

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(c) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b) and Article 59(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in plenary and composed of the following judges:

Ms. Valerija Galić, President

Mr. Miodrag Simović, Vice-President

Mr. Mirsad Ćeman, Vice-President

Ms. Helen Keller, Vice-President

Ms. Seada Palavrić,

Ms. Angelika Nussberger, and

Mr. Ledi Bianku

Having deliberated on the request filed by the **Cantonal Court in Sarajevo** in the case **U-12/22**, at its session held on 22 September 2022, adopted the following

## DECISION ON ADMISSIBILITY AND MERITS

Deciding on the request lodged by the **Cantonal Court in Sarajevo (Judge Danijela Mikić)**, for the review of constitutionality of Article 71 paragraph (2) item (c) of the Bankruptcy Law (*Official Gazette of the Federation of Bosnia and Herzegovina*, 53/21),

it is hereby established that Article 71 paragraph (2) item (c) of the Bankruptcy Law (*Official Gazette of the Federation of Bosnia and Herzegovina*, 53/21) is in conformity with Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article II(4) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

## REASONING

### I. Introduction

1. On 27 April 2022, the Cantonal Court in Sarajevo, Judge Danijela Mikić, (“the applicant”), submitted to the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) a request for a review of compatibility of Article 71(2)(c) of the Bankruptcy Law (*Official Gazette of the Federation of Bosnia and Herzegovina*, 53/21) with Article II(3)(k) of the Constitution of

Bosnia and Herzegovina and Article 1 Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention”) and Article II(4) of the Constitution of Bosnia and Herzegovina, Article 14 of the European Convention and Article 1 of Protocol No. 12 to the European Convention.

## **II. Procedure before the Constitutional Court**

2. Pursuant to Article 23(2) of the Rules of the Constitutional Court, the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina (“the House of Representatives”), the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina (“the House of Peoples”) and the Government of the Federation of Bosnia and Herzegovina (“the Government”) represented by the Office for Cooperation and Representation before the Constitutional Court (“the Office”) were requested, on 6 May 2022, to submit their responses within 30 days as of the date of receipt of the request.

3. The Government and the Office submitted their replies to the request on 6 and 7 June 2022 respectively. The House of Representatives and the House of Peoples failed to respond to the request within given time limit.

## **III. Request**

### **a) Statements of the request**

4. The applicant requests the Constitutional Court to examine whether Article 71(2)(c) of the Bankruptcy Law is in compliance with Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. In addition, the substance of the request indicate that the applicant requests to examine whether the impugned provision is in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina, Article 14 of the European Convention and Article 1 of Protocol No. 12 to the European Convention.

5. While presenting her request, the applicant stated that the provision of Article 71(2)(c) of the Bankruptcy Law prescribing an age limit of 63 for the appointment of a bankruptcy trustee is unconstitutional. Namely, the applicant holds that, by such norm, the bankruptcy trustees are discriminated in relation to other authorities of the bankruptcy procedure, given that the bankruptcy judge, who has the highest authority and responsibility in the bankruptcy procedure, may act as a body of the bankruptcy proceedings up until full age of 70. The request further indicates that the legislation prescribing for the restriction in the appointment of the bankruptcy trustees cannot be an

issue of expediency or the appropriate legislative policy within the scope of legislator's authorities determined by the Constitution to regulate the procedure before the courts, the review of the legality of the disposal of legal entities' funds, as well as the organization, responsibilities and work of state bodies. The applicant holds that the constraint in the provision (stipulating that the Ministry will include on the List of Bankruptcy Trustees a person who, amongst other requirements, has not reached the age of 63 on the day of appointment as a bankruptcy trustee) is particularly distinct regarding the persons who are on the List of Bankruptcy Trustees. For them, the appointment as a bankruptcy trustee, in particular bankruptcy proceedings, represents the only possibility to make any earnings based on the performance of duties of a bankruptcy trustee. This represents the violation of the right to property.

#### **b) Facts of the case due to which the request is lodged**

6. The plaintiff Milorad Petrović ("the plaintiff") initiated an administrative dispute by lodging an action with the Cantonal Court against the respondent Federal Ministry of Justice for the annulment of ruling no. 02-45-3675-17/21 of 17 December 2021. The administrative dispute is registered under no. 09 0 U 040720 22 U.

7. It is indicated in the action that the plaintiff was appointed a bankruptcy trustee by the decision of the Federal Ministry of Justice no. 03-34-2699/05 of 30 December 2005 and he was placed on the List of Bankruptcy Trustees (*Official Gazette of the FBiH*, 25/06 to 67/20). By the ruling no. 02-45-3675-17/21 of 17 December 2021, the respondent deleted (removed) the plaintiff from the List of Bankruptcy Trustees in accordance with Articles 71 and 72 of the Bankruptcy Law as it established that the plaintiff turned 63 years of age on 31 December 2021. A motion to initiate the proceedings for the review of constitutionality, or conformity, of relevant provisions of the Bankruptcy Law with the Constitution of Bosnia and Herzegovina and the European Convention was enclosed by the plaintiff's representative to the action.

#### **IV. Response to the request**

8. The Government of the FBiH points out that it proposed the age limit of 65 in the Proposal for Bankruptcy Law to perform the duties of the bankruptcy trustee, which is equal to the requirement for the old-age pension. The legislation reducing the age limit to 63 was adopted by an amendment in the parliamentary procedure. Considering the aforementioned, the Government states that the relevant Article is not in contravention with the right to property or the right to work, as the bankruptcy trustees perform the relevant duty exclusively as an additional activity and not the activity based on labour relations. The Government indicates that it is a legitimate right of the

employer, given the complexity and social importance of bankruptcy procedure, to determine additional requirements and criteria for the performance of duties of a bankruptcy trustee and thereby determine the mechanisms that will affect the efficiency of the bankruptcy proceedings and thus the stability of the economy in the Federation of Bosnia and Herzegovina.

9. The Office points out that under the consistent case law of the Constitutional Court, which was presented in the decision *U-17/21* of 24 March 2022, the applicant is obliged to specify the request. The applicant specified the request in relation to Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. It indicates that the request was supported by only one sentence that “the bankruptcy judge may act as a body of the bankruptcy proceedings up until the age of 70”. In addition, the Office points out that it stems from the request that the applicant in essence raises an issue of the application of Article 71(2)(c) of the Bankruptcy Law, which it brings to connection with the instant case. It may be said that the applicant requests the Constitutional Court to present its opinion on the application of the relevant provisions of the Bankruptcy Law to the particular case. In addition, the Office states that the Government proposed the age limit of 65 in the Proposal for Bankruptcy Law to perform the duties of the bankruptcy trustee, which is equal to the requirement for the old-age pension, while the amendment adopted in the parliamentary procedure reduced the age limit to 63. It is the legitimate right of the employer, given the complexity and social significance of bankruptcy proceedings, to determine additional requirements and criteria for the performance of duties of a bankruptcy trustee and thereby determine the mechanisms that will affect the efficiency of the bankruptcy proceedings. Having regard to the above stated, the Office holds that the said Article did not affect the right to property given that the bankruptcy trustees perform the relevant duty exclusively as an additional activity and not the activity based on employment. In addition, the Office points out that Article 1 of Protocol No. 1 to the European Convention protects only the existing property but does not include the rights or expectations for the acquisition of property in the future, and it refers to the decision of the European Court of Human Rights (“the European Court”) in the case *Baka v. Hungary*. Given the aforesaid, the Office considers the request unfounded and proposes the Constitutional Court to dismiss the request. It is proposed to determine that the provision of Article 71(2)(c) of the Bankruptcy Law is in conformity with the Constitution of Bosnia and Herzegovina which clearly regulates the application of the relevant law in the procedures of protection and exercise of rights.

## **V. Relevant law**

10. The **Bankruptcy Law** (*Official Gazette of the Federation of Bosnia and Herzegovina*, 53/21) in the relevant part reads:

*Article 1*

*(Subject of the Law)*

*This law regulates pre-bankruptcy and bankruptcy proceedings, legal consequences of opening and conducting pre-bankruptcy and bankruptcy proceedings, reorganization of a bankruptcy of an insolvent debtor based on a bankruptcy plan and international bankruptcy.*

*Article 2(1) items 1, 12 and 14 to 16*

*(Definitions of terms)*

*Expressions and terms used in this law have the following meaning:*

*1) bankruptcy proceeding is a special type of civil proceedings conducted by a court to determine whether the legally prescribed requirements for opening bankruptcy proceedings against certain entities and collecting and liquidating the entire assets of the bankruptcy debtors are met to ensure group and proportionate settlement of all its creditors,*

*12) bankruptcy judge is a judge of the competent court and the body of bankruptcy proceedings that conducts bankruptcy proceedings against the bankruptcy debtor,*

*14) bankruptcy trustee is a body of bankruptcy proceedings who, under the supervision of a bankruptcy judge, performs the tasks of bodies of the bankruptcy debtor, collects and liquidates the property of the bankruptcy debtor, and prepares and implements the settlement of creditors,*

*15) assembly of creditors is the highest body of creditors that decides on the most important issues of bankruptcy proceedings,*

*16) creditors' committee of is a body of bankruptcy proceedings that represents the interests of creditors in bankruptcy proceedings.*

*Article 18*

*(Deadline for completion of bankruptcy proceedings)*

*1) Bankruptcy proceedings shall be completed within one year and in complex cases within two years as of the date of opening the proceedings.*

2) *If the bankruptcy proceedings are not completed within one, i.e., two years from the day of opening, the bankruptcy proceedings shall continue and may last for another year, and the bankruptcy judge will inform the president of the court about the reasons for the extension of deadline.*

3) *The President of the Court shall be obliged to keep records of bankruptcy proceedings not completed within the period referred to in paragraph 1 of this Article and submit such records to the Federal Ministry of Justice (“the Ministry”) and the High Judicial and Prosecutorial Council of Bosnia and Herzegovina.*

*Article 69*

*(Bodies of bankruptcy proceedings)*

*Bodies of bankruptcy proceedings are the following: bankruptcy judge, bankruptcy trustee, assembly of creditors and creditors’ committee.*

*Article 70*

*(Bankruptcy judge)*

1) *The Bankruptcy Judge directs and controls the bankruptcy proceeding from the moment the petition to open is filed until the closing of the bankruptcy proceeding.*

2) *The Bankruptcy Judge appoints the experts and auditors in the bankruptcy proceeding, the interim bankruptcy trustee, the members of the interim creditors’ committee, and the bankruptcy trustee, and legally supervises the work of the interim bankruptcy trustee and the bankruptcy trustee pursuant to the provisions of this law.*

3) *The Bankruptcy Judge may invalidate decisions of the bankruptcy trustee, which violate the provisions of this Law and other positive regulations, which reduce the bankruptcy estate, and violate the rights of creditors.*

*Article 71*

*(Bankruptcy Trustee)*

1) *Only natural persons who have appropriate professional qualifications and business experience that are on the List of Bankruptcy Trustees before the Ministry may be appointed bankruptcy trustees.*

2) *On the List of Bankruptcy Trustees, the Ministry shall include a person who meets the following requirements:*

- a) that s/he is the citizen of Bosnia and Herzegovina, i.e., the Federation of Bosnia and Herzegovina;*
- b) that s/he is medically fit to perform the duty of the bankruptcy trustee;*
- c) that s/he has not reached the age of 63 on the day of appointment as bankruptcy trustee;*
- č) that s/he have completed economics, law or technical faculty, namely the seventh degree of higher education, i.e., higher education of the first cycle (valued at 240 ECTS credits) or the second cycle of the Bologna study system, that s/he has at least five years of work experience in the profession and have passed the specialised exam for bankruptcy trustee;*
- ć) that s/he has not been convicted for the following criminal offences: against humanity and values protected by international law; criminal offences under Chapter XIX of the Criminal Code of the Federation of Bosnia and Herzegovina (Official Gazette of FBiH, 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, 46/16 and 75/17- "the CC FBiH) against sexual freedom and morality; criminal offenses under Chapter XXX of the CC FBiH against public order and legal turnover; criminal offences under Chapter XXXI of the CC FBiH against bribery and criminal offenses against official and other responsible functions; criminal offences under Chapter XXIX of the CC FBiH against judiciary; criminal offences under Chapter XXII of the CC FBiH against the economy, business and security of payment transactions and the criminal offences under Chapter XXIII of the CC FBiH in the field of taxation.*
- 3) Taking the professional exam for the bankruptcy trustee shall be done based on a public invitation of the Minister.*
- 4) The public invitation shall be published in the Official Gazette of the FBiH and at least one daily newspaper available on the entire territory of the Federation of BiH and on the website of the Ministry.*
- 5) The specialised professional exam for the bankruptcy trustee shall be taken before the committee of three members appointed by the Minister. The program of the professional exam (curriculum) for the bankruptcy trustee and the manner of taking it, as well as the manner of professional training of the bankruptcy trustees, shall be prescribed by a rulebook issued by the Minister.*
- 6) The bankruptcy trustees may be organised into the Bankruptcy Trustee's Association.*



*(List of Bankruptcy Trustees)*

- 1) *The List of Bankruptcy Trustees shall be compiled by the Minister. It shall be published in the Official Gazette of the Federation of BiH and the website of the Ministry. The decision (ruling) on entry on the List of Bankruptcy Trustees shall be issued by the Minister.*
- 2) *At the end of each calendar year, the Ministry shall review the existing List of Bankruptcy Trustees whose right to appointment ceased pursuant to Article 71 of this Law. At the beginning of each calendar year, the relevant List shall be transmitted to all courts on the territory of the Federation that have jurisdiction to act in accordance with this Law and shall be published in the Official Gazette of the Federation of BiH and the website of the Ministry.*
- 3) *After receiving two final decisions on dismissal of the bankruptcy trustee referred to in Article 80(4) of this Law, the Minister shall issue a decision removing that person from the List of Bankruptcy Trustees.*
- 4) *The decision of the Minister by which a person is removed/deleted from the List of Bankruptcy Trustees shall be delivered to the person to whom it refers.*
- 5) *The appeal is not permitted against the decision by which a person is removed/erased from the List of Bankruptcy Trustees but an administrative dispute may be lodged against it within 30 days as of the date of receipt thereof.*
- 6) *The decision /ruling of the Minister by which a person is removed/deleted from the List of Bankruptcy Trustees shall be published in the Official Gazette of the Federation of BiH and on the website of the Ministry.*

*Article 73*

*(Appointment of Bankruptcy Trustee)*

- 1) *The bankruptcy judge shall appoint the bankruptcy trustee by the ruling on opening of bankruptcy proceedings.*
- 2) *The bankruptcy judge may appoint as the bankruptcy trustee a person who is on the List of Bankruptcy Trustees.*

*Article 77(1) to (4)*

*(Rights of the Bankruptcy Trustee)*

- 1) *The bankruptcy trustee is authorized and obligated, forthwith, to take possession of the property included in the bankruptcy estate, to manage it, to continue business operations until the reporting hearing, if possible and if this does not impair the bankruptcy creditors, and to liquidate it in accordance with the provisions of this Law.*
- 2) *If it is in the ordinary course of the business and necessary for the preservation of the bankruptcy estate, s/he is authorised to liquidate particular assets, especially perishables, during the continued operation of the business, even before the decision of the assembly of creditors is made.*
- 3) *On the basis of the enforceable decision on the opening of the bankruptcy, the bankruptcy trustee may request the turnover of assets that are in possession of the debtor, and the business records also, even if in the possession of third parties.*
- 4) *The reward and compensation for the work of the bankruptcy trustee is determined by the bankruptcy judge in accordance with the Rulebook which stipulates the compensations and rewards for the work of bankruptcy trustees.*

*Article 80(1) and (2)*

*(Supervision of the work of bankruptcy trustees)*

- 1) *The management of the property and the performance of the services of the bankruptcy trustee are subject to the legal supervision of the Bankruptcy Judge.*
- 2) *The Bankruptcy Judge may request that the bankruptcy trustee provide him with information on the current situation and management*

*Article 296*

*(Bankruptcy proceedings and List of Bankruptcy Trustees)*

- 1) *Bankruptcy proceedings that were opened before this Law came into effect shall be concluded pursuant to the regulations in effect at the time of their opening.*
- 2) *Persons included on the List of Bankruptcy Trustees in accordance with the regulations in effect before this Law shall remain on the List of Bankruptcy Trustees to the date of renewal in accordance with Article 72(2) of this Law.*

11. The **Law on Bankruptcy Proceedings** (*Official Gazette of the Federation of Bosnia and Herzegovina*, 29/03, 32/04, 42/06, 4/17 – Decision of Constitutional Court of FBiH and 52/18), which was in force up before passing of the Bankruptcy Law, as far as relevant, reads:

*Article 23(1) to (3)*

*Persons Who May Be Appointed Bankruptcy Trustees*

*(1) Only physical persons who have appropriate professional qualifications and business experience may be appointed bankruptcy trustees.*

*(2) A bankruptcy trustee must have completed professional education and passed a specialized examination. The Federal Minister of Justice shall prescribe detailed provisions on the type of education and content of the specialized examination.*

*(3) Until a sufficient number of bankruptcy trustees complete their professional education and pass the specialized examination, the Federal Minister of Justice shall compile a preliminary list of bankruptcy trustees after receiving opinions from the presidents of the courts with jurisdiction over bankruptcy proceedings.*

12. The **Bankruptcy Law** (*Official Gazette of the Republika Srpska*, 16/16) reads in relevant part:

*Requirements for taking the bankruptcy trustee professional exam and  
inclusion on the list of bankruptcy trustees*

*Article 66(1) and (4)(3)*

*(1) Taking the professional exam for a bankruptcy trustee shall be performed based on the public announcement by the Minister.*

*(4) A person who lodge a request for passing the bankruptcy trustee professional exam must fulfil the following requirements:*

*3) that s/he has not reached the age of 70.*

13. The **Bankruptcy Law** (*Official Gazette of the Brčko District of Bosnia and Herzegovina*, 16/19, 29/20 and 16/22) in relevant part reads:

*Article 71(1) and (2)(c)*

*(Bankruptcy Trustee)*

*(1) Only physical person who have appropriate professional qualifications and business experience and are included on the List of Bankruptcy Trustees at the court may be appointed bankruptcy trustee.*

(2) *The Judicial Commission shall introduce to the List of Bankruptcy Trustees only a person who fulfils the following requirements:*

*c) that s/he has not reached the age of 70 on the day of appointment as bankruptcy trustee.*

14. The **Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, 25/04, 93/05, 48/07 and 15/08) in the relevant part reads:

*Article 90*

*Mandatory Retirement Age*

*The mandatory retirement age for judges and prosecutors appointed by the Council shall be age seventy (70).*

## **VI. Admissibility**

15. In examining the admissibility of the present request, the Constitutional Court invoked the provisions of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina.

16. Article VI(3)(c) of the Constitution of Bosnia and Herzegovina reads:

*c) The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision.*

17. The request for constitutional review was submitted by the Cantonal Court in Sarajevo, which means that the request was submitted by an authorized person under Article VI(3)(c) of the Constitution of Bosnia and Herzegovina (see, Constitutional Court, Decision on Admissibility and Merits *U 5/10* of 26 November 2010, paragraphs 7 to 14, published in the *Official Gazette of Bosnia and Herzegovina*, 37/11).

18. In contesting the admissibility of the request, the Office indicates that the applicant, in essence, raises an issue of the application of Article 71(2)(c) of the Bankruptcy Law and brings that into connection with the particular case due to which the request was filed. However, it claims that the task of the Constitutional Court is not to give instructions and explanations on how to apply the law to the particular case as that is the task of ordinary courts, as being pointed out in the relevant

jurisprudence of the Constitutional Court. In that connection, the Constitutional Court notes that the application explicitly requests the review of conformity of the provision of Article 71(2)(c) of the Bankruptcy Law with the right to property referred to in Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention and the right not to be discriminated against referred to in Article II(4) of the Constitution of Bosnia and Herzegovina, Article 14 of the European Convention and Article 1 of Protocol No. 12 to the European Convention. In that connection, the Constitutional Court points out that in this particular case the compliance of the law with the Constitution of Bosnia and Herzegovina is assessed, for which there is undeniable jurisdiction of the Constitutional Court according to the relevant provisions of the Constitution of Bosnia and Herzegovina. The Constitutional Court notes that it considers the review of constitutionality in a general sense (*erga omnes*) and not in relation to the specific case (*inter partes*) which is the reason for the submission of the request (see, Constitutional Court, Decision *U 15/11* of 30 March 2012, paragraph 63). Namely, the Constitutional Court will not enter into consideration of the specific case, which is pending before the Cantonal Court, or deal with the manner in which the ordinary courts and other competent bodies should apply the challenged legal provision. The Constitutional Court will deal with the review of constitutionality of these provisions in an abstract manner in relation to the right to property and the right to non-discrimination.

19. In view of provisions of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina and Article 19(1) of the Rules of the Constitutional Court, the Constitutional Court holds that this request is admissible because it is filed by an authorised applicant and there is no formal reason for which the request would be rendered inadmissible.

## **VII. Merits**

20. The applicant requests the Constitutional Court to examine whether Article 71(2)(c) of the Bankruptcy Law is in compliance with Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention as well as with Article II(4) of the Constitution of Bosnia and Herzegovina, Article 14 of the European Convention and Article 1 of Protocol No. 12 to the European Convention.

21. Contested Article 71(2)(c) of the Bankruptcy Law reads:

*2) the Ministry shall include, on the List of Bankruptcy Trustees, a person who meets the following requirements:*

*c) that s/he has not reached the age of 63 on the day of appointment as bankruptcy trustee;*

**a) Right to property**

22. Article II(3) of the Constitution of Bosnia and Herzegovina in the relevant part reads:

*All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:*

*k) The right to property.*

23. Article 1 of Protocol No. 1 to the European Convention reads:

*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

*The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

24. The applicant contends that the restrictions set forth in Article 71(2)(c) of the Bankruptcy Law are contrary to the right to peaceful enjoyment of property referred to in Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. In this connection, the request indicates that this restriction is particularly distinct concerning persons who are on the List of Bankruptcy Trustees and for whom the appointment as a bankruptcy trustee in a particular bankruptcy proceeding represents the only possibility to acquire any earnings based on the performance of duties of a bankruptcy trustee.

25. The Constitutional Court will first establish whether the impugned provision raises issues under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. In that respect, the Constitutional Court needs to consider the issue whether the provision of Article 71(2)(c) of the Bankruptcy Law refers to “possessions” safeguarded by Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

26. In that connection, the Constitutional Court points out that, under the consistent case law of both the European Court and the Constitutional Court, the “possessions”, in terms of Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, can be either “existing possessions” or “assets, including claims, in respect of which an applicant can argue that he has at least a “legitimate expectation” that they will be realised (see, European Court, *Jantner v. Slovakia*, Application no. 39050/97, Judgement of 4 March 2003,

paragraph 27 and the Constitutional Court, Decision on Admissibility and Merits *AP 2349/06* of 27 February 2008, paragraph 44, available at [www.ustavnisud.ba](http://www.ustavnisud.ba)). In addition, the Constitutional Court points out that a “legitimate expectation” must be much more tangible than the hope itself, however reasonable it may be, and must be based on a legal provision or legal act such as a decision of the court (see, European Court, *Kopecný v. Slovakia*, Application no. 44912/98, Judgement of 28 September 2004, paragraphs 48 and 49 and the Constitutional Court, Decision on Admissibility and Merits *AP 2361/06* of 10 January 2008, paragraph 10, available at [www.ustavnisud.ba](http://www.ustavnisud.ba)).

27. However, the Constitutional Court notes that the European Court have consistently indicated in its decisions that the European Convention does not include the right to acquire property. In this regard, the Constitutional Court recalls the case law of the European Court according to which future income cannot be considered “possessions” unless it has already been earned or is definitely payable (see, ECHR, *Erkan v. Turkey* (dec.), Application no. 29840/03 of 24 March 2005 and *Anheuser-Busch Inc. v. Portugal* [GC], Application no.73049/01, paragraph 64, ECHR 2007 I). Accordingly, the scope of operations of freelance businesses – without fixed income or guaranteed turnover – which is exposed to the hazards of economic life does not constitute “possessions” (European Commission of Human Rights, *Greek Federation of Customs Officers, Gialouris and others v. Greece*, Application no. 24581/94, decision of 6 April 1995). The Constitutional Court recalls that in the particular case the customs officers held that their right to property under Article 1 of Protocol No. 1 to the European Convention had been violated due to entry into force of the law abolishing customs duties in Greece as a member of the European Union in relation to other Member States, and they claimed to have suffered a serious economic loss, commensurate with 80% of their income, without receiving any compensation. In that case, the European Commission noted that the occupation of customs officer is a “liberal profession”, with no fixed income and no guaranteed turnover but which is subject to the hazards of economic life. The European Commission pointed out that although the abolition of customs barriers threatens to cause customs officers economic loss, the Commission considers that the latter cannot claim to be entitled to a guaranteed volume of business, which could have qualified as a “possession” within the meaning of Article 1 of Protocol No. 1 to the European Convention. As a result, the European Commission concluded that the application is *ratione materiae* incompatible with Article 1 of Protocol No. 1 to the European Convention.

28. In addition, the Constitutional Court, *mutatis mutandis*, recalls that, according to the case law of the European Court, there is no right under the European Convention to continue to be paid a salary in a certain amount (see, *Vilho Eskelinen and others v. Finland* [GC], cited above, paragraph

94). In that connection, the Constitutional Court points out to the decision of the European Court in the case of *Baka v. Hungary* (Application no. 20261/12, decision of 27 May 2014) to which the Office referred as well, wherein the European Court stated, “The decision to terminate his term of office prevented the applicant from continuing to receive his salary. Due to the legislative reforms of 2011, the applicant could no longer enjoy certain pension benefits. However, that income was not actually earned by the applicant and therefore he could not expect its payment”. In view of this, the European Court found that the requirements for the applicability of Article 1 of Protocol No. 1 to the European Convention had not been met.

29. Relating the aforementioned case law to the specific request, the Constitutional Court notes that the provisions of Article 71 of the Bankruptcy Law provide for the requirements under which a certain person could be taken into account for appointment as a bankruptcy trustee in bankruptcy proceedings. Article 71(1) of the Bankruptcy Law stipulates that only natural persons who have appropriate professional qualifications and business experience, who are on the List of Bankruptcy Trustees before the Ministry of Justice of the Federation of BiH, may be appointed bankruptcy trustees. Then, Article 71(2) of the Bankruptcy Law establishes requirements under which certain persons may be included on the List of Bankruptcy Trustees. In accordance with that provision, it is necessary that a person is a citizen of Bosnia and Herzegovina, *i.e.*, the Federation of Bosnia and Herzegovina, is medically fit, has not reached the age of 63 on the day of opening of the bankruptcy proceedings, has appropriate professional education/qualifications, has not been convicted, has at least five years of work experience in the profession and have passed the specialised exam for bankruptcy trustee. In addition, paragraphs 3, 4 and 5 of Article 71 of the Bankruptcy Law stipulates the manner of taking a specialised professional exam for the bankruptcy trustee. Furthermore, Article 72 of the Bankruptcy Law prescribes that the Minister of Justice of the Federation of Bosnia and Herzegovina compiles the List of Bankruptcy Trustees and it is published in the Official Gazette. Besides, this Article regulates that, at the end of each calendar year, the Ministry shall review the existing List of Bankruptcy Trustees whose right to appointment ceased pursuant to Article 71 of the Bankruptcy Law. At the beginning of each calendar year, the revised List is transmitted to all courts on the territory of the Federation of Bosnia and Herzegovina that have jurisdiction to act in accordance with this Law and it is published in the Official Gazette of the Federation of Bosnia and Herzegovina and at the website of the Ministry.

30. In view of the content of above provisions, the Constitutional Court notes that the contested Article 71(2)(c) of the Bankruptcy Law relates only to the requirements for the entry on the List, *i.e.*, remaining on the List of Bankruptcy Trustees. Thus, the fact that a certain person is on the List



of Bankruptcy Trustees does not imply that that person receives any reimbursement based on that fact alone. In accordance with Article 74 of the Bankruptcy Law, a person on the List of Bankruptcy Trustees becomes a bankruptcy trustee only by appointment as a bankruptcy trustee by the court in a particular bankruptcy proceeding, depending on the decision of the judge acting in the case and other relevant circumstances of each particular case. Therefore, only in the case when a person is appointed as a bankruptcy trustee in a specific bankruptcy procedure, that person exercises the right to compensation in accordance with Article 77 of the Bankruptcy Law. Article 77 stipulates that the reward and compensation for the work of the bankruptcy trustee be determined by the bankruptcy judge in accordance with the Rulebook, which stipulates the compensations and rewards for the work of bankruptcy trustees. Consequently, the Constitutional Court notes that the said provision, taken in context with other relevant provisions of the Bankruptcy Law does not imply that a person on the List of Bankruptcy Trustees, solely based on that fact, has a certain fixed income or guaranteed turnover, but it is a prospect of earning income in the future. In view of the above, the Constitutional Court holds that the disputed provision does not relate to the property of bankruptcy trustees, given that the persons on the List of Bankruptcy Trustees do not earn money solely by being on the List. Their earnings depend on the fact whether they would be appointed a bankruptcy trustee in the bankruptcy proceedings by a bankruptcy judge, which is a future uncertain fact.

31. It follows that the impugned provision of Article 71(2)(c) of the Bankruptcy Law, which refers only to the requirements under which certain persons may be included in the List of Bankruptcy Trustees, does not raise constitutional issues concerning the violation of property rights under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. Therefore, the request for the review of constitutionality is manifestly ill-founded in relation to the right to property and the compliance of the disputed provision with the standards of the right to property cannot be examined in more detail (whether there is property protected by this Article, whether interference has occurred, whether the interference has a legitimate aim in the public interest and whether a fair balance has been struck).

**b) Prohibition of discrimination**

32. Article II(4) of the Constitution of Bosnia and Herzegovina reads:

*The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex,*

*race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

33. Article 14 of the European Convention reads:

*Prohibition of discrimination*

*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

34. Article 1 of Protocol No. 12 to the European Convention reads:

*General prohibition of discrimination*

*1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

*2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.*

35. The applicant contends that the bankruptcy trustees are discriminated against in relation to other bodies of the bankruptcy proceedings by the impugned Article 71(2)(c) of the Bankruptcy Law. In that connection, it is indicated that a bankruptcy judge who has the highest authority and responsibility in bankruptcy proceedings may continue to work up to the age of 70. In addition, the applicant states that the legislation prescribing the restriction in the appointment of bankruptcy trustees cannot be a question of expediency, i.e., appropriate legislative policy within the constitutionally established powers of the legislator to regulate proceedings before courts, control of legality of disposal of funds of legal entities and the organization and competence and work of state authorities.

**Relevant standards regarding the prohibition of discrimination**

36. Considering the allegations of the request, the Constitutional Court first emphasizes that Article 14 of the European Convention protects persons (including legal persons) who are in “matching situations” from discriminatory differences in treatment. For the purposes of Article 14 of the European Convention, treatment is considered discriminatory if there is no “aim and reasonable justification”, i.e., if it does not go in the direction of a legitimate aim and if there is no

reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, Constitutional Court, Decision *AP-98/03* of 27 October 2004, paragraph 34).

37. The Constitutional Court also highlights that while Article 14 of the Convention prohibits discrimination with regard to the “enjoyment of the rights and freedoms set forth in the Convention”, Article 1 of Protocol No. 12 introduces a general prohibition of discrimination. In addition, it is important to emphasize that regardless of the differences in the scope of these provisions, the meaning of the concept of discrimination in Article 1 of Protocol no. 12 is identical to the interpretation under Article 14 (see the Explanatory Report attached to Protocol No. 12, paragraph 18). Namely, Article 1 of Protocol No. 12 to the European Convention comprises a general prohibition of discrimination principle and it guarantees the enjoyment of all rights stipulated by law, without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. In addition, Article 1 of Protocol No. 12 to the European Convention purports that no one shall be discriminated against by any public authority on any ground, thus expanding the basic principle of non-discrimination to domestic law and not only to the rights guaranteed by the European Convention as provided for in Article 14 of the European Convention. The European Court has frequently underlined that Article 14 merely complements the other substantive provisions of the Convention and the Protocols thereto (*Molla Sali v. Greece* [GC], Application no. 20452/14, paragraph 123, 18 June 2020). This means that the guarantee provided by Article 14 has no independent existence (*Carson and Others v. the United Kingdom* [GC], Application no. 42184/05, paragraph 63, 16 March 2010) and this Article forms an integral part of each of the Articles laying down rights and freedoms.

38. The European Court confirmed that the notions of discrimination prohibited by both Article 14 of the Convention and Article 1 of Protocol No. 12 were to be interpreted in the same manner (*Pilav v. Bosnia and Herzegovina*, no. 41939/07, paragraph 40, 9 June 2016; *Zornić v. Bosnia and Herzegovina*, no. 3681/06, paragraph 27, 15 July 2014; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, paragraphs 55-56, 22 December 2009). Following the principles of Article 14 of the European Convention, the Constitutional Court emphasises that there must be a difference in treatment of persons in analogous or relevantly similar situations in order for an issue of discrimination to raise (see, *DH and Others v. Check Republic* [GC], no. 57325/00, paragraph 175, ECHR 2007-IV). However, only differences in treatment based on personal characteristics (or “status”) by which persons or groups of persons differ from one another can raise the issue of discrimination (see, *Carvalho Pinto de Sousa Morais v. Portugal*, no. 17484/15, paragraph 45,

ECHR 2017). In its decisions, the European Court has consistently indicated that differential treatment of persons in analogous or relevantly similar situations will only be considered discriminatory if there is no objective and reasonable justification – in other words, if a legitimate aim is not pursued or if there is no reasonable relationship between the means employed and the aim sought to be achieved (see, *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, paragraph 76, ECHR 2013 (excerpts)).

39. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background. A wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (see, *Carson and Others v. the United Kingdom* [GC], no. 42184/05, paragraph 61, ECHR 2010, and *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, paragraph 52, ECHR 2006-VI).

#### **Application of those principles to the present case**

40. Having regard to the applicant's brief allegations concerning the question of the abstract constitutionality of the challenged Article 71(2)(c) of the Bankruptcy Law, the Constitutional Court will analyse the impugned provision with regard to a violation of the right to non-discrimination. The Constitutional Court notes that it has already concluded in the previous part of the decision that this particular case raised no constitutional issue of violation of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. Therefore, it follows that the conditions for considering a violation of right referred to in Article 14 of the European Convention have not been met. However, the Constitutional Court notes that according to the allegations in the request, the applicant essentially points to discrimination based on the Law itself. Therefore, taking into account that the issue of the application of impugned Article 71(2)(c) of the Bankruptcy Law relates to the possibility of enjoyment of a right specifically granted to an individual based on national law and actions of the public authority in exercising its discretionary powers, the Constitutional Court holds that Article 1 of Protocol No. 12 is applicable to the instant case. Therefore, the constitutionality of the provision of Article 71(2)(c) of the Bankruptcy Law should be examined from the standpoint of Article 1 of Protocol No. 12 to the European Convention.

41. In conjunction with the allegations of the request that the impugned provision is discriminatory on the basis of age, the Constitutional Court recalls that the European Court accepted that the age may represent “other status” for the purposes of Article 14 of the European Convention (see, amongst others, *Schwizgebel v. Switzerland*, no. 25762/07, paragraph 85, ECHR 2010 (excerpts)). In a number of its decisions, the European Court considered the allegations of applicants who claimed that they were discriminated against based on age (see, amongst others, European Court, *Schwizgebel v. Switzerland*; *Carvalho Pinto de Sousa Morais v. Portugal*, Application no. 17484/15, 2017; *British Gurkha Welfare Society and Others v. the United Kingdom*, Application no. 44818/11, 2016). Consequently, the Constitutional Court does not see any reason, in the circumstances of the instant case, not to accept the standpoint of the European Court that age may represent “other status” for the purposes of Article 14 of the European Convention.

42. The Constitutional Court reiterates that it must be shown that a certain person has been treated differently than other person or group of persons in relevantly similar situation or equally to the group of persons in relevantly different situation when the complaint considers the violation of the right to non-discrimination. Another person or group of persons with whom the comparison is made is called a “comparator”. In accordance with this principle, the Constitutional Court will consider the question as to whether there are professional groups or other groups of persons in the domestic legal system that could be in relevantly similar situations.

43. The Constitutional Court first notes that the content of the request indicates that bankruptcy trustees are treated differently compared to bankruptcy judges who are in a relevantly similar situation. In this connection, the Constitutional Court recalls the position taken in the case of *Van der Mussele* (see, European Court, *Van der Mussele v. Belgium*, judgment of 23 November 1983), as follows: *...Yet between the Bar and the various professions cited by the applicant, including even the judicial and parajudicial professions, there exist fundamental differences to which the Government and the majority of the Commission rightly drew attention, namely differences as to legal status, conditions for entry to the profession, the nature of the functions involved, the manner of exercise of those functions, etc. The evidence before the Court does not disclose any similarity between the disparate situations in question: each one is characterised by a corpus of rights and obligations of which it would be artificial to isolate one specific aspect.* In addition, the Constitutional Court recalls that the European Court of Human Rights, in the case of *Graziani-Weiss v. Austria* (Application no. 31950/06, Judgment of 18 October 2011, paragraph 65), deciding on the existence of differential treatment of lawyers and notaries who were obliged to represent

certain categories of the population, pointed out that there was a significant difference between the professional groups of practising lawyers, whose rights and duties were governed by specific laws and regulations, and the group of other persons who might have studied law, and even received professional legal training, but were not working as practising lawyers. The foregoing considerations were sufficient to enable the European Court to conclude that for the purposes of appointment as a guardian in cases where legal representation was necessary, the professional groups of lawyers and public notaries on the one hand, and other legally trained persons on the other hand, were not in relevantly similar situations.

44. Considering the aforementioned in the light of the appellant's claims about the alleged possibility to equalize the duties of bankruptcy trustees and judges, the Constitutional Court notes that the judiciary is a special branch of government in respect of which special rules have been established necessary to ensure independence and impartiality in proceedings. The Constitutional Court highlights the specific nature and social significance of the aforementioned categories referred to in the challenged law for every state based on democratic principles. The legislator must bear in mind that its independent status cannot be compared to any other categories. Generally speaking, the duty of the judiciary is to interpret laws passed by the legislature, and it should have absolute independence from other branches of government. Moreover, the Constitutional Court recalls that the requirements for performing the duty of judges have been prescribed by the relevant provisions of the Entity constitutions, the laws on courts, and the Law on the HJPC. As to the age for performing the duties of a judge, it is determined in such a way that Article 90 of the Law on the HJPC stipulates the age for mandatory retirement of judges and prosecutors appointed by the HJPC to be 70. In addition, the retirement age of judges is (also) a constitutional category, given that Article VI(1)(c) of the Constitution of Bosnia and Herzegovina prescribes for the judges of the Constitutional Court that they "shall serve until age 70", and an identical provision is contained in the Constitution of the Federation of Bosnia and Herzegovina in respect of the judges of ordinary courts, where it is prescribed that they "shall serve until the age of 70." That age limit is prescribed notwithstanding the instance at which the judges are appointed and regardless of the type of proceedings in which the judges act. Therefore, it can be concluded that the ability of judges to perform their duties up to the age of 70 is not exclusively related to bankruptcy proceedings, but it is already an established legislative practice that is characteristic of this branch of government since it is of special interest to any state which operates on the principles of democracy and the rule of law. In view of the above, the Constitutional Court notes that the conditions and method of

appointing judges, their duties in court proceedings, as well as their role and importance in the legal system, cannot be compared in any way to any other categories, including the bankruptcy trustees.

45. Considering the existence of discrimination against bankruptcy trustees in the context of the Bankruptcy Law, the Constitutional Court next recalls that it is not disputed that Article 69 of the Bankruptcy Law states that bodies of bankruptcy proceedings are the following: bankruptcy judge, bankruptcy trustee, and assembly of creditors and creditors' committee. Even if the status of persons on the List of Bankruptcy Trustees could be identified with the bankruptcy trustees who are appointed and acting in the particular proceedings, the Constitutional Court points out that the fact that some issues are determined in the manner prescribed by the impugned provision cannot be considered *per se* as differential treatment. Namely, the bankruptcy proceedings are a special type of civil proceedings that is conducted by the court to determine if the legally prescribed requirements for opening the bankruptcy proceedings over certain subjects are met and for the purpose of collecting and liquidating the entire property of the bankruptcy debtor, in order to ensure group and proportionate settlement of all his creditors. In bankruptcy proceedings, all bodies of the bankruptcy proceedings have different roles, *i.e.* rights and duties.

46. The bankruptcy judge is a judge of the competent court and a body of bankruptcy proceedings that conducts bankruptcy proceedings against the bankruptcy debtor. The assembly of creditors is the highest body of creditors that decides on the most important issues of bankruptcy proceedings, and the board of creditors is the body of bankruptcy proceedings that represents the interests of creditors in bankruptcy proceedings. The bankruptcy trustee (provided s/he is appointed) is a body of bankruptcy proceedings which, under the supervision of the bankruptcy judge, performs the tasks of the body of the bankruptcy debtor, collects and liquidates the assets of the bankruptcy debtor, and prepares and implements the settlement of creditors. As to the authorities and duties of the bankruptcy judge and bankruptcy trustee, the Constitutional Court notes that the bankruptcy judge, *inter alia*, leads and manages the bankruptcy proceedings from the submission of the proposal for opening to the completion of the bankruptcy proceedings; s/he appoints the experts and auditors in the bankruptcy proceeding, the interim bankruptcy trustee, the members of the interim creditors' committee, and the bankruptcy trustee, and legally supervises the work of the interim bankruptcy trustee and the bankruptcy trustee pursuant to the provisions of this law; the bankruptcy judge may render ineffective decisions of the bankruptcy trustee which violate the provisions of this Law and other positive regulations, which reduce the bankruptcy estate, and violate the rights of creditors. On the other hand, the bankruptcy trustee is a body of the bankruptcy debtor who, amongst other things, is authorised and obligated, forthwith, to take possession of the

property included in the bankruptcy estate, to manage it, to continue business operations until the reporting hearing, if possible and if this does not impair the bankruptcy creditors, and to liquidate it in accordance with the provisions of that Law.

47. In view of the above, i.e., given the different role of the bankruptcy trustee in relation to other bodies of the bankruptcy proceedings, the Constitutional Court, without any need for detailed analysis of the rights and obligations of judges and bankruptcy trustees in the course of bankruptcy proceedings, holds that the judges acting in bankruptcy proceedings cannot be considered a comparative category in the context of the provisions of the Bankruptcy Law. Namely, these are different duties where different rules of conduct apply, and the state enjoys a wide margin of appreciation in regulating the requirements to perform these duties. For this reason, the bankruptcy judges cannot be considered as a comparative category for the purpose of determining the existence of differential treatment which could possibly stem from the provisions of Article 71(2)(c) of the Bankruptcy Law and other provisions of the Bankruptcy Law. In addition, the Constitutional Court considers that neither the assembly of creditors nor the creditors' committee can be considered comparative categories, given that their status and participation in the proceedings relates to the claims they have against the bankruptcy debtor. Therefore, the Constitutional Court holds that it could not establish, within the category of persons acting as the bodies of bankruptcy proceedings, that such persons are in relevantly similar situations, so that it could be established whether there is a difference in treatment between them.

48. In addition, the Constitutional Court notes that it ensues from the response to the appeal by the Office and the Government of the FBiH that the Government of the FBiH, in the draft and proposal of the Bankruptcy Law, proposed the age limit of 65 for registration on the list of bankruptcy trustees, which is identical to the condition for old-age pension, i.e. for exercising other social rights. However, the legal solution reducing the age limit to 63 was adopted in the parliamentary procedure based on a proposed amendment and, therefore, it follows that the legislator did not want to link the requirements for registration and remaining on the list of bankruptcy trustees to the age limit for retirement. Accordingly, taking into account that the impugned provision only refers to the requirements for registration and remaining on the list of bankruptcy trustees, based on which the persons on the list do not exercise any social rights, including the right to a pension, the Constitutional Court could not conclude that other employees referred to in the Labour Law can be considered a comparative category.

49. Finally, the Constitutional Court notes that Article 66(4)(3) of the Bankruptcy Law applicable in the Republika Srpska prescribes that a person who lodges a request for passing the



bankruptcy trustee professional exam must fulfil, amongst others, the requirement which states that s/he has not reached the age of 70. As well, Article 71 of the Bankruptcy Law applicable in the Brčko District of Bosnia and Herzegovina stipulates that the Judicial Commission shall introduce to the List of Bankruptcy Trustees only a person who has not reached the age of 70 on the day of appointment as bankruptcy trustee. However, the Constitutional Court holds that possible differences in the Entity laws, *per se*, cannot raise the issue of discrimination in the situation where neither there are any other arguments in the request nor can it be concluded that the provisions of the impugned Law are manifestly discriminatory (see, Decision on Admissibility and Merits U-22/18, paragraph 24, available at [www.ustavnisud.ba](http://www.ustavnisud.ba)). In addition, the Constitutional Court highlights that the mentioned area falls under the exclusive jurisdiction of the Entities and the Brčko District of Bosnia and Herzegovina, as their legislative bodies enjoy a wide margin of appreciation with respect to the age limit for registration on the lists of bankruptcy trustees.

50. In view of the above, the Constitutional Court points out that it could not establish that the impugned provision of Article 71(2)(c) of the Bankruptcy Law raises the issue of differential treatment of persons in analogous or relevantly similar situations, that is, that the legal system of Bosnia and Herzegovina has any comparative categories in respect of which the differential treatment could be found. In line with the aforementioned, the Constitutional Court concludes that the requirements have not been met so that it could consider further issues in relation to the right not to be discriminated against, i.e., the issue of the existence of a reasonable and objective justification for differential treatment. In view of all the aforementioned, the Constitutional Court concludes that Article 71(2)(c) of the Bankruptcy Law does not raise the issue of discrimination prohibited under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention.

51. The Constitutional Court, therefore, concludes that the impugned provision of Article 71(2)(c) of the Bankruptcy Law is compatible with Article II(4) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention.

### **VIII. Conclusion**

52. The Constitutional Court concludes that the provision of Article 71(2)(c) of the Bankruptcy Law is compatible with the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. In addition, it is in conformity with the right to prohibition of discrimination referred to in Article II(4) of the

Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention.

53. Pursuant to Article 59(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of the present decision.

54. In terms of Article 43 of the Rules of the Constitutional Court, the Separate Dissenting Opinion of Judge Ledi Bianku is annexed to the Decision.

55. Pursuant to Article VI(5) of the Constitution of Bosnia and Herzegovina, the decisions of Constitutional Court shall be final and binding.

Valerija Galić  
President  
Constitutional Court of Bosnia and  
Herzegovina  
/signed/

#### **DISSENTING OPINION OF JUDGE LEDI BIANKU**

1. In this case I have difficulties to follow my esteemed colleagues, in finding that Article 71(2)(c) of the Bankruptcy Law, by prescribing an age limit of 63 for the appointment of a bankruptcy trustee, does not raise a discrimination issue on the ground of age under the Constitution or the European Convention of Human rights.
2. As it can be read in the facts of the case, the above-referred article has been the legal basis for the deletion of the plaintiff's name in the main proceedings, from the list of trustees, i.e. for the termination of the possibility to exercise that precise activity (paragraph 7 of the Constitutional Court decision).
3. As indicated in paragraph 1 of the decision, in the request submitted before the Constitutional Court, the applicant requests a review of Article 71(2)(c) of the Bankruptcy Law (*Official Gazette of the Federation of Bosnia and Herzegovina*, 53/21) with Article II(2) of the Constitution of Bosnia and Herzegovina, the provisions of Article 1 Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention or ECHR"), Article 14 of the European Convention and Article 1 of Protocol No. 12 to the European Convention.
4. I will briefly elaborate the reasons of my dissent trying to answer the following questions:
  - i. Does the referred situation fall within the ambit of a substantive right provided by Article 2 (3) of the Constitution or by the European Convention?
  - ii. Is there a difference in treatment due to the application of Article 71(2)(c) of the Bankruptcy Law, by prescribing an age limit of 63 for the appointment of a bankruptcy trustee, and compared to whom?

iii. If the answer to question 2 is positive, is the difference in treatment justified?

**I. Does the referred situation fall within the ambit of a substantive right provided by Article 2 (3) of the Constitution or by the European Convention?**

5. In substance, the plaintiff in the main proceedings complains that he has not been able to exercise a professional activity, albeit he complied with all legal requirements, except the age criteria which will be discussed later.

6. As mentioned above, in the request reference is made to the right to property under Article 1 of Protocol 1 of the ECHR. In this regard, in the case of *Malik v. the United Kingdom*, no 23780/08, 13/03/2012 the European Court of Human Rights (ECtHR) has stated the following:

*“90. In previous cases involving professional practices, the Court has taken the view that a restriction on applicants’ right to practise the profession concerned, such as a refusal to register an applicant on a professional list, significantly affected the conditions of their professional activities and reduced the scope of those activities. Where, as a consequence of the restrictions, the applicant’s income and the value of his clientele and, more generally, his business, fell, the Court has held that there was interference with the right to peaceful enjoyment of possessions (see Van Marle, cited above, § 42).”*

7. I find that the same arguments adopted by the ECtHR apply in the case under consideration. Whereas in *Malik v. the United Kingdom* the applicant’s medical licence was suspended, in the case of the plaintiff in the main proceedings, in the case under consideration, the authorisation to continue and exercise the profession of a trustee, was definitively interrupted, due the plaintiff attainment of age of 63, as prescribed by Article 71(2)(c) of the Bankruptcy Law. Therefore, I am of the opinion that the referred situation falls within the ambit of Article 2(3)(k) of the Constitution and of Article 1 of Protocol 1 to the ECHR.

8. In addition, the exercise of a professional activity, similar to the one of the plaintiff in the main proceedings, has been considered by the ECtHR as falling within the ambit of Article 8 ECHR. In this regard the ECtHR has clearly stated that:

*“57. The Court has further held that restrictions on registration as a member of certain professions (for instance, lawyer or notary), which could to a certain degree affect the applicant’s ability to develop relationships with the outside world undoubtedly fall within the sphere of his or her private life (see Campagnano v. Italy, no. 77955/01, § 54, ECHR 2006-IV). In the case of Bigaeva (cited above, §§ 23-25), the Court held that Article 8 could also cover employment, including the right of access to a profession, specifically that of lawyer.” (ECtHR Jankauskas v. Lithuania (No. 2), no. 50446/09 27/06/2017. See also ECtHR Denisov v. Ukraine, no. 76639/11, [GC], 25/09/2018, § 100, ECtHR, Naidin v. Romania, no. 38162/07, 21/10/2014, §§ 31-35).*

9. Therefore, I am of the opinion that the situation raised in the main proceedings and referred to the Constitutional Court, falls as well within the ambit of Article 2(3)(f) of the Constitution and Article 8 ECHR.

**II. Is there a difference in treatment due to the application of Article 71(2)(c) of the Bankruptcy Law, by prescribing an age limit of 63 for the appointment of a bankruptcy trustee, and compared to whom?**

10. The reply to this question evidently depends on the comparator used, as correctly indicated in paragraph 42 of the decision of the majority.
11. I agree with the reasoning of the majority of my esteemed colleagues that the plaintiff in the main proceedings is not in a comparable situation with bankruptcy judges and other bodies in the bankruptcy proceedings (paragraphs 44-47 of the decision of the Constitutional Court).
12. On the contrary, I cannot follow the position of the majority when it comes to the comparison with the general population, which can exercise any professional activity, public or private, as a rule until the age of 65. I do not find it convicting the argument of the majority in paragraph 48 of the decision, that the fact that the trustees do not exercise any social rights, including the right to a pension, does not make them in a comparable situation with the persons who have the right to exercise a profession until the age of 65.
13. To my reading of the situation, there is an additional ground of comparison in this case. The plaintiff in the main proceedings, same as all other bankruptcy trustees that attained the age of 63, have to cease their functions, whereas the trustees who have not attained age of 63, may remain in their post. Such situation has been considered as a difference in treatment by the Court of Justice of the European Union (CJEU) in the judgment of 6 November 2012 in the case of *European Commission v. Hungary*, C-298/12, (ECLI:EU:C:2012:687), where it says that similar situations reveal

*“53...the existence of a difference in treatment between persons compulsorily obliged to retire because they have reached the age of 62 and those who, having not yet reached that age, may remain in their post. The difference in treatment on grounds of age is based on the very existence of an age-limit above which the persons concerned must retire, regardless of the age fixed for that limit and, a fortiori, for the previously applicable limit.*

*54 It must, therefore, be held that the provisions at issue in the main proceedings give rise to a difference in treatment based directly on age within the meaning of Article 1 of Directive 2000/78, in conjunction with Article 2(2)(a) thereof.”*

14. Finally, I have doubts also when the comparison is made with the persons exercising exactly the same profession in Republika Srpska or in the Brčko District of BiH, who, based on the respective entity laws, referred in paragraph 49 of the decision, can exercise this profession until the age of 70. It seems difficult to me to assert that persons who are citizens of the same State party to the ECHR, are not in a relevant similar situation to other citizens of the same State exercising the same profession, with the only reason that they are residents in another entity of the same State.
15. Therefore, I think that the situation of the plaintiff in the main proceedings can be compared both to the general population in the Federation, who can work until the age of 65, to the bankruptcy trustees who have not attained the age of 63, and to the trustees in bankruptcy proceedings in Republika Srpska or in the Brčko District of BiH, who can

work until the age of 70. The plaintiff being subject of a blanked limitation once he reaches the age of 63, I think there is a difference in treatment based on age, compared with the two other categories mentioned in this paragraph. The ECtHR has already accepted that “age” constitutes “other status” for the purposes of Article 14 of the European Convention (see as recent authority ECtHR, *Carvalho Pinto de Sousa Morais v. Portugal*, no. 17484/15, 25/07/2017, § 45)

**III. If the answer to question 2 is positive, is the difference in treatment justified?**

16. A difference in treatment in law, such as the one in the case at hand, shall be, however, objectively and reasonably justified by a legitimate aim and the means of achieving that aim shall be appropriate and necessary.
17. The only arguments the majority has advanced in their reasoning for the justification of the difference in treatment, is the one that “possible differences in the entity laws, per se, cannot raise the issue of discrimination in the situation where neither there are any other arguments in the request nor can it be concluded that the provisions of the impugned Law are manifestly discriminatory” and that “the entities have a wide margin of appreciation” on the questions of age limits for registration on the lists of bankruptcy trustees. Whereas I accept that both arguments could be considered as legitimate, I note that the majority has stopped short of analysing whether the contested measure was appropriate and necessary as such. A margin of appreciation argument alone, even when is used in the case of States, seems insufficient to me, to be able justify a discrimination measure on the ground of age.
18. As a conclusion, I think that in adopting and maintain the contested measure i.e. prescribing an age limit of 63 for continuing to serve as a bankruptcy trustee provided by law Article 71(2)(c) of the Bankruptcy Law, the Federation authorities have not justified that this measure was justified and necessary to achieve the legitimate aims, if any, when compared with the three categories analysed in paragraph 10-15 of this opinion. For these reasons I think that the above provision raises issues under Article 2(IV) taken together with Articles 2(3)(f) and 2(3)(k) of the Constitution, and under Article 14 ECHR taken together with Article 8 ECHR and Article 1 of the first Protocol thereof.