*see: Case materials, Vol. 3, pp. 47*). The Constitutional Court indicates that the present case cannot be applied to explanation of content of special investigatory operations and investigatory operations measures. However, comparison of the above mentioned procedures might help understanding the role of consent of a judge in cases regulated by Section 7 (5) of the Investigatory Operations Law.

Pursuant to requirements of Section 210 (2) of the Criminal Procedure Law (hereinafter – the CPL), special investigatory operations shall be performed based on a decision of an investigating judge. Section 212 (4) of the CPL establishes that in emergency cases, a person directing the proceedings may commence special investigatory operation by receiving the consent of a public prosecutor, and, not later than the next working day, a decision of an investigating judge. Pursuant to Section 214 (2), if a special investigatory operation has been commenced in accordance with the procedures provided for in Section 212, Paragraph four of this Law, an investigating judge shall decide on the justification of the commencement of such investigatory operation, as well as the necessity for continuing such operation, if such operation has not been completed. If the investigatory operation was not justified, or was performed illegally, the judge shall decide on the admissibility of the acquired evidence, and regarding actions with seized objects.

However, the first sentence of Section 7 (5) of the Investigatory Operations Law includes a reference that a body performing investigatory operations has the right to perform them without consent of a judge. However, investigatory operations measures to be performed in accordance with the special method and gravity of criminal offences established in this section does not exclude the duty of the body performing investigatory

operations to receive consent of the Chief Justice of the Supreme Court or a Justice of the Supreme Court specially authorized by him or her for performance of investigatory operations measures after they have been launched.

Investigatory operations measures performed in cases established in Section 7 (5) of the Investigatory Operations Law are subject to monitoring by a public prosecutor, which also includes control. The public prosecutor performs monitoring of investigatory operations measures not only pursuant to the procedure established in the Investigatory Operations Law but also in accordance with other normative acts regulating the authority of the public prosecutor. For instance, Section 12 of the Office of the Prosecutor Law includes a duty of a public prosecutor to monitor investigatory operations. However, monitoring by a public prosecutor established in Section 7 (5) of the Investigatory Operations Law does not exclude judicial post-control. The court verifies causes of urgency of investigatory operations measures and lawfulness of measures taken. Like in case of special investigatory operations, post-control of investigatory operations measures include assessment of the court in respect to validity of measures performed and lawfulness of acquisition of information.

Consequently, Section 7 (5) of the Investigatory Operations Law establishes that performance of investigatory operations measures should at all events be notified to a public prosecutor; the above mentioned section also commits the body performing investigatory operations to receive consent of the Chief Justice of the Supreme Court or a Justice of the Supreme Court specially authorized by him or her.

The restriction established in Section 7 (5) of the Investigatory Operations Law shall be regarded as the most lenient measure for reaching of the legitimate aim because monitoring by a public prosecutor and judicial post-control over lawfulness of investigatory operations measures ensures effective protection of rights of persons.

18. In order to assess the necessity of the restriction established in Section 7 (5) of the Investigatory Operations Law, it is necessary to investigate whether interference by the State into private life of the Applicant is proportional with the legitimate aim.

The Constitutional Court has already concluded in its case-law that inviolability of a person's private life is one of the fundamental values of a democratic society. However, there are limits even to the right to inviolability of a private life (*see: Judgment of 21 December 2001 by the Constitutional Court in the case No. 2001-04-0103, Para 4.1*). Such limits shall also be established in respect to inviolability of the fundamental rights and correspondence of a person.

The principle of proportionality requires a reasonable balance between interests of the society and those of a person in case if the public power restricts the right and legal interests of a person. Consequently, it is necessary to assess whether a fair balance between the right to inviolability of private life and correspondence of a person, on the one hand, is balanced with the duty of the State to guarantee security of the society on the other.

It is not possible to agree with the statement of the Applicant, namely, that infringement of his right is greater than the benefit gained by the society. By means of a lawful restriction of the right to private life of a person, the State facilitates combatting crimes and permits a body performing investigatory operations to immediately react to threats of criminal offences that are particularly dangerous for the society and to prevent them and disclose the persons involved. When performing investigatory monitoring of non-public conversations in cases established in Section 7 (5) of the Investigatory Operations Law, protection of security of the society is ensured.

Consequently, investigatory operations measures performed to prevent criminal offences referred to in Section 7 (5) of the Investigatory Operations Law shall be regarded as proportional and compliant with Article 96 of the Satversme of the Republic of Latvia only if a consent of the Chief Justice of the Supreme Court or

a Justice of the Supreme Court specially authorized by him or her disregarding the time of termination of the investigatory operations measures.

19. The Applicant indicates that the Department of Specially Authorized Public Prosecutors of the General Prosecutor's Office cannot be regarded as an effective measure for protection of the rights of person in the meaning of Article 8 and Article 13 of the Convention (*see: Case materials, Vol. 1, pp. 17 – 18*).

The Constitutional Court has already recognized in its case-law that, in Latvia, the Office of the Prosecutor may be regarded as an effective and available means of protection, because the status and the role of the prosecutor in supervision of law secures independent and impartial review of cases in compliance with Article 13 of the Convention (*see: Judgment of 11 October 2004 by the Constitutional Court in the case No. 2004-06-01. Para 19*).

In the frameworks of the present case, it is necessary to investigate whether Section 7 (5) of the Investigatory Operations Law ensures a person with protection compliant with Article 13 of the Convention in cases when the right to inviolability of private life and correspondence guaranteed in the Convention is infringed.

Consequently, the Constitutional Court concludes that Section 7 (5) of the Investigatory Operations Law establishes cases when a body performing investigatory operations has the right to immediately perform investigatory operations measures, as well as the procedure, according to which performance thereof should be notified to a public prosecutor and consent should be received. However, this norm is not related with the right of a person to assurance of effective protection as established in Article 13 of the Convention. Consequently, compliance of Section 7 (5) of the Investigatory Operations Law with Article 13 of the Convention shall be assessed in compliance with the first sentence of Section 35 (1) of the Investigatory Operations Law, the latter establishing

mechanism for monitoring investigatory operations and being contested by the Applicant in respect to its compliance with Article 92 of the Satversme.

20. The Applicant indicates that the first sentence of Section 35 (1) of the Investigatory Operations Law fails to comply with Article 92 of the Satversme because it has no legitimate aim and it is not necessary in a democratic society. The norm fails to establish procedure, according to which control and monitoring of performance of investigatory operations measures would be executed. In monitoring investigatory operations measures, first sentence of Section 35 (1) of the Investigatory Operations Law confers the public prosecutor's office a broad margin of appreciation (*see: Case materials, Vol. 1, pp. 20 – 21*).

20.1. Article 92 of the Satversme provides: „ Everyone has the right to defend his or her rights and lawful interests in a fair court. Everyone shall be presumed innocent until his or her guilt has been established in accordance with law. Everyone, where his or her rights are violated without basis, has a right to commensurate compensation. Everyone has a right to the assistance of counsel.”

The term “fair court” incorporated into Article 92 of the Satversme, includes two aspects, namely, "a fair court" as an independent institution of the judicial power and "a fair court" as an adequate process, characteristic to a law-based state in which the case is being reviewed. In the first aspect this notion shall be read together with Chapter VI of the Satversme, in the other – together with the principle of a law-based state, which follows from Article 1 of the Satversme (*see: Judgment of 5 March 2002 by the Constitutional Court in the case No. 2001-10-01, Para 2*).

The Constitutional Court has already indicated in its case-law that the right to a fair court is one of the most significant rights of a person, therefore restrictions to this right of a person shall be determined in the most indispensable cases (*see: Judgment of 14 March 2006 by the Constitutional Court in the case No. 2005-18-01, Para 10*). Even

though the Satversme does not directly envisage cases in which the right to a fair court might be restricted, the right is not absolute (*see: Judgment of 4 January 2005 by the Constitutional Court in the case No. 2004-16-01, Para 7.1*).

The first sentence of Article 92 of the Satversme requires that a person shall address only judicial institutions referred to in Article 82 of the Satversme to defend his or her rights and legal interests. Based on the case-law of the European Court of Human Rights in relation to Article 13 of the Convention, it can be concluded that assurance of effective remedies does not depend only on the possibility of addressing the court, but on the whole mechanism of supervision and its performance (*see: Judgment of 6 December 2004 by the Constitutional Court in the case No. 2004-14-01, Para 10 of the Findings*). Not all courts administer justice. Moreover, according to conclusions made by the Constitutional Court in its case-law, administering of justice is not the only effective remedy. A person can effectively protect his or her rights and legal interests not only before the court but also other judicial institutions (*see: Judgment of 11 October 2004 by the Constitutional Court in the case No. 2004-06-01, Para 18*).

It can neither be *expressis verbis* concluded from grammatical text of Article 8 and Article 13 of the Convention that the State would have the duty to subject, by means of normative regulatory framework, performance of investigatory operations measures only to judicial control. By referring to case-law of the European Court of Human Rights, Mr. J. Pastille indicates that such regulatory framework is preferable but not obligatory. The procedure, according to which particular rights are ensured, falls within the jurisdiction of each Member State; though it cannot be aimed at non-observance of the requirements established in the Convention (*see: Case materials, Vol. 3, pp. 19 – 20*).

The Constitutional Court has already concluded in Para 17 of the present judgment that a body performing investigatory operations shall have the duty to request, at any event, consent of the Chief Justice of the Supreme Court or a Justice of the Supreme Court specially authorized by him or her regarding performance of investigatory operations measures. Consequently, the legislator has established such regulatory

framework of investigatory operations that requires not only monitoring by a public prosecutor but also judicial control or at least judicial post-control of lawfulness of measures taken and compliance thereof with requirements of law.

20.2. The first sentence of Section 35 (1) of the Investigatory Operations Law provides that monitoring regarding the conformity to law of investigatory operations shall be performed by the Prosecutor General and by prosecutors specially authorized by the Prosecutor General. Such monitoring shall be performed in accordance with the Office of the Prosecutor Law and respective internal normative acts of the General Prosecutor's Office subject to laws (*see: Kavalieris A. Operatīvās darbības likuma komentāri. Rīga: Raka, 2002, pp. 93*).

Section 1 (1) of the Office of the Prosecutor Law provides that the Office of the Prosecutor is an institution of judicial power, which independently carries out supervision of the observance of law within the scope of the competence determined by this Law. In the second part of the above mentioned section it is indicated that the task of the Office of the Prosecutor shall be to react to a violation of law and to ensure the deciding of matters relating to such in accordance with the procedures prescribed by law.

The Constitutional Court has already indicated in its case-law that an institution of judicial power has double nature. On the one hand it is an undivided, centralized system of three grade institutions, headed by the Prosecutor General, but – on the other hand – officials of the Prosecutor's Office i.e. the prosecutors independently and uni-personally perform the functions of the Office of the Prosecutor (*see: Judgment of 20 December 2006 by the Constitutional Court in the case No. 2006-12-01, Para 12.2*).

In 15 May 2009 Informative Report on the legal regulatory framework to be established in the Investigatory Operations Law, its deficiencies and the necessity to elaborate a new normative acts regulating investigatory operations, it has been indicated that performance of investigatory operations restricts human rights in a special way; therefore the Investigatory Operations Law establishes a strict control mechanism by means of such operations (*see: Informative Report on the legal regulatory framework to*

be established in the Investigatory Operations Law, its deficiencies and the necessity to elaborate a new normative acts regulating investigatory operations [*Informatīvais ziņojums par Operatīvās darbības likumā paredzēto tiesisko regulējumu, tā nepilnībām un nepieciešamību izstrādāt jaunu operatīvo darbību regulējošu normatīvo aktu*] <http://polsis.mk.gov.lv/view.do?id=3016>, consulted on 19 April 2011). As to performance of investigatory operations measures referred to in Section 7 (4) of the Investigatory Operations Law, in cases established in Paragraph 5 of the same section, a body performing investigatory operations is committed to notify a public prosecutor, namely to the Prosecutor General and prosecutors specially authorized by the Prosecutor General within the term of 24 hours (*see: Kavalieris A. Operatīvās darbības likuma komentāri. Rīga: Raka, 2002, pp. 26*). Consequently, the Prosecutor General and a prosecutor specially authorized by the Prosecutor General shall control lawfulness of investigatory operations measures.

Pursuant to Section 22 (2) of the Investigatory Operations Law, elaboration of investigation is launched after adopting such a decision approved by a head or deputy head of the institution performing investigatory operations law and a public prosecutor is informed thereon. Consequently, investigatory operations measures established in Section 7 (5) of the Investigatory Operations Law and performed by a body performing investigatory operations shall be notified to the Prosecutor General and a prosecutor specially authorized by the Prosecutor General. The Constitutional Court indicates that in case of receipt of such notice, the public prosecutor shall perform monitoring of compliance of investigatory operations measures performed with requirements of law, which would thus ensure observance of the rights of the concerned person.

20.3. The Applicant indicates that the possibility to protect one's rights is limited in cases when his telephone calls are monitored (*see: Case materials, Vol. 1, pp. 10, 13, 18 and 22*).

The regulatory framework included in Section 35 of the Investigatory Operations Law refers to monitoring mechanism for performance of investigatory operations that

shall be assessed in conjunction with the right of a person to protect his or her infringed rights.

Section 5 of the Investigatory Operations Law provides: If a person believes that a body performing investigatory operations has through its actions infringed the lawful rights and freedoms of the person, such person is entitled to submit a complaint to a prosecutor who, after conducting an examination, shall provide an opinion with respect to the conformity to law of the actions of the officials of the body performing the investigatory operations, or the person may bring an action in court. Should it be established that his or her rights are infringed, the person shall have the right to request compensation for the detriment.

It follows from the aforementioned that the Prosecutor General and a prosecutor specially authorized by the Prosecutor General perform monitoring of investigatory operations and, based on the results of such monitoring, provides an opinion on lawfulness of activities undertaken by officials of the body performing investigatory operations. Verification is necessary for the Prosecutor General and a prosecutor specially authorized by the Prosecutor General to make sure that investigatory operations measures have been lawful. However, the effective regulatory framework establishes both, judicial control and judicial post-control. Consequently, it is not possible to agree with the opinion that the effective regulatory framework fails to provide an independent post-control in respect to investigatory operations measures.

Pursuant to Section 29 (3) of the Investigatory Operations Law, if in the course of investigatory operations the rights and interests of persons have been unlawfully infringed and as a result thereof harm has been caused, the obligation of the relevant official, prosecutor or court shall be to restore such rights and to compensate for or allay the inflicted material and moral harm in accordance with procedures prescribed by law. Consequently, it can be concluded that the Investigatory Operations Law establishes responsibility of the body performing investigatory operations in the case of infringement of the fundamental rights.

It should also be indicated that pursuant to Section 24 (1) of the Investigatory Operations Law, information obtained in the course of investigatory operations measures shall be classified as restricted access information or an official secrets object. Such information may be utilized as evidence in a criminal proceeding only according to the procedures specified in the Criminal Procedure Law, ensuring the implementation of the investigatory measures and the confidentiality and safety of the persons involved therein. Consequently, by means of the regulatory framework of the Investigatory Operations Law, the legislator has expressed its will to ensure confidentiality of investigatory operations measures. The limited accessibility of obtained information can be explained by the nature and tasks of investigatory operations. The Investigatory Operations Law fails to provide the right or duty of a body performing investigatory operations to notify the concerned person on investigatory operations measures after the procedure has been terminated. However, such notification of a person during performance of investigatory operations measures would contradict the tasks of investigatory operations measures established in Section 2 of the Investigatory Operations Law.

The Constitutional Court indicates that protection of the rights of persons is effectively ensured by verifying the data obtained as the result of investigatory operations measures pursuant to the procedures established in the Criminal Procedure Law and the Investigatory Operations Law.

Pursuant to Section 24 (4) of the Investigatory Operations Law, where investigatory operations are performed in a criminal matter, the performer of procedures shall be informed of all the information obtained in such matter in the course of proceeding with investigatory operations. Compliance of the information obtained in the result of investigatory operations measures with Section 9 of the Criminal Procedure Law and requirements of the Investigatory Operations Law shall be assessed by the court by verifying evidence submitted. When subjecting particular actions to legal criminal regulation, data on facts obtained in the result of them and included in respective procedural minutes might be used as full-fledged evidence (*see: Strada-Rozenberga K.*

Pierādīšanas teorija kriminālprocesā. Vispārīgā daļa. Rīga: Biznesa augstskola „Turība”, 2002, pp. 187).

Consequently, the person directing the proceedings and the court ensure verification of admissibility of information obtained as the result of investigatory operations law. However, the Prosecutor General and a person specially authorized by the Prosecutor General perform monitoring of lawfulness of investigatory operations measures, whilst the court executes post-control of the above mentioned measures by ensuring protection of the rights of persons.

Consequently, the first sentence of Section 35 (1) of the Investigatory Operations Law does comply with the right to a fair court established in Article 92 of the Satversme and also complies with Article 13 of the Convention, like Section 7 (5) of the Investigatory Operations Law does.

The Constitutional Court

Based on Article 30-32 of the Constitutional Court Law

h o l d s:

1) Section 7 (5) of the Investigatory Operations Law does comply with Article 96 of the Satversme of the Republic of Latvia;

2) Section 7 (5) of the Investigatory Operations Law and the first sentence of Section 35 (1) of the Investigatory Operations Law does comply with Article 13 of the European Convention of the Protection of Human Rights and Fundamental Freedoms;

3) the first sentence of Section 35 (1) of the Investigatory Operations Law does comply with Article 92 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 publishing it.

Translated by E. Labanovska, translator of the Constitutional Court